



## **Penalisation of drug possession – institutional action and costs**

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- *Polish law provides punishment for possession of psychoactive or intoxicating substances, normally referred to as drugs or narcotic drugs. Pursuant to Art. 62 of the Act on Counteracting Drug Addiction, dated 29 July 2005, possession of any quantity of narcotic drugs shall be punished with imprisonment for a term of up to three years; up to eight years – in case of possession of a considerable quantity of drugs; with a fine or up to one year imprisonment in cases of lesser gravity.*
- *In 2008, police detected 30,548 criminal offences related to drug possession. That constituted more than a half (53%) of all offences punishable under the Act on Counteracting Drug Addiction (ACDA).*
- *The enforcement of Art. 62 of the ACDA costs the state budget approximately 80 million PLN per year. In 2008, to one person convicted for a serious offence under that Act, there was an average cost of 687.3 thousand PLN and the average of 1764.4 eight-hour working days of law enforcement and administration of justice personnel. In spite of the high cost, in view of the representatives of both the law enforcement services and the judiciary, the enforcement of the Act does not result in mitigating drug problems in Poland, such as reduction of drug trafficking or “detering” their potential users.*

It is a controversial issue whether punishing for possession of any amount of drugs is a right thing to do. Regardless of one's opinion, however, it is worth being aware of the consequences of the adopted legal solutions. The available data on the practice of the operation of the law enforcement agencies and the administration of justice, allow us to state that the current legal situation facilitates schematic and unreflective application of legal rules, without proper consideration of the personal situation and attributes of the offenders or the gravity of their offences.

## The legal context

The issue of punishability of possession of intoxicating and psychoactive substances is regulated by the Act on Counteracting Drug Addiction (ACDA) dated 29 July 2005<sup>1</sup>. Art. 62 of the Act provides as follows:

“1. Whoever, contrary to the provisions of the Act, possesses intoxicating or psychotropic substances, shall be liable to a penalty of imprisonment for the term of up to 3 years.

2. If the object of the offence referred to in point 1 above, is a considerable amount of intoxicating or psychotropic substances, the offender shall be liable to a penalty of imprisonment for the term from 6 months to 8 years.

3. In cases of lesser gravity, the offender shall be liable to a fine, a penalty of limitation of liberty or imprisonment for the term of up to 1 year”.

At the same time, the legislators have not specified what “a considerable amount” of such substances shall mean; moreover, in the judicial practice, various interpretations of “a case of a lesser gravity” can be found.

The law currently in force means penalisation of all forms of possession of intoxicating and psychotropic substances – in accordance with the criminal law principle of legalism of prosecution, criminal proceedings are instituted against everyone who, contravening the provisions of the Act, is in possession of narcotics.

Penalisation of possession of any amount of drugs has been present in Polish law since 2000. The first act on drug abuse prevention of 1985<sup>2</sup> did not provide for a penalty for possession of intoxicating substances, while at the same time it penalised all the acts related to participation in illegal traffic in such substances. In 1997, a new act was prepared (Act on Counteracting Drug Addiction, dated 24 April 1997)<sup>3</sup>. It was then that the legislators introduced provisions concerning penalty for possession of intoxicating substances (Art. 48, paragraph 1)<sup>4</sup>, however, those

<sup>1</sup> Journal of Laws of 2005, no. 179, item 1485.

<sup>2</sup> The Act on Prevention of Drug Abuse dated 31 January 1985 (Journal of Laws of 1985 no. 4, item 15, Art. 1).

<sup>3</sup> Journal of Laws of 1997, no. 75, item 468.

<sup>4</sup> The Act dated 24 April 1997, on Counteracting Drug Addiction (Journal of Laws of 1997, no. 75, item 468).

provisions did not apply to possession of small amounts of forbidden substances solely for personal use (Art. 48, paragraph 4). Such a legal situation can be described as criminalisation, that is recognizing possession of drugs as a prohibited act, with simultaneous depenalisation, that is, waving the punishment for drug possession of a consumer character.

The need to prepare an act on counteracting drug addiction in the late 1990s, was partially caused by the necessity to harmonise Polish law with the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances done in Vienna, on 20 December 1988<sup>5</sup> (the so called Vienna Convention) Art. 3 paragraph 2 of the Convention relates to criminalization of possession of any amount of narcotic drugs. Even though the Convention clearly points to the direction in which the law on drug possession should develop in the countries ratifying the Convention, it does not however, determine the extent to which criminal sanctions are actually applied against perpetrators of such acts<sup>6</sup>.

The Vienna Convention leaves some room for free interpretation, which is treated differently by different countries. That refers, for instance, to applying the so called opportunism of prosecution, that is the lack of criminal sanctions against perpetrators of acts qualified as being of slight noxiousness to society, while preserving a total ban on possession of intoxicating and psychoactive substances. That means that it is still prohibited to possess an illegal psychoactive substance, but that is not tantamount to instituting court proceedings against the detained person and punishing him or her (in cases of lesser gravity, where no other additional prerequisites exist). The Polish legislators used that particular freedom of interpretation when, in 1997, they prohibited possession of intoxicating substances (Art. 48, paragraph 1), but at the same time refrained from imposing a penalty on petty users of such substances if they possessed slight amounts of narcotic drugs only for their own use (Art. 48, paragraph 4).

The legal situation of 1997, assuming criminalisation of drugs possession with simultaneous depenalisation of possession of small amounts of drugs for one's own use, was changed in 2000, when the ACDA was amended<sup>7</sup>. As a result of the amendment, the treatment of possession became more rigorous, and the principle of legalism was introduced, under which every person possessing even the smallest amount of an intoxicating or psychoactive substance was liable to prosecution and such legal conditions are still in force today. Since 2000, the ACDA has been amended a few times, for example, in 2006<sup>8</sup>, the upper limit of criminal liability for

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<sup>5</sup> Journal of Laws of 1995, no. 15, item 69.

<sup>6</sup> K. Krajewski, G. Świątkiewicz: *Problemy narkotyków i narkomanii w ustawodawstwie polskim* [Problems of narcotic drugs and drug abuse in Polish legislation]; United Nations Development Programme (UNDP), Warsaw 2004.

<sup>7</sup> The Act dated 26 October 2000, amending the Act on Counteracting Drug Addiction (Journal of Laws of 2000, no. 103, item 1097).

<sup>8</sup> The Act dated 27 April 2006 amending the Act on Counteracting Drug Addiction and on the responsibility of collective entities for acts prohibited under the threat of punishment (Journal of Laws of 2006, no. 120, item 826).

possessing considerable amounts of narcotic drugs was raised to eight years, yet, it still has not been clearly specified what amount of a substance should be treated as considerable.

To sum up, imposing punishment for possession of any amount of narcotic drugs has been present in Polish law for almost 10 years, it is not, however directly related to or required by any international agreement (the Vienna Convention) ratified by Poland.

## **What purpose does punishment for possession serve? An institutional perspective**

**O**n the basis of the results of studies carried out by IPA<sup>9</sup>, an assessment can be made, of the arguments “for” and “against” punishment for possession of any amount of intoxicating or psychotropic substance, that are most often used in public debate<sup>10</sup>.

### **“Catching small fry makes it possible to get to the real drug dealers, the law currently in force makes the police operational work easier”**

**T**his argument became the starting point for the ACDA amendment in 2000. There are at least two assumptions hidden behind it. First, that allowing possession of small amounts of intoxicating or psychotropic substances for one’s own use makes it more difficult to arrest the dealers, because they usually carry only small amounts of narcotic drugs on them. When detained by the police, they can always lie and say that the dose is only for their own use. Second, since depenalisation of possession of small amounts of drugs makes it impossible to arrest petty retail users and dealers, in consequence, it also makes it impossible to reach the bosses of narcotics gangs.

Does the law in force in Poland for almost 10 years, penalising possession of any amount of narcotic drugs, really help to expose drug dealers and bosses of drug-dealing business? The research carried out by the IPA shows that if that happens at all, it is only to a very limited extent.

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<sup>9</sup> Between April and September 2009, the Institute of Public Affairs carried out a quantitative study (survey) on a representative sample of 464 police officers, prosecutors, judges and probation officers as well as 18 in-depth interviews with police officers, prosecutors, judges, probation officers and prison service personnel.

<sup>10</sup> The phrase “depenalizacja posiadania narkotyków” [depenalisation of drugs possession] in the Google search engine brings 5160 (as of 20 September 2009) results, they are mainly discussion fora sites, press information, blogs and personal websites of people actively participating in the debate. The analysis of the “for” and “against” arguments has been carried out on the basis of the first 250 search results.

Catching the dealers and especially the so called drug-dealing business bosses, is more complicated than it seems. Operational police officers usually know who deals or may deal in drugs on a small scale in their area. However, it is difficult to prove and therefore it usually takes at least a few months to expose a drug dealer and it is done by operational groups or specialised anti-drugs units. In this context, as our interlocutors emphasised, it would be a “waste” to use Art. 62 against a person suspected of drug dealing. It is best to catch them red-handed, during a transaction, as only then it is possible to charge them with drug trafficking (with drugs possession only as an additional charge).

Police officers may use the examination of a person detained for possessing narcotic drugs in order to obtain information about the source of the intoxicating substance. In other words, Art. 62 makes it possible to gather material facilitating operational activity. In practice, however, those who are detained are petty, accidental drugs possessors and addicts who, first of all, do not have the information that would be credible and important enough to lead the police to the gang bosses. Secondly, they have no reason to share the information about the sources of the drugs in their possession with the police. Police cannot get their sentence reduced – in case of offences under Art. 62 the punishment is irrevocable. It does happen, however, that the detainees hope to get a reduced sentence and give evidence against the person from whom they have bought the drugs. The interviews with police officers, carried out as part of the study, indicate that those who testify are usually accidental users who, at the moment of their detention, do not have proper knowledge of the legal consequences of possessing drugs. It does happen though, that they withdraw their depositions after some time, from fear of exclusion from the group or running afoul of the dealer or his comrades. None of our interlocutors suggested that thanks to the depositions of people detained under Art. 62 it had been possible to get to a serious drug trafficker. It should not be overlooked that if a dealer is arrested for possession of a small amount of drugs, it is rather unlikely that he would lead the police to the person he buys narcotics from. It is much more likely that he would choose the penalty of imprisonment (probably a suspended sentence) rather than cooperation with the police, which would not let him avoid the criminal conviction, anyway.

In a questionnaire addressed to police officers, we have asked them to comment on the following statement: “Article 62 of the Act on Counteracting Drug Addiction is an effective tool for reducing drug trafficking”. The police officers had different views. Almost half of them (48%) did not agree with the statement. Police officers as a group make an ambivalent assessment of punishment for possession of narcotic drugs as a method to reduce drug trafficking.

Opinions of other representatives of law enforcement agencies and the judiciary are also divided. The prevailing opinion, however, is such that they do not treat Art. 62 as a useful tool in fighting drug trafficking (or they do not have a view on that). As many as 60% of prosecutors (8% have no view), 45% of judges (17% have no view) and

56% of probation officers (13% have no view) do not agree with the statement that it is a useful tool for reducing drug trafficking.

## Easy statistics

Art. 62 helps to fight drug trafficking only in a limited way, but it is very useful for improving the statistics of police, prosecution service and the court service – the officers call it a “statistics provision”. The offence of possessing narcotic drugs is easy to disclose by chance, which usually happens as a side effect of standard police activity such as traffic inspection or patrol service. Investigations in cases concerning drugs possession usually turn out to be very simple, defendants generally agree to simplified proceedings, and voluntarily submit themselves to punishment. Cases dealt with under Art. 62 are quickly dropped from court case lists. In almost half of the cases, all that is required are court sessions without the necessity to hold a trial. That means that the provision is a good tool to improve crime detection indicators and increase the number of successfully closed cases.

Art. 62 causes two specific side effects: it helps to improve the statistics and provides police with a helpful instrument for operational work. However, it does not bring any spectacular reduction of drug trafficking – in 2008 only 24% of cases charged under ACDA, as police statistics show, concerned trafficking. Whereas more than half (53%) of the cases concerned detection of possessing psychoactive and intoxicating substances.

## **“Depenalisation will create a fad for drug taking. The law should discourage people from taking drugs”**

This argument can be heard both in political circles and in the mass media. It emphasises the normative role of the law which should guide human behaviour to the “right” direction. It also highlights the susceptibility of the society, of its individual members, to drug addiction or, at least, to drug use.

In order to learn about the opinion of police officers and officials working in organisations involved in the implementation of ACDA, we have asked them to comment on the following statement: is “Article 62 of the Act on Counteracting Drug Addiction an effective tool to deter potential narcotic drugs users (people who have not taken narcotic drugs so far)”. The opinions have been divided: those who disagree with the statement include: half of police officers (51%), (7% have no view); as many as 66% of prosecutors (6% have no view); almost half (46%) of judges (19% have no view) and 58% of probation officers.

Prevention of drugs use may concern both, people who have not had anything to do with them yet as well as those who already use them. We have asked the interviewed police officers and state administration officials to give their opinion on the following statement: “Art. 62 of the Act on Counteracting Drug Addiction is an effective tool for reducing the use of narcotic drugs among people who already are drug users”. Those who have not agreed with it included: almost half (48%) of police officers (11% have no view); half (52%) of judges (15% have no view); as many as 61% of prosecutors (12% have no view) and 57% of probation officers (14% have no view).

Summing up, the views are divided but the general tendency, confirmed by the study, indicates scepticism among prosecutors, police officers, judges and probation officers about treating punishment for drugs possession as an effective prevention tool, both with respect to people who have not tried narcotic drugs yet as well as the incidental users.

### **“In a situation of depenalisation, drug addicts will be used to distribute narcotic drugs”**

The above argument focuses on people addicted to narcotic drugs. Its authors express their concern about people who are addicted. However, the statements made by those who do not agree with it, indicate that it is the addicts who are affected by imposing penalty for possession of any amount of drugs. The solution currently applied has contributed to the loss of confidence in the treatment system built on the basis of the liberal law of 1985. People who are addicted, because of their affliction are involved in drug trafficking and constitute an “easy target” for the law enforcement services. The opponents of prosecuting for possession also emphasise that under the rule of the existing law, a drug addict is treated in the same way as a drug dealer since the same procedure is launched against the former and the latter. In their opinion, drug addicts should be given treatment and not punished.

Officers and state administration officials involved in the implementation of the ACDA, and especially police officers, are sceptical about the effectiveness of Art. 62 as an instrument helpful in solving the problem of addiction to intoxicating substances. Three-fourths of police officers, 66% of prosecutors, almost half (46%) of judges and more than half (56%) of probation officers interviewed by IPA have not agreed with the following statement: “Art. 62 of the Act on Counteracting Drug Addiction is an effective tool helping to overcome the habit of drug use in people addicted to narcotic drugs”.

The Act on Counteracting Drug Addiction provides for quite a large variety of possibilities of treatment and therapy for addicted people but they are not used in practice. The evidence of that is, first of all, the mechanism of proceeding with the cases prosecuted under Art. 62 of the ACDA. It rarely happens that a motion

submitted by the prosecution to the court (under Art. 335 of the Code of Criminal Procedure) were questioned by the court as that would mean that the case would have to be sent to trial. From the court's point of view, it is easier to approve the penalty agreed by the prosecutor with the defendant, pursuant to Art. 335 of the Code of Criminal Procedure, and close the case. The enforcement proceedings are also deprived of any deeper reflection on the real problem that the defendant may have. Secondly, this is also confirmed by the statistics concerning expert opinions that are commissioned in the course of the proceedings. A person detained for possession of narcotic drugs is very rarely subjected to addiction diagnosing. The study shows that prosecutors have ordered expert psychiatric opinions in 38% of cases; 93% of those opinions concerned soundness of mind and only two thirds – addiction. The situation in courts is similar – psychiatric expert opinions are ordered by 34% of judges, 88% of the ordered expert opinions concern soundness of mind, and 35% – addiction. An addiction diagnosis provides the basis for considering the application of any of the statutory measures related to treatment.

## Costs

In 2008, the implementation of Art. 62 of the ACDA cost 79.2 million PLN. The working time of law enforcement and administration of justice officers related to cases under Art. 62 of the ACDA was estimated at 1,631,377.2 hours, which amounts to approximately 203.9 thousand eight-hour working days. In 2008, per one person convicted for a serious offence under Art. 62 of the ACDA, the average cost amounted to, at least, 687.3 thousand PLN and average time spent on the case by law enforcement and administration of justice personnel amounted to 1764.4 eight-hour working days<sup>11</sup>. It is worth adding that the above cost calculation reflects rather the bottom limit of the actual expenditure incurred by the state in connection with those cases, because while making the calculation conservative assumptions have been adopted. A question therefore arises, whether the costs and the time spent are commensurate with the results achieved and the adopted objectives of Art. 62 of the ACDA and what could be changed in the Act in order to use the resources better – taking into consideration both the gravity of an offence and the type of substance involved in it.

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<sup>11</sup> The costs have been calculated taking into account the relation of the working time of police officers, prosecutors, judges, probation officers and prison service personnel devoted to cases dealt with under Art. 62 of the ACDA to their wages; the costs of expert opinions ordered in connection with cases dealt with under Art. 62; costs of the execution of sentences issued pursuant to Art. 62 (prison service costs); minus the amount of fines imposed in those cases.



## Recommendations

The main question is the following: what should be the role of an act on counteracting drug addiction and, consequently, what solutions should it offer: to fight the problem effectively, limiting its size and mitigating the negative consequences connected with the use of narcotic drugs (the so called, harm reduction), or should it appease the social mood, pushing the narcotics problem behind the walls of institutions. And even though the institutions will not solve the problem, they may make it less visible.

On the basis of the results of the study we have carried out, we wish to recommend the following:

- A framework should be created for cooperation between institutions involved in the implementation of Art. 62 of the ACDA. The fact that each of the institutions delivering its tasks under the Act is guided by its own rationality, embedded, per se, in the nature of the institution (law enforcement bodies focus on prosecuting offences, the judiciary focus on imposing penalties), has led to their assimilating the Art. 62 and performing their duties in a routine manner. Even though the present law provides for a number of solutions and measures, the institutions – just because of this rationality – do not want to or simply cannot use them in full. That is why it seems reasonable to undertake efforts to initiate cooperation of those institutions and to develop synergies between their operations. It is a good practice when institutions are open for cooperation with local government and non-governmental organisations operating in the area of drug abuse. Such organisations might push the institutions off their beaten track, supplying them with fresh knowledge and showing a different perspective.
- With respect to people detained for possession of small amounts of psychoactive and intoxicating substances, with no previous criminal record (detained for the first time), a dismissal of such cases could be considered at the prosecution proceedings level and thus avoiding the entry of such a detainee into the court register. Such a solution would also help drug addicts who receive a suspended sentence, with the suspension automatically annulled after a subsequent detention (which results in serving the sentence in prison). Perhaps introducing a “third time lucky” type of provision, would make it possible to better differentiate between the motives for possession of drugs in case of drug addicts who, sooner or later will be detained again. A solution allowing for dismissal of cases by prosecutors would fit within the opportunism of prosecution principle, whose practical application lies within the framework of the UN Convention ratified by the Polish government.
- Law enforcement services and the judiciary should be made more sensitive to the problem of drug addiction, for instance through organisation of courses on the ACDA for prosecutors and judges as part of their post-graduate practical training. The Act provides for quite extensive opportunities for treatment and therapy of people addicted to narcotic drugs, but those opportunities are not used in practice, which is often a result of the lack of knowledge and interest in the problems of drug addiction

within the prosecution service and the courts. Effective action in this area would also require more frequent or even obligatory ordering of expert psychiatric opinions concerning drug addiction (and not only soundness of mind). That would, in consequence, lead to issuing an order to start treatment with respect to people diagnosed as addicted to drugs. On the other hand, lack of sufficient number of places in in-prison therapeutic wards should be the reason why only those people for whom no other treatment option is available (addicts serving prison sentences for serious crimes, who pose a threat to society and not just to themselves) should be referred to such wards.

■ The economic costs related to the implementation of Art. 62 should be reduced. Within the existing legal regulation, at least two points may be indicated, generating costs that could be reduced. One of them would involve dismissing cases at the prosecution service level. The other refers to psychiatric expert opinions. They can be prepared at different stages of the proceedings – they can be ordered by the prosecutor, the court or the prison service. A psychiatric expert opinion may concern soundness of mind or addiction. Since prosecutors focus mainly on detecting an offence, they order expert opinions concerning soundness of mind, not addiction. If at a later stage, the court or the prison service wish to refer to an expert opinion concerning addiction, they must order another one, which entails additional cost. That problem could be solved by making it mandatory, in case of psychiatric opinions, to order, simultaneously, opinions concerning soundness of mind and addiction.

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