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Criminal Liability for Transporting Drugs Outside the Territory of the Republic of Poland

Odpowiedzialność karna za przewóz narkotyków poza terytorium Polski

ABSTRACT

The article examines the issue of criminal liability for the transport of drugs outside the European Union or within its borders, but excluding the territory of Poland. Due to the introduction of a legal definition of transport and the change in the current content of Article 55 of the Act of 29 July 2005 on counteracting drug addiction, introduced by the amendment of 1 April 2011, such acts currently remain outside the scope of penalization of this Act. The author attempts to demonstrate that the legislator's oversight, resulting in internally contradictory and illogical criminal law consequences, necessitates urgent intervention on their part. It certainly does not authorize judicial practice to apply an interpretation that extends the scope of penalization of Article 55 of the Act of 2005. Ensuring the extraterritorial effectiveness of the criminal law norm expressed in this provision may only provide such an approach to transport that does not require its reference to the borders or territory of the Republic of Poland.

Keywords: counteracting drug addiction; drug transport; drugs

INTRODUCTION

Prima facie, it might seem that the issue of criminal liability for the transport of controlled substances outside the borders of the Republic of Poland has already been fully scientifically worked out. However, upon closer examination, it turns out that this issue still raises many doubts and arouses a number of controversies.

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Attempts made here and there to resolve the difficulties arising from the transport operation have not brought the expected results that would enable the proper application in judicial practice of the provision setting out the general framework of liability for conduct meeting the above characteristics, despite the long-standing tradition of penalizing this type of activity in a separate act dedicated to counteracting drug addiction. It is worth stating here in advance that the current state of affairs results mainly from the incorrect designation of the transport activity itself. The efforts undertaken not long ago to specify the meaning of the discussed feature were not very successful. Instead of correctly determining the criminal consequences for an act that fulfils its essence, they only deepened the ambiguities that had previously arisen in this context. It turned out that the definition of the concept of transportation, which was thought to more accurately solve the issue of drug transit through Poland, became inadvertently normatively inept, limiting the scope of penalization previously in force in this area. Meanwhile, due to the cross-border nature of drug crime, as well as Poland's obligations under international conventions in the field of punishment and prosecution for the crime of transporting substances under international control, this matter is of high priority, especially for judicial practice, and requires clear declarations from the legislator.[1] Attempts to eliminate the shortcomings of the statutory regulation of transport by means of appropriate interpretation cannot in any way release the legislator from the obligation to design the content of that feature in such a way that would allow the latter to simply and correctly classify the aforementioned activity performed in its entirety outside the borders of the Polish state. From the point of view of this legitimate expectation, it seems necessary to organize and explain the problem announced in the title, and within its framework, to consider the direction of further changes that can be implemented in this area. The above problems are presented using the formal-dogmatic method.

[1] It is worth adding here that the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna on 20 December 1988 (Journal of Laws 1995, no. 15, item 69), in Article 3 (1) (a) obliges the signatory states to establish as a crime, under their national law, i.a., the transport in transit of any narcotic drug or psychotropic substance, if such acts are committed intentionally and contrary to the provisions of the Single Convention on Narcotic Drugs, done in New York on 30 March 1961 (Journal of Laws 1966, no. 45, item 227, as amended), or the Convention on Psychotropic Substances, done in Vienna on 21 February 1971 (Journal of Laws 1976, no. 31, item 180).

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PENALIZATION OF THE TRANSPORT OF NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES BEFORE THE AMENDMENT OF 1 APRIL 2011

The first time we encounter the criminalization of the act of transporting narcotic substances is in the Act of 31 January 1985 on the prevention of drug addiction.[2] According to Article 29, a penalty of imprisonment of up to 5 years and a fine was imposed on anyone who, contrary to the provisions of the Act, transported narcotic or psychotropic substances in transit. In cases of lesser gravity, the perpetrator shall be subject to the penalty of imprisonment for up to one year, restriction of liberty or a fine. However, if the subject of the act was a significant quantity of narcotics or psychotropic substances or the act was committed in order to gain a material or personal benefit, the perpetrator shall be subject to the penalty of deprivation of liberty for a term of not less than 3 years and a fine. The subsequent Act of 24 April 1997 on counteracting drug addiction[3] took over the aforementioned legal status without any major changes (Article 42). The modifications introduced consisted essentially in including poppy milk and poppy straw (also in the case of its privileged and qualified varieties) in the description of the act in question. In fact, significant changes in the scope of cross-border transport were brought about only by the Act of 29 July 2005 on counteracting drug addiction,[4] which replaced the term concerning "transport in transit" in the original version with another term – "through the territory of the Republic of Poland or the territory of another country" (Article 55). Additionally, for pragmatic reasons, poppy seed milk was eliminated from the scope of this causative activity. The use of psychoactive substances produced from natural plants containing opiate alkaloids (including opium poppy products) is gradually replacing the use of their synthetic equivalents. Hence, penalizing acts involving poppy milk and its products was deemed completely unnecessary. The introduced change in terminology was not merely conventional in nature, as certain doubts had already arisen earlier as to whether the element expressed by the phrase "transport in transit" covered the transportation of narcotic substances by the perpetrator between two or more countries, bypassing the territory of Poland.

To put it somewhat simply, two extreme positions emerged in the case law and criminal law literature at that time. According to the first of them, the punishability of the offence typified in Article 42 of the Act of 1997 in its causative form, consisting in the "transport in transit" of narcotic drugs, psychotropic substances, poppy milk or poppy straw, concerned the border and territory of the Republic of Poland,

[2] Journal of Laws 1985, no. 4, item 15, as amended.
[3] Journal of Laws 1997, no. 75, item 468, as amended, hereinafter: Act of 1997.
[4] Journal of Laws 2005, no. 179, item 1485, hereinafter: Act of 2005.

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and not the borders and territory of another country or countries.[5] The basis for resolving the analysed dilemma was sought primarily in the formulation "contrary to the provisions of the Act" placed in the content of Article 42 (1) of the Act of 1997. Namely, it concerned Article 25 of the Act of 1997, which specified the conditions for the legality of the transfer of psychoactive substances. The permit issued by the Chief Pharmaceutical Inspector was decisive for the issue of legality of the import from abroad or export abroad of the above-mentioned substances (irrespective of the requirement to have permits issued by the competent authorities of the export or import country). The lack thereof meant that their movement across the state border and possibly the territory (transit) took place "in violation of the provisions of the Act" and was therefore illegal.[6] Since the regulation of the conditions for the legality of transfer in Article 25 of the Act of 1997, as well as the decisions of the Polish government administration body (Chief Pharmaceutical Inspectorate) could only refer to the border of the Republic of Poland, it was considered that the provision "contrary to the provisions of the Act" (*in principio*) clearly proved that the sanctioned standard contained in Article 42 (1) of the Act of 1997 penalizes the transfer of prohibited substances only across the domestic border. The issue of permits for the transport of prohibited substances in other countries is regulated by foreign law, not Polish law. The latter will not apply there and the content of Chapter XIII of the Penal Code, which refers to the level of criminal liability and not illegality, is irrelevant.[7] The administrative-law nature of the regulation of Article 25 of the Act of 1997 therefore excluded the assumption of the existence of any generalized ban on the cross-border transfer and transit of these substances. It was argued that a different approach, making the illegality of these activities across the border of any foreign country dependent on the lack of a permit issued by a Polish administration body, regardless of the country from which the export took place, would lead to a completely absurd situation.

The correctness of the view presented here was additionally confirmed by the system of control over the transfer of these substances imposed by the Conventions of 1961, 1971 and 1988, which left the matter of the conditions or procedures for

[5] See resolution of the Supreme Court of 30 July 2002, I KZP 19/02, LEX no. 54183; judgment of the Supreme Court of 8 January 2003, IV KKN 413/02, LEX no. 75370; judgment of the Court of Appeal in Gdansk of 19 June 2002, II AKa 154/02, LEX no. 75029; T.L. Chruściel, M. Preiss-Mysłowska, *Ustawa o przeciwdziałaniu narkomanii. Komentarz*, Warszawa 2000, pp. 266–268; M. Bojarski, W. Radecki, *Pozakodeksowe przepisy karne z komentarzem*, Warszawa 1992, p. 135.

[6] This provision introduced a system of control over the transfer of these items imposed by the 1961 and 1971 Conventions, based on permits and special documents issued by the competent authorities of the signatory states (its current equivalent is Article 37 of the Act of 2005).

[7] Resolution of the Supreme Court of 21 May 2004, I KZP 42/03, OSP 2005, no. 1; M. Bojarski, *Glosa do uchwały SN z dnia 21 maja 2004 r., I KZP 42/03*, "Orzecznictwo Sądów Polskich" 2005, no. 1, p. 7.

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issuing permits and special documents by the competent authorities of the signatory states to be decided by the parties.[8] As a result, each country independently determines the conditions for the legal movement of controlled substances across its own borders through internal administrative regulations and penalizes acts committed in violation of them in the same way.[9] Due to the lack of autonomy in this last area of regulation, the provisions of the Conventions of 1961, 1971 and 1988 only indicate the direction of possible legal solutions. They do not contain self-executing regulations that would fully describe the conditions for criminal liability without the need to refer to national law.[10] They do not therefore preclude the principle that the offences listed therein "shall be prosecuted and punished in accordance with the domestic law of the Party" (Article 36 (4) of the 1961 Convention, Article 22 (5) of the 1971 Convention, Article 3 (11) of the 1988 Convention).

Taking into account this aspect of the issue allowed us to assume that the transit offence within the meaning of Article 42 (1) of the Act of 1997 is only the transport of the substances listed therein through the territory of the Polish State. This form of conduct was banned to prevent the uncontrolled flow of psychoactive substances through Poland to the markets of other countries. It was emphasized that their free and unrestricted transportation from one country to another is an undesirable and reprehensible phenomenon, the containment of which requires the harmonization of legal solutions in individual countries. Only the introduction of protective regulations following the Polish model in other countries can effectively prevent the market of a given country from being replenished with these substances, make their trade difficult or limit their harmful availability. In any case, highlighting the mechanism of cooperation on the part of states favouring the internationalisation of criminal prosecution was intended to additionally strengthen the view about the limited territorial scope of the functioning of the transit offence in question.

The authors opposing this position stated that such reasoning is only superficially logical. By means of an appropriate interpretation, referring to the text of the Act itself, it was established that Article 42 of the Act of 1997 applies to international trade, in the case of which there is a greater or lesser connection with the territory and border of the Republic of Poland, but only in the scope relating to the import or export of the substances in question.[11] It was sufficiently clear from the phrases

[8] This refers to the 1961 Single Convention on Narcotic Drugs, the 1971 Convention on Psychotropic Substances, and the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

[9] Resolution of the Supreme Court of 30 July 2002, I KZP 19/02, LEX no. 54183.

[10] J. Duda, *Odpowiedzialność karna za obrót narkotykami poza granicami Polski (artykuł polemiczny)*, "Czasopismo Prawa Karnego i Nauk Penalnych" 2017, no. 1, p. 91.

[11] See T. Srogosz, *Ustawa o przeciwdziałaniu narkomanii. Komentarz*, Warszawa 2006, p. 384.

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listed in Article 25 (2) and (3) of the Act of 1997[12] that in both cases, such a transfer was considered, the purpose of which was the territory of the Polish state. As a result, the powers of the Polish administrative body could only apply to cases of import from abroad to Poland or export abroad from Poland of these substances. However, these reasons were inferior to the act of transporting. In order to comply with the provisions of Article 25 (6) of the Act of 1997, it was not possible to require a permit from the Chief Pharmaceutical Inspector for this type of activity. This provision made the transport of narcotic drugs and psychotropic substances through the territory of the Republic of Poland dependent on the presentation of an export permit issued by the competent authorities of the exporting country or an import permit issued by the competent authorities of the importing country. However, it did not mention anything about the Chief Pharmaceutical Inspectorate decision. The silence about the participation of the Polish administration body in the matter of transport was therefore interpreted as a waiver of the need to have such a permit. The illegality of such transit had nothing to do with the permission of the Polish administrative body. What played a key role here was an export licence issued by the country from which the substances were exported or an import licence issued by the authorities of the importing country.

In such a case, it was considered that the fulfilment of the verb element in the form of transporting the said means could take place by performing, in principle, any action the essence of which was reduced to the physical transport of these means through the territory of the transit country.[13] The acceptance that Article 42 (1) of the Act of 1997 penalizes any transport through the territory of any country, without reference to the territory and borders of the Republic of Poland, also respected the content of Article 1 (u) of the 1988 Convention. According to the latter provision, a "transit country" is a country through whose territory the illegal transport of narcotic drugs, psychotropic substances (and other substances) is carried out, and which is neither the country of origin nor the country of final destination of these drugs and substances. All this allowed us to state that the third form of punishable conduct did not exclude the transport of substances prohibited by Article 42 (1) of the Act of 1997 through any country. This approach equated transportation in

[12] Article 25 (2): "Import from abroad (…) may take place after obtaining, for each shipment imported into the country, an import permit issued by the Chief Pharmaceutical Inspector and an export permit issued by the competent authorities of the exporting country". Article 25 (3): "Export abroad (…) may take place after obtaining, for each shipment exported from the country, an export permit issued by the Chief Pharmaceutical Inspector and an import permit issued by the competent authorities of the importing country".

[13] See, i.a., judgment of the Supreme Court of 3 March 2002, V KKN 33/01, OSNKW 2002, no. 9–10, item 83; judgment of the Court of Appeal in Warsaw of 4 December 2003, II AKa 308/03, LEX no. 1681292.

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transit with the movement of controlled substances from country A to country B, through country C, which did not necessarily have to be Poland.[14]

If one considers this correctly, the source of the discrepancy between one concept and the other lay, most generally, in the formulation "contrary to the provisions of the Act" contained in the content of the norm sanctioned by Article 42 (1) of the Act of 1997, and especially in the manner of understanding it. The view that this feature should be interpreted solely through the prism of the provisions of the Act of 1997 regulating the transfer of drugs (Article 25 thereof) narrowed the scope of application of the norm of Article 42 (1) in the part concerning the act of transportation to the borders and territory of Poland. In turn, the rejection of such a strict correlation with Polish regulatory regulations made it possible to extend the scope of the standard in question to the area where Polish legal provisions do not apply without any major difficulties. With this approach, criminal liability was extended to cases of transport taking place outside the borders of our country.

The discrepancies briefly outlined here, related to the criminal law assessment of the conduct of a perpetrator acting entirely outside the territory of the Polish state, were intended to be dispelled by the Act of 2005 mentioned above. In the opinion on the draft of this Act, we read, among other things, that the new wording, which introduces the concept of transporting narcotic drugs, psychotropic substances or poppy straw through the territory of the Republic of Poland or the territory of another country, is a response to the problems that emerged in the case of committing such an offence abroad.[15] Since the answers and explanations provided in this respect varied, it was considered that adding the element of "territory of another country" would sufficiently neutralize the dispute as to the assessment of the indicated conduct. This direction of resolving the issue in question was also taken up by the Supreme Court, which, sharing the legislator's position in principle, stated that the linguistic interpretation of the provision of Article 55 of the Act of 2005 clearly indicates that the scope of this provision covers only those situations in which drugs are transferred across at least one border.[16] Although the statement of the Supreme Court did not refer directly to the issue of transporting drugs through the territory of "another country", as the subject of the investigation was the phrase "transports through the territory of the Republic of Poland", its identification with the "transport in transit" used in Article 42 of the Act of 1997, the dominant element of which was the international element, resulted in the extension of the scope of regulation of Article 55 of the Act of 2005 on drugs to cases of transporting drugs

[14] T. Bojarski, *Glosa do uchwały SN z dnia 30 czerwca 2002, I KZP 19/02*, "Orzecznictwo Sądów Polskich" 2003, no. 7–8, item 101.

[15] See K. Krajewski, *Opinia w przedmiocie rządowego projektu ustawy o przeciwdziałaniu narkomanii (druk nr 4024)*, Kraków 2005, p. 3.

[16] Resolution of the Supreme Court of 20 December 2006, I KZP 31/06, LEX no. 214179.

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across at least one border of a country other than the Republic of Poland. The described result of the interpretation was also supported by the wording of Article 37 (6) of the Act of 2005, which "leaves no doubt" that "the feature of 'transportation' does not apply to the movement of drugs within the borders of Poland, i.e. 'across' (and not 'through') the territory of the Republic of Poland".[17] The analysis of the features of Article 55 of the Act of 2005 clearly proved that the place where this crime was committed could be both the territory of the Republic of Poland and the territory of another country.[18]

Of course, reducing transit to a common denominator with transport through at least one border did not fully correspond to linguistic intuitions – after all, "transit" means "the passage of people or the transport of goods through a specific area of a given country or from one country to another through the territory of a third country, without stopping and without reloading goods at intermediate points" – nevertheless, in order not to expose oneself to the accusation of internal contradiction, it was necessary to reject the different valuation of the transport of drugs through the territory of another country from the transport from one country to another.[19] Without denying the difference in content between these concepts, it was almost universally accepted that the new formula of "transport" included, on an equal footing with "classic" transit (i.e. transport of drugs through the territory of another country), also the movement of drugs between any two foreign countries, without the need to refer the latter to the borders and territory of the Republic of Poland.[20] Although the duplication of the provision in the new act, making the legality of drug transport dependent on obtaining an "export permit" issued by the exporting country, was related to the application of Polish regulatory regulations, it was not possible to conclude on this basis alone that carrying out transport activities outside Poland would remain unpunished. It was rightly emphasized that the provision of Article 37 (6) of the Act of 2005, like its predecessor Article 25 (6) of the Act of 1997, concerned international or Community trade in the listed substances without any connection with the territory and borders of the Polish State.

The distinction introduced (the territory of the Republic of Poland or the territory of another state), although justified and necessary, quickly turned out to be a half-solution to the discussed problem. While the transit of psychoactive substances through the territories of EU countries did not pose any serious difficulties, due to the Council Framework Decision 2004/757/JHA of 25 October 2004

[17] *Ibidem*.

[18] Judgment of the Supreme Court of 20 October 2011, III KK 120/11, LEX no. 1101661.

[19] P. Żak, *Odpowiedzialność karna za przemyt narkotyków poza obszarem Unii Europejskiej*, "Prokuratura i Prawo" 2014, no. 4, pp. 66–67.

[20] Such as T. Srogosz, *op. cit.*, p. 384; K. Łucarz, A. Muszyńska, *Ustawa o przeciwdziałaniu narkomanii. Komentarz*, Warszawa 2008, p. 495; B. Kurzępa, *Komentarz do art. 55*, [in:] *Ustawa o przeciwdziałaniu narkomanii. Komentarz*, ed. A. Ważny, Warszawa 2013, pp. 362–363.

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laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking,[21] which forced the harmonization of legal provisions in this respect, the issue of assessing the implementation of this form of agency in its entirety outside the territory of the EU remained unresolved. The risk of possible doubts in this respect was additionally increased by the lack of a definition of "transport", although at the same time the glossary of statutory expressions (Article 4 of the Act of 2005) was supplemented with definitions of such conceptual categories as import (point 21), export (point 36), intra-Community acquisition (point 33), and intra-Community supply (point 32).

THE LEGAL STATUS REGARDING THE TRANSPORT OF PSYCHOACTIVE SUBSTANCES RESULTING FROM THE AMENDMENT OF 1 APRIL 2011

An unexpected turn in the way of approaching the analyzed element was brought about by the amendment of 1 April 2011,[22] which removed from Article 55 (1) of the Act of 2005 the previously applicable phrase "transports through the territory of the Republic of Poland or the territory of another country" and replaced it with the concept of "transport" newly defined in Article 4 (20a) of the Act of 2005. According to the latter provision, "transport" currently means any movement of narcotic drugs, psychotropic substances or poppy straw (and from 2018 new psychoactive substances[23]) between two countries through the territory of the Republic of Poland, which begins and ends outside that territory. The recommended change was intended to overcome the existing exponential discrepancies that had arisen in the analysis of this concept. The idea was to effectively prevent the transit of drugs through Poland, which started on the territory of another country and ended in another country. The authors of the amendment themselves admit this, stating firmly in the justification of the government bill that the introduction of the legal definition of "transport" to the glossary of the Act, alongside existing terms such as "import" and "export", should eliminate once and for all the controversy about

[21] OJ L 335/8, 11.11.2004.

[22] Act of 1 April 2011 amending the Counteracting Drug Addiction Act and certain other acts (Journal of Laws 2011, no. 117, item 678.

[23] This concerns the Act of 20 July 2018 amending the Counteracting Drug Addiction Act and the State Sanitary Inspection Act (Journal of Laws 2018, item 1490). As a result of the aforementioned amendment, the provision of Article 55 was changed only in such a way that it was supplemented with an additional feature of the subject of the executive action in the form of a "new psychoactive substance". The same applies to dictionary definitions of terms, including transport (Article 4 (20a) of the Act).

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the essence of this causative act.[24] However, this approach had an impact on the content of Article 55 (1) of the Act of 2005. Supplementing the glossary with the statutory definition of the concept of transport made it necessary to adjust the content of the provision of Article 55 (1) of the Act of 2005 to the new wording of Article 4 (20a) of the Act of 2005. As a result of replacing one phrase with another, there was not so much a simplification as a significant narrowing of the statutory features of the offence specified in Article 55 (1) of the Act of 2005. Upon closer examination of the statutory characteristics of the analyzed feature, it turns out that criminal liability under the provision of Article 55 of the Act of 2005 will no longer be incurred by perpetrators of the movement of narcotic drugs, psychotropic substances or poppy straw (currently also a new psychoactive substance[25]) across the border of two or more EU Member States, bypassing the territory of the Republic of Poland, or across the border of two or more countries that are not members of the European Union, bypassing its area, including through the territory of a third country (transit).[26] As a result of such a presentation of the matter, instead of the simplification of Article 55 (1) of the Act of 2005 declared by the drafter, we are dealing here with a significant impoverishment of its content by the fragment concerning the "territory of another country".

Therefore, reducing the text of Article 55 of the Act of 2005 to include cases of drug movement between EU Member States, bypassing Poland, and between non-EU countries, bypassing its territory, not only did not free the "transport" formula from the previously expressed ambiguities, but on the contrary – it provided further reservations, this time, however, relating to the accuracy of the assumptions adopted in this respect. Especially since no similar changes were made to the content of Articles 61 and 66 of the Act of 2005, which still contain the provision on "transport through the territory of the Republic of Poland or the territory of another country". This, in turn, makes us consider the purposefulness of the change being analyzed.

It follows from the content of Article 6 (20a) of the Act of 2005 that narcotic substances are to be present in the territory of Poland only temporarily, because the destination of the transported goods is a country other than the transit country. The same applies to the place of origin of the goods, which is also a country other than the transit country. The starting and ending points of the transport must be

[24] Sejm RP, VI kadencja, Uzasadnienie rządowego projektu ustawy o zmianie ustawy o przeciwdziałaniu narkomanii oraz niektórych innych ustaw, druk nr 3420, https://orka.sejm.gov.pl/druki6ka.nsf/wgdruku/3420 (access: 12.12.2025).

[25] See footnote 21.

[26] As in P. Żak, *op. cit.*, p. 65. The author points out that import and export involve the movement of goods across external borders – "into" and "outside" the customs territory of the European Union; transport, intra-Community supply and intra-Community acquisition, in turn, refer to the territory and borders of Poland.

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located outside the borders of Poland, since the latter is not the destination.[27] The distinguishing feature of the discussed feature in relation to activities consisting in the import and export of narcotic substances prohibited by law, where their place of destination or origin is the country to which the drug is imported or from which it is exported, is therefore the temporary nature of their "stay" on the territory of the Polish state. Therefore, the essence of the characteristic thus understood should be sought in the very act of transporting a controlled substance through the territory of the Polish state. The issue of crossing the borders of our country remains irrelevant, although transit transport is undoubtedly integrated with just such an activity. Even under the previous legal status, the Supreme Court drew attention to this aspect of the issue, rightly arguing that the meaning of transport in transit is completely exhausted by the transport of a prohibited substance through the territory of the country and that, with such an approach, taking basically any action in this respect is tantamount to fulfilling the element under consideration. According to the Supreme Court, the inherent connection of transit with the import of an illegal substance into the territory of the country and its subsequent export does not mean that the scopes of these concepts overlap completely. Each of the above-mentioned activities has been penalized separately, and therefore each of them should be given appropriate meaning.[28] In this way, the cassation court applied the element of "transport in transit" exclusively to the performance of an activity involving the movement of narcotics through the territory of the transit country. It is no different now, since the statutory definition of transport literally requires the transport of prohibited substances through the territory of the Republic of Poland (from country A to country B). It further follows that, in terms of the element of transport, Article 55 of the Act of 2005 typifies an offence that is committed at the time of transporting prohibited substances through the territory of the Polish state, and not across its border.[29] In order for the above type of activity to occur in the form of an act, it is no longer sufficient to introduce them into the country through

[27] M. Kulik, *Komentarz do art. 55*, [in:] *Pozakodeksowe przestępstwa przeciwko zdrowiu. Komentarz*, ed. M. Mozgawa, LEX/el. 2017, theses 20 and 23; J. Wiśniewska, *Komentarz do art. 55*, [in:] *Przepisy karne ustawy o przeciwdziałaniu narkomanii (art. 53–74). Komentarz*, eds. B. Gadecki, J. Karnat, Legalis 2024.

[28] Judgment of the Supreme Court of 3 March 2002, V KKN 33/01, OSNKW 2002, no. 9–10, item 83.

[29] In order to attribute liability for the transportation of narcotic drugs or psychotropic substances under Article 55 (1) of the Act of 2005, it is necessary to establish that the perpetrator transited these substances through the territory of the Republic of Poland from one country to another (judgment of the Supreme Court of 3 December 2014, II KK 240/14, LEX no. 1552142; B. Kurzępa, *Glosa do wyroku Sądu Najwyższego z dnia 3 grudnia 2014 r., sygn. akt II KK 240/14*, "Prokuratura i Prawo" 2015, no. 9; similarly, judgment of the Court of Appeal in Gdansk of 9 February 2017, II AKa 264/16, LEX no. 2333196). See also D. Zając, *Komentarz do art. 55*, [in:] *Przestępstwa narkotykowe i dopalacze. Komentarz*, eds. W. Górowski, D. Zając, Kraków 2019, p. 113; P. Kubaszewski, *Komentarz do*

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at least one state border.[30] This type of activity can at best be considered as an attempt to transport. If, however, it was established during the proceedings that the final destination of the transported substances was the territory of Poland, the assignment of liability for transport would be eliminated. In such a case, liability for intra-Community acquisition or import could be considered.[31]

The limitation of the extraterritorial effectiveness of the criminal law norm set out in Article 55 (1) of the Act of 2005 in the part concerning transport makes it impossible, as mentioned earlier, for Polish authorities to prosecute Polish citizens committing a similar act outside the territory of the Polish state.[32] This approach to the transport issue constitutes a clear regression compared to the situation before the amendment. Although the legislator, by defining "transportation", intended primarily to clarify the features of this offence and to make its assessment more objective, it would be blindly straightforward to assume that by making the above-mentioned change, in this case it typified the essence of the offence of "transportation" in a way that would allow for the correct application of the provision in question. If this is not the conclusion that the authors of the amendment had in mind, then it does not seem that the currently applicable wording of Article 55 (1) of the Act of 2005 is a happy one. Given the elimination from the content of Article 55 (1) of the Act of 2005 of the conduct consisting in the transport of substances listed therein through the territory of a country other than Poland, we are once again faced with the need to resolve interpretational doubts related to determining the place where this type of crime was committed. This time, however, the question arises whether the described behavior remains completely unpunished or whether responsibility for it can be anchored in other criminal provisions of the Counteracting Drug Addiction Act.

Due to the statutory decree of the concept of "transport", it is not possible to extend the scope of application of Article 55 (1) of the Act of 2005 by way of interpretation, referring, e.g., to the legislator's intention accompanying the amendment, or the content of conventional obligations binding on the Republic of Poland. Such a procedure would essentially amount to supplementing the current text of the act with the missing phrases.[33] From there, it is only a short step to the accusation of violating the principle of legal certainty. It is irrelevant that such a legal state conflicts with obligations arising from international law. The consequences of this discrepancy lie with the state, not the individual. It should not come as a surprise then that in the judicial practice an attempt was made to save the situation, which

art. 55, [in:] *Ustawa o przeciwdziałaniu narkomanii. Komentarz do wybranych przepisów karnych*, ed. P. Kładoczny, Warszawa 2013, p. 48.

[30] See earlier judgment of the Court of Appeal in Warsaw of 30 October 2015, II AKa 256/15.

[31] D. Zając, *op. cit*., p. 113.

[32] Of course, provided that the transport does not begin or end in the EU customs territory, otherwise the perpetrator commits "import" or "export", punishable by the Act.

[33] See decision of the Supreme Court of 14 October 2015, I KZP 11/15, LEX no. 1813471.

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usually came down to qualifying the relevant acts as an offence under Article 56 of the Act of 2005, penalizing in a basic, qualified and privileged type – introducing narcotic drugs, psychotropic substances, poppy straw or new psychoactive substances into circulation or participating in such circulation. Although there were also sporadic cases of courts issuing acquittals.[34] This is because the clause contained in Article 56 (1) of the Act of 2005, referring to "whoever, contrary to the provisions of Articles 33–35, 37, 40 and 40a", replacing the earlier synthetic formulation in this respect "whoever contrary to the provisions", has inadvertently become the source of various proposals for its understanding.[35] Since the discussion on this subject has been reported in the literature and case law too often to elaborate on this matter in more detail, it is enough to limit ourselves here to recalling that the position excluding the application of Article 56 of the Act of 2005 to acts of illegal introduction of controlled substances into circulation committed outside the borders of the Republic of Poland ultimately prevailed. Hence, the solution to the problem of the liability of perpetrators of the transport of controlled substances exclusively through the territories of foreign countries on this particular route was bound to prove unsuccessful. Without questioning the need to overcome the difficulties resulting from the amendment of Article 55 (1) of the Act of 2005, it seems that the only sensible solution to this controversial problem is to modify the approach to the Act of 2005.

The extreme nature of the definition currently in force in this respect could be mitigated by reformulating it in such a way that it would once again criminalize the transfer of controlled substances from one country to another, including through the territory of a third country, without relating such behaviour to the borders and territory of the Republic of Poland. The proposed change to the content of "transport" would have the positive effect of eliminating the currently visible asymmetry in the explanation of the concepts defined by law. It is worth noting that, in addition to transport, the Act of 2005 also defines import (Article 4 point 21), meaning any introduction of scheduled substances with the status of non-Community goods into the customs territory of the European Community, and export (Article 4 point 36), meaning, on the other hand, the exit of scheduled substances from the customs ter-

[34] Opinia Prokuratora Generalnego z dnia 4 marca 2015 r. w sprawie rządowego projektu ustawy o zmianie ustawy o przeciwdziałaniu narkomanii oraz niektórych innych ustaw, druk nr 3107, https://www.senat.gov.pl/download/gfx/senat/pl/senatposiedzeniatematy/2252/drukisejmowe/3107-002.pdf (access: 12.12.2025).

[35] On this topic at length in J. Duda, *Odpowiedzialność karna…*, and the literature cited herein; idem, *Glosa do uchwały SN z dnia 28 stycznia 2016 r., I KZP 15/15*, "Orzecznictwo Sądów Polskich" 2016, no. 10, p. 1410 ff. Otherwise, see resolution of the panel of seven judges of the Supreme Court of 28 January 2016, I KZP 15/15, LEX no. 1963641. See also the approving commentary: T. Bojarski, *Glosa do uchwały SN z dnia 28 stycznia 2016 r., I KZP 15/15*, "Orzecznictwo Sądów Polskich" 2016, no. 10, p. 1404 ff.

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ritory of the European Community. Due to the interdependence of the analyzed concepts, it seems fully justified to postulate that transport should also be identified with transit, which involves the movement of narcotic drugs, psychotropic substances, poppy straw or a new psychoactive substance between EU Member States or from an EU Member State to a country located outside the customs territory of the European Community. The new transport formula should include situations in which the aforementioned drugs are transported from one place to another located in the customs territory of the European Community, crossing at least one international border, or movement outside the customs territory of the European Community. Transport understood in this way would make it possible to maintain an adequate relationship between these concepts. he desired correlation in this respect is, of course, not the only argument for the need to reword the definition of transport.

The next one concerns Poland's implementation of obligations resulting from international agreements. A closer look at the provisions of the Single Convention on Narcotic Drugs of 1961 (Article 36 (1) (a) and (2) (a) (iv)), the Convention on Psychotropic Substances of 1971 (Article 22 (1) (a) and (2) (a) (iv)) and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (Article 4 (1) (a)) proves the existence of an obligation on the part of Poland either to establish jurisdiction over offences committed abroad or to extradite the perpetrator – including a Polish citizen – to another party.[36] It follows from this that Poland's obligation to prosecute offences committed abroad includes cases where it is impossible to extradite the alleged perpetrator. And here we come to the heart of the matter. Although the constitutional ban on the extradition of a Polish citizen has been weakened by the amendment to Article 55 of the Act of September 2006 amending the Constitution of the Republic of Poland,[37] at the statutory level it only applies to the extradition of a Polish citizen based on a European Arrest Warrant. The extradition of a Polish citizen for the purpose of conducting criminal proceedings against him in a country that is not a member of the European Union is still excluded on the basis of Article 604 § 1 (1) of the Criminal Procedure Code.[38] Therefore, the Minister of Justice is wrong in seeing the extradition of a Polish citizen who transported controlled substances as a fulfilment of international obligations arising in particular from Article 4 (2) (a) of the 1988 Convention.[39] The expressed view is, in fact, a mystification intended to maintain the illusion that the shortcomings of the statutory regulation of Article 55 of the Act of 2005 can be circumvented by means of procedural solutions. The whole

[36] J. Duda, *Glosa…*, p. 1416.

[37] Journal of Laws 2006, no. 200, item 1471.

[38] J. Duda, *Glosa…*, p. 1416.

[39] Statement of the Minister of Justice contained in the letter of 12 June 2014, quoted in the decision of the Supreme Court of 14 October 2015, I KZP 11/15, LEX no. 1813471.

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point is that the possibility of extradition, at least with respect to Polish citizens, must result from an international agreement ratified by Poland, which means that the provision of Article 604 § 1 (1) of the Criminal Procedure Code will not apply in such a situation at all. Also two further conditions for the extradition of a Polish citizen listed in Article 55 (2) of the Constitution of the Republic of Poland, i.e. double criminality and the commission of the entire act outside the territory of the Polish state, should be included in such an agreement. Otherwise, it will be in contradiction with the above-mentioned provision of the Polish Constitution. For the sake of accuracy, it should be added here that Poland is not yet a party to any agreement that would directly oblige it to extradite its own citizens. Moreover, contrary to the expressed recommendation to abolish the obstacle to citizenship between EU Member States (Article 7 (1) of the 1996 Convention[40]), Poland even submitted a declaration in which, referring to the content of Article 55 (1) of the Polish Constitution, it refused to execute applications containing a demand for the extradition of Polish citizens (Article 7 (2) of the 1996 Convention).[41] In the face of such a declaration, the assurance of the Minister of Justice that national regulations, especially those of constitutional rank, enable a Polish citizen to be held criminally liable for the act of transporting controlled substances outside the territory of Poland does not seem entirely credible.[42] The enigmatic statement that the scope in which Polish provisions cannot constitute the basis for criminal liability for this type of act is very narrow and has limited significance from the point of view of judicial practice sounds equally suspicious. It simply seems to result from an inaccurate knowledge or recognition of the nature of the problem.

CONCLUSIONS

As a final conclusion, it should be reiterated once again that the current formula for transport categorically opposes qualifying the relevant conduct as an offence under Article 55 of the Act of 2005. Transferring the entire burden related to determining liability for the act of transporting prohibited substances outside the territory of the Polish state to the judicial interpretation, which seeks in the provision of Article 55 Act of 2005 what the legislator himself was unable or did not want to express in it, is in fact no interpretation at all and is glaringly artificial.

[40] Convention drawn up on the basis of Article K.3 of the Treaty on European Union relating to Extradition between the Member States of the European Union, Dublin, 27 September 1996 (OJ C 313/12, 23.10.1996).

[41] S. Steinborn, *Komentarz do art. 604*, [in:] *Komentarz aktualizowany do art. 425–673 Kodeksu postępowania karnego*, ed. L.K. Paprzycki, LEX/el. 2015.

[42] See footnote 37.

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Leaving the above solution unchanged raises the assumption that the legislator actually does not see the importance of the problem and its usefulness. Therefore, if the legislator wants to maintain the internal logic and practical meaning of the provision of Article 55 of the Act of 2005, he should resolve the issue of criminal liability for the transport of controlled substances exclusively through the territory of a third country in such a way that it has a clear basis in its content. In accordance with the tendency of the Supreme Court's case law and the prevailing position of the doctrine, this would involve including transport without the need to refer it to the borders or territory of the Republic of Poland. Only such a clear and transparent regulation of this issue will allow the judicial authorities to abandon the efforts to look for grounds for liability for this type of act where they cannot be found.

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ABSTRAKT

Przedmiotem artykułu jest kwestia odpowiedzialności karnej za przewóz narkotyków poza obszarem Unii Europejskiej lub w jej granicach, z pominięciem jednak terytorium Polski. Z uwagi na wprowadzenie legalnej definicji przewozu oraz zmianę dotychczasowej treści art. 55 ustawy z dnia 29 lipca 2005 r. o przeciwdziałaniu narkomanii nowelizacją z dnia 1 kwietnia 2011 r., tego rodzaju czyny pozostają obecnie poza zakresem penalizacji tej ustawy. Autorka stara się dowieść, że to niedopatrzenie ustawodawcy, prowadzące do wewnętrznie sprzecznych i nielogicznych konsekwencji prawnokarnych, wymaga pilnej interwencji z jego strony. Na pewno nie uprawnia ono praktyki sądowej do stosowania wykładni rozszerzającej zakres penalizacji art. 55 ustawy o przeciwdziałaniu narkomanii. Zapewnienie eksterytorialnej skuteczności normy prawnokarnej wysłowionej w tym przepisie może przynieść jedynie takie ujęcie przewozu, które nie będzie wymagało odniesienia go do granic czy też do terytorium Rzeczypospolitej Polskiej.

Słowa kluczowe: przeciwdziałanie zjawisku narkomanii; przewóz narkotyków; narkotyki