

Criminalisation of Possession of Narcotics in Poland¹

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Abstract: *The subject of this paper is the issue of the criminalisation of the possession of narcotics in Poland. Particular attention is paid to the institution of the optional termination of criminal proceedings in cases when the person who has committed the offence is in possession of an inconsiderable amount of narcotics for personal use. The aim of the study is, among other things, to demonstrate how this institution functions in practice and to examine whether the Polish regulations are compatible with the international and the European regulations. The author first presents a historical outline of the criminalisation of offences involving an unlawful possession of narcotics, and then develops the idea of what should be understood by 'possession' of narcotics while also addressing the issue of 'possession of narcotics within one's own body'. In the further section of the paper, the author analyses the notion of 'an inconsiderable quantity of narcotics', presenting views expressed in the literature and showing disparities in interpretations of this notion in the case law. In the final section, the author presents conclusions and an assessment of the current state of the relevant Polish legislation.*

Key Words: *Criminal Law; Narcotics; Possession of Narcotics; Criminalisation of Possession of Narcotics; Illicit Drugs; Psychotropic Substances; Inconsiderable Quantity of Narcotics; Poland.*

Introduction

The issue of the possession and use of narcotics is of a global nature. This issue also concerns Poland. Arguments for and against the criminalisation of the possession of narcotics as well as the effects of the use of narcotics are similar around the world and are well known. For this reason, the author of this paper will not focus in detail on the sociological and criminological aspects of the possession and use of narcotics, but rather

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on the provisions of criminal law which penalise the possession of narcotics. This does not mean, however, that the author will completely omit arguments which have been put forward in Poland, intended to legitimise particular legislative changes regarding the possession of narcotics. The aim of the author is not to engage in depth in theoretical considerations. The author intends this paper to have a practical character, that is, to show how in practice the institution of the optional termination of criminal proceedings functions in Poland in cases of the possession of an inconsiderable quantity of narcotics for personal use. The issue is of a great importance in the practical application of justice. It may also be significant for foreign nationals such as tourists who visit Poland while addicted to narcotics, for whom the knowledge of when (i.e. after meeting which requirements) such an individual may expect termination of criminal proceedings for the possession of narcotics.

In order to present the issue of the criminalisation of the possession of narcotics, the author conducts an analysis of the relevant criminal legislation, legal literature and the case law of the Polish courts. First, the author presents a detailed historical outline of the criminalisation of offences involving an unlawful possession of narcotics. It is the author's belief that such a presentation of the historical outline is justified, as for many readers it will provide a picture of the realities of life in Poland and the period during which narcotics appeared in Poland on a larger scale. When presenting the history of the criminalisation of the possession of narcotics in Poland, the author refers to the provisions of the international law and the European Union law. In the following section of the paper, the author explains the scope of the criminalisation of the possession of narcotics in Poland, also clarifying what is understood by 'possession' of narcotics, and draws attention to the issue of 'possession of narcotics within one's own body'. Then the author analyses the compliance of the Polish regulations with the international regulations and the European Union regulations. Next, the institution of the optional termination of criminal proceedings, as it is defined in the Act on Counteracting Drug Addiction, is presented. In the following section, the author conducts an analysis of the notion of 'an inconsiderable quantity of narcotics', while presenting views expressed in the literature and illustrating the disparities of interpretations which exist in the case law. In the final section, the author presents conclusions together with an assessment of the current state of the relevant Polish legislation.

To start with, it is important to explain that the Polish law does not define the term ‘narcotic’. This term, however, does appear in the Act on Counteracting Drug Addiction and is widely used not only in the media, but also in the discussions among lawyers and in the legal literature. The Act on Counteracting Drug Addiction, when defining criminal offences involving narcotics, uses the terms ‘illicit drugs’, ‘psychotropic substances’ and ‘new psychoactive substances’, defining these in the Article 4. The term ‘Narcotics’ is used as a collective term including illicit drugs, psychotropic substances and new psychoactive substances.

1 Historical outline of the criminalisation of the possession of narcotics

In Poland, the possession of narcotics became a punishable criminal offence only with the passage of the Act on Counteracting Drug Addiction, dated on 24 April 1997.² The introduction of the criminalisation of the possession of narcotics was an implementation by Poland of international obligations resulting from the ratification in year 1994 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, drawn up in Vienna on 20 December 1988.³ The reason for introducing the criminalisation of the possession of narcotics was also the socio-economic changes after year 1989, including the intensive development of drug-related crime.⁴ The literature emphasises that the *ratio legis* of introducing the criminalisation of the possession of narcotics was the need to enable the prosecution and punishment of all those who in any way contribute to the creation of illegal narcotics supply on the market, including facilitating the prosecution of narcotics dealers who are difficult to catch in the act of selling narcotics.⁵ In other words,

² See *Act of 24 April 1997 on Counteracting Drug Addiction* [1997]. Journal of Laws of Poland, 1997, no. 75, item 468. Please note that almost all Polish legal acts are available only in Polish. They can be consulted at <https://isap.sejm.gov.pl>.

³ See *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, drawn up in Vienna on 20 December 1988* [1994-04-30]. Journal of Laws of Poland, 1995, no. 15, item 69.

⁴ See SROGOSZ, T. Kilka uwag na temat polskiej „wojny z narkotykami”. *Przegląd Prawa Publicznego*. 2018, nr 12, pp. 44-57. ISSN 1896-8996; and ŁUCARZ, K. and A. MUSZYŃSKA. *Ustawa o przeciwdziałaniu narkomanii: Komentarz*. 1. wyd. Warszawa: Wolters Kluwer, 2008. 899 p. ISBN 978-83-7526-875-1, LEGALIS Commentary to the Article 62, thesis 1.

⁵ See KONARSKA-WRZOSEK, V. Pozakodeksowe przestępstwa przeciwko zdrowiu. In: M. BOJARSKI, red. *Szczególne dziedziny prawa karnego: Prawo karne wojskowe, skarbowe i pozakodeksowe: Tom XI*. 1. wyd. Warszawa: C. H. Beck; Instytut Nauk Prawnych PAN, 2014, p. 455. System prawa karnego. ISBN 978-83-255-1318-4.

the criminalisation of the possession of narcotics was justified by the need to facilitate, especially in terms of evidence, the detection of drug-related crimes.⁶ It is worth mentioning that the implementation of the criminalisation of the possession of narcotics was preceded by a tumultuous public debate in Poland.

In the initial wording of the Article 48 of the Act on Counteracting Drug Addiction was stated that whosoever in violation of the provision of this act possesses illicit drugs or psychotropic substances shall be subject to imprisonment for a period of up to 3 years. In cases of lesser gravity, the offender shall be subject to imprisonment for a period of up to 1 year, a restriction of freedom, or a fine. If the subject of the offence is a considerable quantity of illicit drugs or psychotropic substances, the offender shall be subject to imprisonment for a period of up to 5 years and a fine. Article 48 para. 4 stated that a person who commits the offence and possesses for personal use an inconsiderable quantity of illicit drugs or psychotropic substances shall not be punished. This Act on Counteracting Drug Addiction has been revised and amended numerous times. As a result of an amendment from year 2000,⁷ Article 48 para. 4 was deleted. The clause in the Article 48 para. 4 providing for the non-punishment of persons possessing an inconsiderable quantity of narcotics for personal use was intended to prevent the law enforcement agencies and the justice system from being swamped by thousands of cases annually involving persons who are addicted to or experimenting with drugs, the punishment of whom would not be useful, while the social stigma of a conviction might negatively affect the further course of their lives.⁸ The solution adopted in the Article 48 para. 4 was a compromise regulation, intended to protect addicted individuals and occasional consumers from a mass repression.⁹ This solution was, however, heavily criticised, especially by the police, for interfering with or, in fact, making it impossible to identify

⁶ See ŁUCARZ, K. and A. MUSZYŃSKA. *Ustawa o przeciwdziałaniu narkomanii: Komentarz*. 1. wyd. Warszawa: Wolters Kluwer, 2008. 899 p. ISBN 978-83-7526-875-1, LEX Commentary to the Article 62, thesis I.2.

⁷ See *Act of 26 October 2000 on the Amendment of the Act on Counteracting Drug Addiction* [2000]. Journal of Laws of Poland, 2000, no. 103, item 1097.

⁸ See KONARSKA-WRZOSEK, V. Pozakodeksowe przestępstwa przeciwko zdrowiu. In: M. BOJARSKI, red. *Szczególnie dziedziny prawa karnego: Prawo karne wojskowe, skarbowe i pozakodeksowe: Tom XI*. 1. wyd. Warszawa: C. H. Beck; Instytut Nauk Prawnych PAN, 2014, p. 457. System prawa karnego. ISBN 978-83-255-1318-4.

⁹ See ŁUCARZ, K. and A. MUSZYŃSKA. *Ustawa o przeciwdziałaniu narkomanii: Komentarz*. 1. wyd. Warszawa: Wolters Kluwer, 2008. 899 p. ISBN 978-83-7526-875-1, LEX Commentary to the Article 62, thesis I.2.

narcotics dealers and to force them to face criminal liability. In deleting the Article 48 para. 4, the lawmakers hoped primarily to make the war on narcotics dealers more effective. In the justification for the proposed amendment to the Act on Counteracting Drug Addiction it was stated, among other things, that from the experience of the police, dealers of narcotics, when distributing the drugs, often have only a small amount on their persons, thus making it difficult to establish whether the narcotics discovered in the possession of the individual are for personal use or not.¹⁰ The repeal of the controversial Article 48 para. 4 was also criticised. In the literature, attention was drawn, among other things, to the fact that after the amendment of the Act on Counteracting Drug Addiction in year 2000, the number of offences involving the possession of narcotics increased enormously in Poland, while the number of cases involving serious narcotics offences remained essentially the same. It was also claimed that the intensive activity of the police against consumers and the large number of imprisonments which resulted from this activity reduced neither the demand nor the supply of narcotics.¹¹

On 29 July 2005, a new Act on Counteracting Drug Addiction was passed.¹² This is the act which is currently enforced. According to the Article 62 of the mentioned act, whosoever in violation of the provisions of the Act on Counteracting Drug Addiction possesses illicit drugs or psychotropic substances shall be subject to imprisonment for a period of up to 3 years (para. 1). In cases of lesser gravity, the offender shall be subject to a fine, a restriction of freedom, or imprisonment for a period of up to 1 year (para. 3). According to the initial wording of the Article 62 para. 2, if the subject of the criminal offence is a considerable quantity of illicit drugs or psychotropic substances, the offender shall be subject to a fine and imprisonment for a period of up to 5 years. This provision was amended and currently the offender shall be subject to imprisonment for a period of from 1 to 10 years. The normative clause contained in the Article 62 para. 1 'in violation of the provisions of this Act' refers to the Articles 33, 34 and 42 of the Act on Counteracting Drug Addiction. The pro-

¹⁰ See Justification of the Bill on the Amendment of the Act on Counteracting Drug Addiction. In: *Print No. 631 of the Sejm of the Republic of Poland of the 3rd Term* [online]. 1998-06-03, p. 2 [cit. 2021-02-19]. Available at: [http://orka.sejm.gov.pl/RejestrD.nsf/wg-druku/631/\\$file/631.pdf](http://orka.sejm.gov.pl/RejestrD.nsf/wg-druku/631/$file/631.pdf) (only in Polish).

¹¹ See KLINOWSKI, M. Granice odpowiedzialności za posiadanie narkotyków. *Prokuratura i Prawo*. 2011, nr 3, p. 103. ISSN 1233-2577.

¹² See *Act of 29 July 2005 on Counteracting Drug Addiction* [2005]. *Journal of Laws of Poland*, 2005, no. 179, item 1485, as amended.

visions of these Articles define cases of a legal possession of illicit drugs and psychotropic substances as well as preparations containing them and their precursors. These items may be possessed only by individuals and institutions indicated in the Act on Counteracting Drug Addiction and only after meeting relevant requirements. In the most general terms, these provisions concern the possession of narcotics for medicinal, industrial, or research purposes.

A significant change in terms of the criminalisation of the possession of narcotics took place in year 2011.¹³ At that time, a new article, Article 62a, was introduced in the Act on Counteracting Drug Addiction which read as follows: 'If the subject of the offence mentioned in the Article 62 para. 1 or 3 is illicit drugs or psychoactive substances in an inconsiderable quantity intended for the offender's personal use, the proceedings may be terminated, including before issuance of a decision initiating an investigation, if the penalty for the offender would be inappropriate for the circumstances surrounding the offence or for its degree of harm inflicted on society at large.' In the justification for the government proposal for this amendment it was claimed, among other things, that the intent of the provision was 'primarily to make it possible in certain circumstances to waive prosecution of particular categories of minor offences involving the consumption of narcotics against which the application of criminal repression would not seem to bring any positive effects. This is because repression does not significantly reduce the volume of illegal supply of illicit drugs or psychotropic substances, nor does it have any of the desired effects in terms of a reduction in demand for these substances.' It was also stated that penal repression may, by stigmatising the perpetrators, cause serious damage and initiate or deepen the process of their social derailment. Thus, one of the arguments for the new regulation was that the stigmatisation of consumers of narcotics by means of convictions for the possession of narcotics may begin or intensify the process of exclusion of such individuals from society. However, it should be stressed that in the justification for the government proposal there was expressly emphasised that the proposed regulation was also meant to relieve the law enforcement agencies of the need to conduct numerous investigations into cases of the possession of inconsiderable

¹³ See *Act of 1 April 2011 on the Amendment of the Act on Counteracting Drug Addiction and Certain Other Acts* [2011]. *Journal of Laws of Poland*, 2011, no. 117, item 678.

quantities of narcotics and the need to engage significant resources and manpower in such activities.¹⁴

The next significant change in terms of the criminalisation of the possession of narcotics took place in year 2018.¹⁵ At that time, a new article, Article 62b, was introduced in the Act on Counteracting Drug Addiction which stated that whosoever in violation of the provisions of the mentioned Act possesses new psychoactive substances shall be subject to a fine (para. 1). If the subject of the offence is a considerable quantity of new psychoactive substances, the offender shall be subject to a fine, a restriction of freedom, or imprisonment for a period of up to 3 years (para. 2). According to the Article 62b para. 3, if the subject of the offence is a new psychoactive substance in an inconsiderable quantity intended for the personal use of the offender, proceedings may be terminated, including before issuance of a decision initiating an investigation, if the penalty for the offender would be inappropriate for the circumstances surrounding the offence or for its degree of harm inflicted on society at large. This change to the Act on Counteracting Drug Addiction was a response from the lawmakers to the increasing problem in Poland of new psychoactive substances. The amendment to the Act on Counteracting Drug Addiction was aimed at placing new psychoactive substances under the control analogous to illicit drugs and psychotropic substances.¹⁶ The above-mentioned amendment to the Act on Counteracting Drug Addiction was also caused by the need to adapt the Polish law to new solutions adopted at the European Union level. In this Act on Counteracting Drug Addiction, the lawmakers clearly stated that it serves the application of the Regulation (EU) 2017/2101 of the European Parliament and of the Council of 15 November 2017 amending Regulation (EC) No. 1920/2006 as Regards Information Exchange on, and an Early Warning System and Risk Asses-

¹⁴ See Justification for the Bill on the Amendment of the Act on Counteracting Drug Addiction and Certain Other Acts. In: *Print No. 3420 of the Sejm of the Republic of Poland of the 6th Term* [online]. 2010-09-22, pp. 14-15 [cit. 2021-02-19]. Available at: [http://orka.sejm.gov.pl/Druki6ka.nsf/0/19E59ABFE28E2AEBC12577A80035A59E/\\$file/3420.pdf](http://orka.sejm.gov.pl/Druki6ka.nsf/0/19E59ABFE28E2AEBC12577A80035A59E/$file/3420.pdf) (only in Polish).

¹⁵ See *Act of 20 July 2018 on the Amendment of the Act on Counteracting Drug Addiction and the Act on the State Sanitary Inspection* [2018]. Journal of Laws of Poland, 2018, item 1490.

¹⁶ See Justification of the Bill on the Amendment of the Act on Counteracting Drug Addiction and the Act on the State Sanitary Inspection. In: *Print No. 2746 of the Sejm of the Republic of Poland of the 8th Term* [online]. 2018-07-16, p. 4 [cit. 2021-02-19]. Available at: <https://orka.sejm.gov.pl/Druki8ka.nsf/0/2AAEDE997CE43C62C12582CC005BF6A3/%24File/2746.pdf> (only in Polish).

sment Procedure for, New Psychoactive Substances¹⁷ and implements the provisions of the Council Framework Decision 2004/757/JHA of 25 October 2004 Laying down Minimum Provisions on the Constituent Elements of Criminal Acts and Penalties in the Field of Illicit Drug Trafficking.¹⁸ Acting on the basis of statutory delegation, in year 2018 the Polish Minister of Health issued the Regulation on the List of Psychotropic Substances, Illicit Drugs and New Psychoactive Substances.¹⁹ This Regulation implemented the Directive (EU) 2017/2103 of the European Parliament and of the Council of 15 November 2017 amending Council Framework Decision 2004/757/JHA in Order to Include New Psychoactive Substances in the Definition of 'Drug' and repealing Council Decision 2005/387/JHA.²⁰ It should be recalled that the objective of the stated Directive is to extend the application of the European Union criminal law provisions that apply to illicit drug trafficking to new psychoactive substances posing severe public health risks and severe social risks. The mentioned Directive states that new psychoactive substances included in the definition of 'drug' should be covered by the European Union criminal law provisions on illicit drug trafficking. The above-stated Regulation of the Minister of Health of August 2018 was amended by the Regulation of the Polish Minister of Health of August 2019,²¹ which implemented the Commission Delegated Directive (EU) 2019/369 of 13 December 2018 amending the Annex to Council Framework Decision 2004/757/JHA as Regards the Inclusion of New Psychoactive Substances in the Definition

¹⁷ See *Regulation (EU) 2017/2101 of the European Parliament and of the Council of 15 November 2017 amending Regulation (EC) No. 1920/2006 as Regards Information Exchange on, and an Early Warning System and Risk Assessment Procedure for, New Psychoactive Substances*. OJ EU L 305, 2017-11-21, pp. 1-7.

¹⁸ See *Council Framework Decision 2004/757/JHA of 25 October 2004 Laying down Minimum Provisions on the Constituent Elements of Criminal Acts and Penalties in the Field of Illicit Drug Trafficking*. OJ EU L 335, 2004-11-11, pp. 8-11, as amended.

¹⁹ See *Regulation of the Minister of Health of 17 August 2018 on the List of Psychotropic Substances, Illicit Drugs and New Psychoactive Substances* [2018]. Journal of Laws of Poland, 2018, item 1591.

²⁰ See *Directive (EU) 2017/2103 of the European Parliament and of the Council of 15 November 2017 amending Council Framework Decision 2004/757/JHA in Order to Include New Psychoactive Substances in the Definition of 'Drug' and repealing Council Decision 2005/387/JHA*. OJ EU L 305, 2017-11-21, pp. 12-18.

²¹ See *Regulation of the Minister of Health of 21 August 2019 amending the Regulation on the List of Psychotropic Substances, Illicit Drugs and New Psychoactive Substances* [2019]. Journal of Laws of Poland, 2019, item 1745.

of 'Drug'.²² It should be noted that the concept of 'new psychoactive substances' was introduced to the Act on Counteracting Drug Addiction (Article 4, point 11a) as early as in year 2015.²³ However, it was not until year 2018, due to the new European Union regulations, that the possession of new psychoactive substances became a criminal offense. Also in year 2018, the definition of a new psychoactive substance was changed in the Polish law.

2 The scope of the criminalisation of the possession of narcotics in Poland

It must be emphasised that in Poland the possession of any amount of narcotics, even a very small quantity, is a punishable offence. Every incident of the possession (in violation of the provisions of the Act on Counteracting Drug Addiction), including the possession exclusively for personal use, of any kind of narcotics (traditional or one of the new substances, hard or soft) is a criminal offence (not merely a misdemeanour or an administrative offence).

In Poland, the use of narcotics itself is not a punishable criminal offence. It is important to distinguish between the punishable possession of narcotics and the non-punishable use of narcotics. Clarification of this issue requires previous clarification of the notion of the possession. This notion, 'possession', has for years been the subject of controversy in the Polish criminal law doctrine and has caused problems in the practice of criminal justice. 'Possession' occurs not only in the context of narcotics, but is also a factor in many criminal offences, such as the possession of a firearm or ammunition without a permit (Article 263 § 2 of the Polish Criminal Code). The issue of this aspect of the possession leads to the question whether the notion of the possession should be understood in the same way as in civil law, or whether it has in criminal law a distinct meaning. The Article 336 of the Polish Civil Code states that 'a possessor is both one who has practical control over a thing as its owner (an owner-like possessor) and one who has practical control over a thing as its user, pledgee, lessee, leaseholder, or one who has other rights which imply specific control over a thing belonging to another (beneficial owner).'

²² See *Commission Delegated Directive (EU) 2019/369 of 13 December 2018 amending the Annex to Council Framework Decision 2004/757/JHA as Regards the Inclusion of New Psychoactive Substances in the Definition of 'Drug'*. OJ EU L 66, 2019-03-07, pp. 3-5.

²³ See *Act of 24 April 2015 on the Amendment of the Act on Counteracting Drug Addiction and Certain Other Acts* [2015]. *Journal of Laws of Poland*, 2015, item 875.

In civil law, the possession is distinct from being a lessee, which is defined in the Article 338 of the Polish Civil Code ('Whosoever holds practical control in the name of another is a lessee'). Both in the criminal law literature and in the case law, the view that the notion of the possession should be understood in criminal law in a distinct way is prevalent. It is argued that in criminal law, 'possession' should be understood in its common meaning, as 'have'. The possession is every form of control over a thing. Thus, the possession entailing criminal liability is equivalent to the civil law meanings of the possession and being a lessee combined.²⁴ As it has been correctly remarked upon in the literature, a different understanding of identical notions in civil law and criminal law is a violation of the basic postulate of systematic treatment under the law, in accordance with which certain notions should be understood uniformly throughout the entire legal system. The opinion has also been expressed that the increasingly common treatment of a variety of notions in an autonomous manner, applicable exclusively to certain branches of the law, or even to certain laws, leads to terminological chaos.²⁵ Taking into account the view dominant in practice in the justice system, any foreign national should assume that in Poland any form of control over a narcotic may be understood as the possession in the meaning of the Article 62 of the Act on Counteracting Drug Addiction.

It may appear that it is impossible to use narcotics without possessing narcotics. In most cases, the use of narcotics does, in fact, entail the possession of narcotics. It is, however, possible to use a narcotic without possessing it, for example in a situation in which person X performs for person Y, at that person's request, an injection of heroin or amphetamine.²⁶ In this case, person Y does not possess a narcotic, despite having used one.

²⁴ See WYSOCKI, D. Pojęcie „posiadania” w prawie karnym. *Prokuratura i Prawo*. 2000, nr 2, p. 11. ISSN 1233-2577; and *Decision of the Supreme Court of the Republic of Poland Ref. No. III KK 88/14* [2014-04-08]. LEX No. 1458717. Please note that rulings of the Polish courts are available only in Polish. They can be consulted at http://www.sn.pl/orzecznictwo/SitePages/Baza_orzeczen.aspx (the Supreme Court of Poland) or <https://orzeczenia.ms.gov.pl> (common courts). However, many of them are not available online.

²⁵ See KRAJEWSKI, K. Pojęcie posiadania w rozumieniu art. 62 ust. 1 ustawy o przeciwdziałaniu narkomanii. *Glosa do wyroku SN z dnia 21 stycznia 2009 r.*, II KK 197/08. *Państwo i Prawo*. 2009, nr 11, p. 134. ISSN 0031-0980.

²⁶ See example given by KRAJEWSKI, K. Pojęcie posiadania w rozumieniu art. 62 ust. 1 ustawy o przeciwdziałaniu narkomanii. *Glosa do wyroku SN z dnia 21 stycznia 2009 r.*, II KK 197/08. *Państwo i Prawo*. 2009, nr 11, pp. 133-134. ISSN 0031-0980.

Despite the broad interpretation of the factor of the ‘possession’, it is accepted in the literature and in the case law that ‘possession within one’s own body’ is not possession in the understanding of the Article 62 of the Act on Counteracting Drug Addiction.²⁷ The Supreme Court of Poland has rightly stressed that it is not a criminal offence to be under the influence of an illicit drug or a psychotropic substance, but to possess such a substance.²⁸ In practice, there are unfortunately cases in which the law enforcement agencies (the police and public prosecutor) consider the presence of a narcotic discovered in the body (for example, during a blood test at a hospital) to be a case of the possession of narcotics.²⁹ It is crucial to distinguish between the punishable possession of a narcotic and the non-punishable use of a narcotic which results in ‘possession of a narcotic within one’s own body’. The case of couriers who transport narcotics across borders within their own bodies should be addressed separately. In these cases, we are not dealing with the use of narcotics, as narcotics to be smuggled are swallowed in appropriate packages which resist dissolving and do not intoxicate the courier, but rather are dealing with the punishable possession of narcotics. The Polish courts also share this view.³⁰

3 Compliance of the Polish regulations with regulations of the United Nations and the European Union

When analysing the issue of the criminalisation of the possession of narcotics in Poland, it is necessary to examine the compliance of the Polish regulations with the acts of the international law and the European Union law binding on Poland.

The 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances in the Article 3 para. 1 provides, *inter alia*, that each Party shall adopt such measures as may be necessary to

²⁷ See JANKOWSKI, M. and S. MOMOT. Stosowanie przepisu art. 62a ustawy o przeciwdziałaniu narkomanii. *Prawo w Działaniu*. 2016, nr 26, p. 206. ISSN 2084-1906; and KLINOWSKI, M. Karalne posiadanie narkotyków w orzecznictwie Sądu Najwyższego. *Państwo i Prawo*. 2010, nr 7, p. 36. ISSN 0031-0980.

²⁸ See *Decision of the Supreme Court of the Republic of Poland Ref. No. I KZP 24/10* [2011-01-27]. LEX No. 686664.

²⁹ See examples given in JANKOWSKI, M. and S. MOMOT. Stosowanie przepisu art. 62a ustawy o przeciwdziałaniu narkomanii. *Prawo w Działaniu*. 2016, nr 26, p. 206. ISSN 2084-1906.

³⁰ See, for example, *Judgement of the Court of Appeal in Gdańsk Ref. No. II Aka 199/05* [2005-10-05]. LEX No. 466396.

establish the possession of any narcotic drug or psychotropic substance as a criminal offense under its domestic law when committed intentionally. In the Article 3 para. 2, the above-mentioned Convention provides, *inter alia*, that subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention (Single Convention on Narcotic Drugs of 1961), the 1961 Convention as amended or the 1971 Convention (Convention on Psychotropic Substances of 1971). Poland fulfils this obligation by the Article 62 of the current Act on Counteracting Drug Addiction which criminalises the possession of illicit drugs or psychotropic substances, regardless of the intended use of these drugs or substances. It should be considered whether the regulation under the Article 62a of the Act on Counteracting Drug Addiction does not violate the above-mentioned Convention. After all, the Article 3 para. 2 of the above-stated Convention expressly refers to the possession of narcotic drugs or psychotropic substances for one's own use. It should be stated with full conviction that the Article 62a of the Act on Counteracting Drug Addiction does not create an exception to the Article 62 of the same Act and does not decriminalise the possession of narcotic drugs or psychotropic substances for the perpetrator's own use. The Article 62a of the Act on Counteracting Drug Addiction only allows for the discontinuation of criminal proceedings in certain cases, provided that certain conditions are met. Therefore, it should be stated that the Polish regulations meet the requirements of the Convention in question.

In the European Union law, the Council Framework Decision 2004/757/JHA of 25 October 2004 Laying down Minimum Provisions on the Constituent Elements of Criminal Acts and Penalties in the Field of Illicit Drug Trafficking³¹ in the Article 2 para. 1 provides, *inter alia*, that each Member State shall take the necessary measures to ensure the punishability of conduct, committed intentionally and without authority, involving the possession of drugs for the carrying out of activities such as the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dis-

³¹ See Council Framework Decision 2004/757/JHA of 25 October 2004 Laying down Minimum Provisions on the Constituent Elements of Criminal Acts and Penalties in the Field of Illicit Drug Trafficking. OJ EU L 335, 2004-11-11, pp. 8-11.

patch, dispatch in transit, transport, importation or exportation of drugs. It should be recalled here that, following the amendment of this Decision by the Directive (EU) 2017/2103 of the European Parliament and of the Council of 15 November 2017, the term ‘drug’ also covers new psychoactive substances. The Polish Act on Counteracting Drug Addiction in its current wording criminalises the possession of illicit drugs or psychotropic substances in the Article 62, while the possession of new psychoactive substances in the Article 62b. The above-stated Council Framework Decision 2004/757/JHA does not cover, *inter alia*, the possession of drugs exclusively for the perpetrator’s personal consumption as defined by the national law (Article 2 para. 2). The issue of criminalising the possession of narcotics for personal consumption is, therefore, left to the regulation of the Member States. Undoubtedly, therefore, Article 62a and Article 62b para. 3 of the Act on Counteracting Drug Addiction are without prejudice to the present Council Framework Decision. Thus, the Polish approach, giving the possibility of discontinuing the criminal proceedings in the case of an inconsiderable quantity of narcotics for personal use, complies with the European Union obligations. Bearing in mind the above-mentioned provisions created by the Polish legislator, it should be stated that the Polish regulation of the scope of the criminalisation of the possession of narcotics is consistent with the regulation created on the forum of the European Union.³²

4 The institution of the optional termination of criminal proceedings

The Act on Counteracting Drug Addiction outlines in the Articles 62a and 62b para. 3 the institution of the optional termination of criminal proceedings. The provisions of these parts of the Act on Counteracting Drug Addiction are an exception from the legality principle (in favour of the opportunity principle in enforcement), applicable in the Polish criminal proceedings, expressed in the Article 10 para. 1 of the Polish Code of Criminal Proceedings which states that ‘A body entrusted with the prosecution of crime is obliged to initiate and to conduct pre-trial proceedings, and the public prosecutor is also obliged to bring charges and to support

³² See TKACZYK-RYMANOWSKA, K. Problem tzw. dopalaczy i nowych narkotyków w świetle zmian normatywnych do ustawy o przeciwdziałaniu narkomanii. *Prokuratura i Prawo*. 2016, nr 9, pp. 131-146. ISSN 1233-2577; and PIACZYŃSKA, A. Odpowiedzialność karna za posiadanie nowych substancji psychoaktywnych. *Prokuratura i Prawo*. 2019, nr 1, pp. 98-120. ISSN 1233-2577.

the prosecution of acts which are subject to prosecution *ex officio*.³³ These provisions do not, however, constitute an exception from the principle of penalising the possession of narcotics. The regulations in the Articles 62a and 62b para. 3 of the Act on Counteracting Drug Addiction simply create the possibility for the termination of criminal proceedings. In specific cases, it may happen that a person possessing only an inconsiderable quantity of narcotics is prosecuted for a crime and sentenced. The termination of criminal proceedings is allowable both at the pre-trial and the trial stages.³³ The decision in this matter is that of the prosecutor or court, respectively.

The institution mentioned in the Articles 62a and 62b para. 3 of the Act on Counteracting Drug Addiction involves the termination of criminal proceedings. In cases in which it is applied, the offender in the possession of narcotics is not convicted and, therefore, does not incur the stigma of a conviction. This does not mean, however, that the offender does not incur any material consequences for the offence. Such an offender is subject to the forfeiture of the narcotics possessed. This is stated in the Article 70 para. 2 of the Act on Counteracting Drug Addiction as follows: 'In the case of a conviction for the offence mentioned in the Article 62 or Article 62b of the Act on Counteracting Drug Addiction as well as in the termination or conditional termination of criminal proceedings, the court orders the forfeiture of the illicit drug, psychotropic substance, or new psychoactive substance, even if it was not the property of the offender. The court, when ordering the forfeiture of such items, may also arrange for their destruction. An official record shall be drawn up of this destruction.' However, according to the Article 70 para. 3 of the Act on Counteracting Drug Addiction, 'Forfeiture shall not be ordered if the illicit drug, psychotropic substance, or new psychoactive substance is the property of a third party and the offender has obtained it through crime, or misdemeanour, or has come into the possession of the narcotics in a way that clearly violates employee duties or conditions of a contract with the owner of the illicit drug, psychotropic substance, or new psychoactive substance.'

³³ See GENSIKOWSKI, P. Procesowe aspekty stosowania instytucji przewidzianej w art. 62a ustawy o przeciwdziałaniu narkomanii. *Prokuratura i Prawo*. 2013, nr 7-8, pp. 221-222. ISSN 1233-2577; and KULIK, M. Komentarz do niektórych przepisów ustawy o przeciwdziałaniu narkomanii. In: M. MOZGAWA, red. *Pozakodeksowe przestępstwa przeciwko zdrowiu: Komentarz*. 1. wyd. Warszawa: Wolters Kluwer, 2017, p. 680. ISBN 978-83-8107-718-7.

The decision to terminate criminal proceedings may take place after it has been determined that all of the conditions defined in the Articles 62a or 62b para. 3 of the Act on Counteracting Drug Addiction have been met. The primary condition is the inappropriacy of a conviction against the offender. In practice, however, the most basic conditions are 'an inconsiderable quantity of narcotics' and 'intended for personal use'. In the case law, it has been aptly noted that the possession by the offender of some part of the narcotics for personal use and some part intended for someone else means that it is not possible to terminate criminal proceedings for the offender based on the Article 62a.³⁴ This view is also prevalent in the legal doctrine.³⁵

An inconsiderable quantity of narcotics discovered on the person of the offender creates the assumption that the narcotics are intended for the offender's personal use.³⁶ This assumption may be overturned. If the offender possesses only an inconsiderable quantity of narcotics, but also has on his or her person or in his or her domicile an analytical scale or bags for the portioning up of the narcotics, then this leads to the assumption that the offender is a dealer of narcotics and possesses the narcotics for sale purposes, and not for personal use. In the opinion of the District Court in Gliwice, 'Whether an illicit drug is intended for consumption, and not for sale can also be determined by a quite original manner of packaging, namely if it is stored in a jar in a whole, not fragmented form.'³⁷

In determining whether the conditions for termination of criminal proceedings have been met, the starting point is, therefore, the assessment of whether the quantity possessed by the offender is inconsidera-

³⁴ See *Judgement of the Court of Appeal in Wrocław Ref. No. II AKa 270/18* [2018-12-05]. LEX No. 2616121.

³⁵ See, for example, KULIK, M. Komentarz do niektórych przepisów ustawy o przeciwdziałaniu narkomanii. In: M. MOZGAWA, red. *Pozakodeksowe przestępstwa przeciwko zdrowiu: Komentarz*. 1. wyd. Warszawa: Wolters Kluwer, 2017, pp. 675-676. ISBN 978-83-8107-718-7; and GENSIKOWSKI, P. Materialnoprawne ujęcie przesłanek instytucji przewidzianej w art. 62a ustawy o przeciwdziałaniu narkomanii. *Prokuratura i Prawo*. 2015, nr 10, pp. 106-107. ISSN 1233-2577.

³⁶ See KONARSKA-WRZOSEK, V. Pozakodeksowe przestępstwa przeciwko zdrowiu. In: M. BOJARSKI, red. *Szczególne dziedziny prawa karnego: Prawo karne wojskowe, skarbowe i pozakodeksowe: Tom XI*. 1. wyd. Warszawa: C. H. Beck; Instytut Nauk Prawnych PAN, 2014, p. 656. System prawa karnego. ISBN 978-83-255-1318-4.

³⁷ See *Judgement of the District Court in Gliwice Ref. No. VI Ka 43/19* [2019-02-12]. LEX No. 2720008.

ble. This determining factor, 'an inconsiderable quantity of narcotics', will be analysed in the next section of this paper.

5 An inconsiderable quantity of narcotics

To begin with, it should be mentioned that the analysis of the condition for the termination of criminal proceedings due to the inconsiderable quantity of narcotics will be based on the views of scientists and the case law, with reference to traditional narcotics. Due to the short time in which the Article 62b of the Act on Counteracting Drug Addiction has been in force, there is currently very little case law on which to base an analysis.

The element of 'an inconsiderable quantity' of narcotics is of an extremely evaluative nature. This element has generated great controversy both in the doctrine and in the practice of the justice system. It should be mentioned that based on the Act on Counteracting Drug Addiction, four quantities of narcotics can be defined: a considerable quantity (a factor in qualified types of criminal offences), an ordinary quantity (average, normal; this is a factor in the basic types of criminal offences), a small quantity (characterising matters of lesser gravity, the privileged type of criminal offence) and an inconsiderable quantity (which, solely in the case of an unlawful possession of narcotics, may be a basis for the termination of criminal proceedings).³⁸ The stated Act itself does not use the terms 'ordinary quantity' or 'small quantity'. These are notions created in the criminal law doctrine. The Act on Counteracting Drug Addiction uses the terms 'a considerable quantity' and 'an inconsiderable quantity', but does not define these. An attempt to define 'an inconsiderable quantity of narcotics' has been made both in the literature and the case law.

In the literature, it has been stated that the significant factor is the number of single portions that can be made from a given quantity of an illicit drug or a psychotropic substance as well as the type of substance.³⁹ Therefore, not only should the quantitative criterion referring to the weight of the narcotic be taken into account, but also the qualitative cri-

³⁸ See KONARSKA-WRZOSEK, V. Pozakodeksowe przestępstwa przeciwko zdrowiu. In: M. BOJARSKI, red. *Szczególne dziedziny prawa karnego: Prawo karne wojskowe, skarbowe i pozakodeksowe: Tom XI*. 1. wyd. Warszawa: C. H. Beck; Instytut Nauk Prawnych PAN, 2014, p. 443. System prawa karnego. ISBN 978-83-255-1318-4.

³⁹ See KULIK, M. Komentarz do niektórych przepisów ustawy o przeciwdziałaniu narkomanii. In: M. MOZGAWA, red. *Pozakodeksowe przestępstwa przeciwko zdrowiu: Komentarz*. 1. wyd. Warszawa: Wolters Kluwer, 2017, p. 674. ISBN 978-83-8107-718-7.

terion referring to the type of narcotic.⁴⁰ The view has been expressed that the quantity of a substance can be understood as inconsiderable if it does not exceed several grams.⁴¹ Another opinion has been presented that an inconsiderable quantity is one, two, or three portions (doses).⁴² According to yet another view, 'an inconsiderable quantity' is one which is a multiple of a single dose by daily consumption resulting from the nature of the illicit drug or psychotropic substance used by the offender.⁴³ It is the author's opinion that it is inappropriate to restrict *in abstracto* an inconsiderable quantity of narcotics to 2 – 3 doses. In analysing the fulfilment of conditions for the termination of criminal proceedings *in concreto*, the factor 'an inconsiderable quantity of narcotics' should be interpreted by taking into account the factor 'for the personal use of the offender.' Both these factors are legal conditions for the termination of criminal proceedings and, therefore, they should be read in conjunction. *Ergo*, the daily needs of a given offender should be taken into account, resulting from the degree to which the offender is addicted to the narcotics. It is correct to state that when the possessor of the narcotics is a person who is highly addicted and uses several portions daily, it may be appropriate to consider as an inconsiderable quantity an amount allowing for the satisfaction of the needs of the offender for two days.⁴⁴

Based on the Act on Counteracting Drug Addiction of year 1997 which made use of the identical notion in the Article 48 (the notion of 'an inconsiderable quantity' of narcotics), in the case law the thesis was for-

⁴⁰ See GENSIKOWSKI, P. Materialnoprawne ujęcie przesłanek instytucji przewidzianej w art. 62a ustawy o przeciwdziałaniu narkomanii. *Prokuratura i Prawo*. 2015, nr 10, p. 103. ISSN 1233-2577.

⁴¹ See GENSIKOWSKI, P. Materialnoprawne ujęcie przesłanek instytucji przewidzianej w art. 62a ustawy o przeciwdziałaniu narkomanii. *Prokuratura i Prawo*. 2015, nr 10, p. 103. ISSN 1233-2577; and KURZEPA, B. Komentarz do art. 53. In: A. WAŻNY, red. *Ustawa o przeciwdziałaniu narkomanii: Komentarz*. 2. wyd. Warszawa: Wolters Kluwer, 2019. 559 p. ISBN 978-83-8160-600-4, LEX Commentary to Article 62a, thesis 6.

⁴² See KONARSKA-WRZOSEK, V. Pozakodeksowe przestępstwa przeciwko zdrowiu. In: M. BOJARSKI, red. *Szczególnie dziedziny prawa karnego: Prawo karne wojskowe, skarbowe i pozakodeksowe: Tom XI*. 1. wyd. Warszawa: C. H. Beck; Instytut Nauk Prawnych PAN, 2014, p. 456. System prawa karnego. ISBN 978-83-255-1318-4.

⁴³ See MUSZYŃSKA, A. and K. ŁUCARZ. Umożnienie postępowania karnego według art. 62a ustawy z 2005 r. o przeciwdziałaniu narkomanii. *Ruch Prawniczy, Ekonomiczny i Socjologiczny* [online]. 2016, vol. 78, nr 2, p. 141 [cit. 2021-02-19]. ISSN 0035-9629. Available at: <https://doi.org/10.14746/rpeis.2016.78.2.12>.

⁴⁴ See KULIK, M. Komentarz do niektórych przepisów ustawy o przeciwdziałaniu narkomanii. In: M. MOZGAWA, red. *Pozakodeksowe przestępstwa przeciwko zdrowiu: Komentarz*. 1. wyd. Warszawa: Wolters Kluwer, 2017, p. 674. ISBN 978-83-8107-718-7.

mulated that ‘An inconsiderable quantity of a narcotic is a small amount reflecting the ongoing needs of the addicted person, matching the currently experienced narcotic hunger, one or two portions, not more than that, regardless of whether a larger amount has been gathered for anticipated future needs.’⁴⁵ This thesis was rightly criticised in the literature as excessively restrictive.⁴⁶ However, in the case law it was repeated in year 2018. At that time, the Court of Appeals in Kraków emphasised that ‘an inconsiderable quantity of narcotics is only one which reflects the ongoing needs of the addicted person and the narcotic hunger felt by that person. This may be one or two portions, but not more than that.’ The Court of Appeals in Kraków stressed that it does not share the concerns expressed in the legal doctrine regarding this view which refer to the needs of addicted persons, as this circumstance is part of the second factor, that the narcotic be intended for personal use.⁴⁷

The Court of Appeals in Poznań defined the criteria for identifying an amount of narcotics as an inconsiderable quantity as follows: ‘The manner of determining an inconsiderable quantity of illicit drugs or psychotropic substances as a factor in the institution regulated in the Article 62a must take into account not only the quantitative criterion referring to the weight of the substance, but also the qualitative criterion. When interpreting the term “an inconsiderable quantity” as a factor in the institution defined in the Article 62a, the court should not limit itself to the weight of the illicit drugs or psychotropic substances, as the concentration of the secured substance is also relevant, allowing for the determination of how many single doses of the substance can be made from this quantity. To determine the meaning of the notion of an inconsiderable quantity of illicit drugs or psychotropic substances, it is necessary to take into account, apart from the previously mentioned quantitative and qual-

⁴⁵ See *Judgement of the Court of Appeal in Kraków Ref. No. II AKa 161/00* [2000-10-04]. LEX No. 44048.

⁴⁶ See, for example, KULIK, M. Komentarz do niektórych przepisów ustawy o przeciwdziałaniu narkomanii. In: M. MOZGAWA, red. *Pozakodeksowe przestępstwa przeciwko zdrowiu: Komentarz*. 1. wyd. Warszawa: Wolters Kluwer, 2017, pp. 674-675. ISBN 978-83-8107-718-7; and GENSIKOWSKI, P. *Materiałnoprprawne ujęcie przesłanek instytucji przewidzianej w art. 62a ustawy o przeciwdziałaniu narkomanii. Prokuratura i Prawo*. 2015, nr 10, p. 104. ISSN 1233-2577.

⁴⁷ See *Judgement of the Court of Appeal in Kraków Ref. No. II AKa 58/18* [2018-08-15]. LEGALIS No. 1894952.

itative criteria, the criterion of the ratio of the seized amount of the substance to the needs of the offender.⁴⁸

An analysis of the case law of recent years concerning the application of the Article 62a of the Act on Counteracting Drug Addiction delivers the following examples of inconsiderable quantities of narcotics. In one case, the accused possessed 1.07 grams of marijuana containing delta-9-tetrahydrocannabinol and the District Court in Gliwice determined this amount to be inconsiderable in the understanding of the Article 62a of the mentioned Act.⁴⁹ The Regional Court in Warsaw-Mokotów recognised a psychotropic substance in the form of two tablets of clonazepam in a foil bag with a total net weight of 0.27 grams (an amount which would suffice for use on one or two occasions) as an inconsiderable quantity.⁵⁰

It is worthwhile to provide examples concerning amphetamines, as this is a widely known hard drug. The Regional Court in Łuków determined that amphetamines with a total net weight of 1.51 grams is not an inconsiderable quantity.⁵¹ The Regional Court in Warsaw-Śródmieście determined that a psychotropic substance in the form of amphetamines with a total net weight of 0.92 grams, thus between 8 and 11 consumer portions, excludes the possibility of applying the provisions of the Article 62a of the Act on Counteracting Drug Addiction.⁵² This same court in another case determined that it was not possible to terminate criminal proceedings based on the Article 62a of the stated Act because the accused possessed amphetamines with the net weight of 0.57 grams, an amount which corresponds to roughly 5 to 7 commercial portions.⁵³ From these judgements, it can be seen that the Regional Court in Warsaw-Śródmieście believes that amphetamines with a weight of 0.92 grams, or even of 0.57 grams are not an inconsiderable quantity of narcotics. The District Court in Lublin, on the other hand, determined an

⁴⁸ See *Judgement of the Court of Appeal in Poznań Ref. No. II AKa 247/16* [2017-02-23]. LEX No. 2402505.

⁴⁹ See *Judgement of the District Court in Gliwice Ref. No. VI Ka 43/19* [2019-02-12]. LEX No. 2720008.

⁵⁰ See *Judgement of the Regional Court for Warsaw-Mokotów in Warsaw Ref. No. III K 1201/13* [2016-11-04]. LEX No. 2384961.

⁵¹ See *Judgement of the Regional Court in Łuków Ref. No. II K 182/17* [2017-09-06]. LEX No. 2352940.

⁵² See *Judgement of the Regional Court for Warsaw-Śródmieście in Warsaw Ref. No. II K 702/13* [2014-05-09]. LEX No. 1908435.

⁵³ See *Judgement of the Regional Court for Warsaw-Śródmieście in Warsaw Ref. No. II K 324/15* [2015-08-11]. LEX No. 1901905.

amount of 0.95 grams of amphetamines to be an inconsiderable quantity.⁵⁴

The greatest interest on the part of the reader may be generated by the approach of the Polish courts to marijuana, the most popular soft drug. To begin with, it must be said that in Poland the possession of marijuana (in any amount) is a punishable criminal offence. The Regional Court in Bielsk Podlaski expressed the view without doubt that marijuana in the amount of 0.72 grams seized from the accused would definitely fall within the notion of 'an inconsiderable quantity of narcotics', since this amount is less than two full commercial portions.⁵⁵ The Regional Court in Warsaw Praga-Południe considered marijuana in the amount of 1.1 grams to be an inconsiderable quantity.⁵⁶ A more restrictive assessment was made by the Regional Court in Łuków. In a case in which the accused possessed marijuana amounting to 0.848 grams (in a plastic bag) and charred dried vegetal matter of a greenish-brown colour weighing 0.044 grams (in a glass pipe), the court stated that 'Taking into account the fact that some of the substance was found in the pipe, while some of it remained in the plastic bag, it can be presumed that the substance was divided for at least two uses. Therefore, in the opinion of the court, this amount cannot be understood as an inconsiderable quantity.'⁵⁷

The sentences cited above clearly illustrate the disparities in the case law regarding the interpretation of the notion of 'an inconsiderable quantity of narcotics'. Regarding the amphetamines, one court understood 0.95 grams as an inconsiderable quantity, while another court understood 0.57 grams of the substance to be a quantity which was not inconsiderable. When it comes to marijuana, one court determined 1.1 grams of marijuana to be an inconsiderable quantity, while another court determined that marijuana with a total weight of 0.892 grams was not an inconsiderable quantity. In the latter case, the court clearly determined that the accused intended all of the substance possessed for personal use. This decision by the court that the amount of marijuana possessed by the

⁵⁴ See *Judgement of the District Court in Lublin Ref. No. V Ka 921/17* [2017-11-07]. LEX No. 2403340.

⁵⁵ See *Judgement of the Regional Court in Bielsk Podlaski Ref. No. II K 38/17* [2017-03-17]. LEX No. 2378676.

⁵⁶ See *Judgement of the Regional Court for Warsaw Praga-Południe in Warsaw Ref. No. III K 848/16* [2017-06-02]. LEX No. 2484327.

⁵⁷ See *Judgement of the Regional Court in Łuków Ref. No. II K 554/17* [2017-10-25]. LEX No. 2402866.

accused exceeded the limits of an inconsiderable quantity meant that it was not possible to terminate the criminal proceedings, thus resulting in the conviction of the accused. The examples presented above demonstrate how important the interpretation of the notion of ‘an inconsiderable quantity of narcotics’ is in the practice of the criminal justice system. It is worth noting that both sentences were handed down in the same year (2017), thus in identical social and economic circumstances and under the influence of the same prevailing views in the criminal law science.

6 Assessment of the criminalisation of the possession of narcotics in the literature

The criminalisation of the possession of narcotics in Poland has both proponents and opponents. The introduction of the criminalisation of the possession of narcotics was preceded by a heated public debate. This debate was not concluded by reaching a consensus. The topic of the possession of narcotics returns from time to time to the public eye in the media and in the statements of politicians and lawyers. From time to time, new proposals for laws increasing or relaxing the criminal liability for the possession of narcotics appear. The view is valid that the criminalisation of the possession of any amount of narcotics, including small amounts intended for personal use, allows broad possibilities for the application of criminal repression, including against individuals who are addicted, while the decriminalisation of the possession of narcotics without the possibility of legally entering into the possession of such narcotics would leave a legal loophole interfering with the prosecution of crimes related to the unlawful trade in narcotics.⁵⁸ The basic argument for the criminalisation of the possession of narcotics is that this facilitates the war with dealers of narcotics.⁵⁹ On the other hand, the largest group of possessors of narcotics are the consumers of these narcotics, not the representatives of the world of organised crime. The vast majority of offences involving the possession of narcotics are not discovered as a result of police opera-

⁵⁸ See MUSZYŃSKA, A. and K. ŁUCARZ. Umożenie postępowania karnego według art. 62a ustawy z 2005 r. o przeciwdziałaniu narkomanii. *Ruch Prawniczy, Ekonomiczny i Socjologiczny* [online]. 2016, vol. 78, nr 2, p. 137 [cit. 2021-02-19]. ISSN 0035-9629. Available at: <https://doi.org/10.14746/rpeis.2016.78.2.12>.

⁵⁹ See, for example, DERLATKA, M. Zakres pojęcia „posiadanie środka odurzającego” w rozumieniu art. 62 ustawy o przeciwdziałaniu narkomanii. Glosa do uchwały SN z dnia 27 stycznia 2011 r., I KZP 24/10. *Państwo i Prawo*. 2011, nr 12, p. 132. ISSN 0031-0980.

tions, but during routine patrols or traffic stops.⁶⁰ Opponents of the criminalisation of the possession of narcotics note that in the case of this criminal offence, discovery is identical with the identification of the offender, and there is a strong tendency on the part of the law enforcement agencies to search for possessors of narcotics (and, thus, the attention of the law enforcement agencies is directed not towards the supply side, but rather towards the demand side, towards the consumers).⁶¹

It is worth illustrating how the public prosecutors have approached the new regulations regarding the prosecution of the offenders for the possession of narcotics, that is how they have approached the regulations set in the Article 62a of the Act on Counteracting Drug Addiction. Initially, there were very few terminations of criminal proceedings on the basis of the Article 62a of the stated Act. The reason for this was, among other things, the problem with the interpretation of the notion of ‘an inconsiderable quantity’ and the fact that the mentioned Article 62a envisions a new institution. One prosecutor stated that ‘along with the increase in the number of decisions handed down by courts on the basis of which it is possible to approximately define “an inconsiderable quantity”, this provision of the Act is becoming more common and is increasingly used by prosecutors.’ Another prosecutor stated that the application of the Article 62a of the Act on Counteracting Drug Addiction is a common sense approach. From the view of statistical data, it can be seen that in all of Poland, in year 2012 prosecutors terminated 13.45 % of criminal proceedings in all cases involving the possession of narcotics, while in year 2013 this number was 19.45 %. Thus, there is a notable increase in terminations applied by prosecutors on the basis of the stated Article 62a. It is also worth noting that during the work on the amendment of the Act on Counteracting Drug Addiction, the lawmakers assumed a rate of termination of criminal proceedings of 10 %.⁶² A study of prosecutors’ records involving cases closed in year 2014 indicates that the stated Article 62a is applied most often in cases of the possession of marijuana (more than 80 %) and amphetamines (approximately 17 %). The authors of the stu-

⁶⁰ See KLINOWSKI, M. Granice odpowiedzialności za posiadanie narkotyków. *Prokuratura i Prawo*. 2011, nr 3, p. 102. ISSN 1233-2577.

⁶¹ See KLINOWSKI, M. Granice odpowiedzialności za posiadanie narkotyków. *Prokuratura i Prawo*. 2011, nr 3, p. 102. ISSN 1233-2577.

⁶² See SZYMANIAK, P. Prokuratura umarza sprawy za posiadanie narkotyków [The Prosecutor’s Office Discontinues Cases for Drug Possession]. In: *GazetaPrawna.pl* [online]. 2014-11-03 [cit. 2021-02-19]. Available at: <https://prawo.gazetaprawna.pl/artykuly/832951,prokuratura-umarza-sprawy-za-posiadanie-narkotykow.html>.

dy assessed the Article 62a of the Act on Counteracting Drug Addiction as a necessary component.⁶³

In the criminal law literature, the provision of the Article 62a of the Act on Counteracting Drug Addiction has been assessed variously. It has been claimed, among other things, that the current solution is meant to rationalise the prosecution and punishment of individuals who contribute to the spread of narcotics in society and to the drug addiction.⁶⁴ It has also been claimed that at present we are in something like an intermediate state in which, in principle, the possession of narcotics is prohibited, but with the possibility to terminate criminal proceedings in cases when this possession concerns inconsiderable amounts for personal use, and that the regulation contained in the Article 62a of the Act on Counteracting Drug Addiction has both pluses and minuses.⁶⁵ The view has been expressed that the normative formation of the factors of the institution mentioned in the stated Article 62a reflects the intentions of the lawmakers when introducing this institution.⁶⁶ An opposing view has also been expressed, suggesting that the solution in the stated Article 62a does not deliver any of the intended effects, that is that it does not affect a change in the practices of the law enforcement agencies in cases involving the possession of narcotics. It has also been claimed in connection with this that in the wording of the stated Article 62a, there are too many indefinite terms for it to be used for an effective rationalisation of the application of criminal repressions against possessors of narcotics; this in particular concerns the phrase 'an inconsiderable quantity of narcotics'. It has been proposed that, by means of a ministerial ordinance, a reference table of threshold values should be created, that is a table indicating specific quantities of particular narcotics above which the law enforcement agencies would be entitled to assume the intention to distribute the substances possessed for commercial purposes. Such a table has been

⁶³ See JANKOWSKI, M. and S. MOMOT. Stosowanie przepisu art. 62a ustawy o przeciwdziałaniu narkomanii. *Prawo w Działaniu*. 2016, nr 26, p. 188 and 202. ISSN 2084-1906.

⁶⁴ See KONARSKA-WRZOSEK, V. Pozakodeksowe przestępstwa przeciwko zdrowiu. In: M. BOJARSKI, red. *Szczególne dziedziny prawa karnego: Prawo karne wojskowe, skarbowe i pozakodeksowe: Tom XI*. 1. wyd. Warszawa: C. H. Beck; Instytut Nauk Prawnych PAN, 2014, p. 457. System prawa karnego. ISBN 978-83-255-1318-4.

⁶⁵ See KRAJEWSKI, R. Umorzenie postępowania w sprawie o przestępstwo posiadania narkotyków w nieznacznej ilości na własny użytek sprawcy. *Przeгляд Sądowy*. 2017, nr 11-12, p. 175. ISSN 0867-7255.

⁶⁶ See GENSIKOWSKI, P. Materialnoprawne ujęcie przesłanek instytucji przewidzianej w art. 62a ustawy o przeciwdziałaniu narkomanii. *Prokuratura i Prawo*. 2015, nr 10, p. 111. ISSN 1233-2577.

proposed, but only for the most popular narcotics.⁶⁷ In the literature, however, a different view has also been expressed. Namely, that the lawmakers, in not creating a quantitative definition of the value of an inconsiderable quantity, assuming the highly varied and changing catalogue of illicit drugs and psychotropic substances, chose a more rational approach.⁶⁸ It is worth mentioning that also one Polish scientist, the criminologist professor Krzysztof Krajewski, based on the threshold values accepted in the Czech Republic, has developed guidelines for inconsiderable quantities of narcotics. The amounts which they contain concern the entire amount of the substance, regardless of its purity, and do not refer to the active substance. These values are, for example, 10 grams for marijuana and 1.5 grams for amphetamines. These guidelines, of course, are not of a binding nature, yet they may be helpful for prosecutors. They have been sent out to all Polish public prosecutors.⁶⁹

Final conclusions

The above-realised analysis of the scope of the criminalisation of the possession of narcotics allows us to conclude that the Polish regulations are in line with the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and with the regulations created in the European Union.

In our opinion, the view that the Polish lawmakers in not creating a quantitative definition of the value of an inconsiderable quantity chose a more rational approach appears justified, despite the disparities among judges regarding the interpretation of the notion of ‘an inconsiderable quantity of narcotics’. In order to ensure uniformity of the case law among courts, there should, however, be developed some threshold values for particular narcotics, that is, amounts which can be understood as inconsiderable. The development of these values should not be carried

⁶⁷ See KLINOWSKI, M. Granice odpowiedzialności za posiadanie narkotyków. *Prokuratura i Prawo*. 2011, nr 3, p. 99 and pp. 103-110. ISSN 1233-2577.

⁶⁸ See MUSZYŃSKA, A. and K. ŁUCARZ. Umorzenie postępowania karnego według art. 62a ustawy z 2005 r. o przeciwdziałaniu narkomanii. *Ruch Prawniczy, Ekonomiczny i Socjologiczny* [online]. 2016, vol. 78, nr 2, p. 141 [cit. 2021-02-19]. ISSN 0035-9629. Available at: <https://doi.org/10.14746/rpeis.2016.78.2.12>.

⁶⁹ See Wytuczne prof. Krajewskiego nt. wartości granicznych [Guidelines of prof. Krajewski on Limit Values]. In: *Polska Sieć Polityki Narkotykowej* [Polish Drug Policy Network] [online]. 2017-09-18 [cit. 2021-02-19]. Available at: <http://www.politykanarkotykowa.pl/publikacje/wytuczne-prof-krajewskiego-zostaly-dzis-wyslane-do-wszystkich-prokuratur-w-polsce/>.

out through legislation, but in the case law, taking into account the views of scientists and changing mores in society. There should not, however, be stiff absolute boundaries in this issue. The factor ‘an inconsiderable quantity of narcotics’ should be interpreted taking into account the factor ‘for personal use’ in a specific case. Moreover, it should be noted that the lawmakers also did not define ‘a considerable quantity of narcotics’, which is a factor in the qualified type of criminal offence of the possession of narcotics (Article 62 para. 2 and Article 62b para. 2 of the Act on Counteracting Drug Addiction). The absence of a legal definition of ‘a considerable quantity’ justifies the non-definition in the above-mentioned Act of ‘an inconsiderable quantity’ of narcotics.

It is our opinion that the current criminal law regulation of the issue of the possession of narcotics in Poland should be assessed positively, as a compromise solution.

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