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dr Katarzyna TKACZYK-RYMANOWSKA

<https://orcid.org/0000-0002-5503-0624>

Wyższa Szkoła Prawa i Administracji Rzeszowska Szkoła Wyższa

e-mail: katarzyna.tkaczyk-rymanowska@wspia.eu

Possession of significant quantity of narcotic drugs – problem overview in the context of the judgment by the Court of Justice of the European Union dated 11 June 2020 C-634/18

Summary

In the judgment of 11 June 2020, the Court of Justice of the European Union took the position that it is not contradictory to the community regulations for courts to decide, on a case-by-case basis, whether or not in a specific case the quantity of drugs possessed by the offender is significant and therefore the penalty should be made more severe. The interpretation of the concept of a ‘significant quantity’ of drugs may be left for the national courts to decide on a case-by-case basis on condition that this interpretation is reasonably foreseeable. This article presents an opinion in the discussion of the problems generated by the concept of significant quantities of narcotic drugs in the Polish criminal law, as specified in article 62(2) of the Act on Counteracting Drug Addiction of 29 July 2005. Most of all, however, the doubts that the judgment of the Court of Justice may raise in the context of the Polish legal order and recognised (and very diverse) case-law.

Keywords: narcotic, possession, European Union, law, judgement.

Introduction

In the judgment of 11 June 2020¹, the Court of Justice of the European Union, replying in preliminary questions submitted by the District Court in Słupsk²,

¹ [https://sip.lex.pl/orzeczenia-i-pisma-urzedowe/orzeczenia-sadow/c-634-18-minimalne-przepisy-okreslajace-znamiona-523105952?_ga=2.257134722.823947549.1619035428-2074907275.1606931684#xd_co_f=ZDRkYTIyZTgtNjdjMy00ZGRmLTgzNzQtMjQyY-TUzZjE0MjJj~ \[21 April 2021\]](https://sip.lex.pl/orzeczenia-i-pisma-urzedowe/orzeczenia-sadow/c-634-18-minimalne-przepisy-okreslajace-znamiona-523105952?_ga=2.257134722.823947549.1619035428-2074907275.1606931684#xd_co_f=ZDRkYTIyZTgtNjdjMy00ZGRmLTgzNzQtMjQyY-TUzZjE0MjJj~ [21 April 2021])

² Contents of the preliminary questions:

Must the rule of EU law contained in Article 4(2)(a) of Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent ele-

stated that it is not incompatible with community regulations for the court to decide, on a case-by-case basis, whether or not, in a specific case, the quantity of drugs in possession of the offender should be regarded as significant and therefore whether or not to make the penalty more severe. In line with the presented position, the interpretation of the concept of ‘significant quantity of narcotic drugs or psychotropic substances’ is left to the discretion of the national courts, on a case-by-case basis, provided that that interpretation is reasonably foreseeable.

The case brought before the District Court in Słupsk pertained to an offender who possessed over 10 grammes of amphetamine, and in his place of residence, over 16 grammes of marijuana and smaller portions of amphetamine (approximately 0.5 gramme each) and marijuana (2 grammes). From the case files it transpired that the narcotic drugs in possession were held for his personal consumption. The offender pleaded guilty, but the court in Słupsk filed a question with the Court of Justice of the European Union as in line with the EU rules, if the offence involves ‘large quantities of drugs,’ the penalty of imprisonment must be made more severe.

ments of criminal acts and penalties in the field of illicit drug trafficking, read in conjunction with Article 2(1)(c) thereof, be interpreted as meaning that that rule does not preclude the expression ‘a significant quantity of drugs’ from being interpreted on a case-by-case basis as part of the individual assessment of a national court, and that that assessment does not require the application of any objective criterion, in particular that it does not require a finding that the offender possesses drugs for the purpose of performing acts covered by Article 4(2)(a) of that framework decision, that is to say production, offering, offering for sale, distribution, brokerage, or delivery on any terms whatsoever?

In so far as the Polish Law on combating drug addiction contains no precise definition of ‘a significant quantity of drugs’ and leaves the interpretation thereof to the bench adjudicating in a specific case in the exercise of its ‘judicial discretion’, are the judicial remedies necessary to ensure the effectiveness and efficiency of the rules of EU law contained in Framework Decision 2004/757/JHA, and in particular Article 4(2)(a) of that framework decision, read in conjunction with Article 2(1)(c) thereof, sufficient to afford Polish citizens effective protection resulting from the rules of EU law laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking?

Is the rule of national law contained in Article 62(2) of the Law on combating drug addiction compatible with EU law, and in particular with the rule contained in Article 4(2)(a) of Framework Decision 2004/757/JHA, read in conjunction with Article 2(1)(c) thereof, and, if so, is the interpretation which the national Polish courts place on the expression ‘a significant quantity of psychotropic substances and narcotic drugs’ contrary to the rule of EU law pursuant to which a person who has committed the offence of possessing large quantities of drugs to perform activities covered by Article 2(1)(c) of Framework Decision 2004/757/JHA is to be subject to stricter criminal liability?

Is Article 62(2) of the Law on combating drug addiction, which lays down stricter criminal liability for the offence of possessing a significant quantity of psychotropic substances and narcotic drugs, as interpreted by the Polish national courts, contrary to the principles of equality and non-discrimination (Article 14 of the European Convention on Human Rights and Articles 20 and 21 of the Charter of Fundamental Rights [of the European Union], read in conjunction with Article 6(1) TEU)?

The Polish law does not offer a definition of a large (significant) quantity of drugs and it is for the courts to decide whether or not such a term applies in a specific case. In its judgment, the Court of Justice of the European Union explicitly stated that the EU law does not preclude a member state from qualifying the possession of significant quantity of narcotic drugs or psychotropic substances both for personal consumption and for illicit trafficking as an offence. Moreover, the Court indicated that interpretation of the concept of ‘significant quantity of narcotic drugs or psychotropic substances’ may be left to the discretion of the national courts, on a case-by-case basis, provided that that interpretation is reasonably foreseeable³. EU Member States are free to treat the possession of large quantities of drugs for personal consumption as an aggravated criminal offence. In this respect, the EU rules do not offer any definition of the concept of ‘large quantities of drugs’. The Court of Justice of the European Union stressed that the EU rules lay down only minimum rules relating to the constituent elements of criminal acts and penalties in the field of illicit trafficking in drugs and precursors. It follows that the existence of differences between the measures implementing that framework decision in the various national legal orders cannot be regarded as an infringement of any EU rules.

This judgment prompted me to address the problems generated by the concept of significant quantities of narcotic drugs in Polish criminal law, as specified in article 62(2) of the Act on Counteracting Drug Addiction of 29 July 2005⁴. Most of all, I would like to attempt to answer the question whether or not the judgment of the Court of Justice of the European Union is pertinent in the context of the Polish legal order and recognised case-law. Due to the nature and framework of the study, in my deliberations I pass over the analysis of the causative act in the form of ‘possession’ and doubts that this constituent element introduces to the legal order⁵. I also pass over the discussion of the unconstitutional, in my opinion, method of defining narcotic drugs or psychotropic substances covered by the power conferred by article 62 of the Act⁶.

³ ECL:EU:2020:455, item 52 of the judgment of the Court of Justice of the European Union.

⁴ Journal of Laws Dz.U. 2005, No. 179, item 1485 as amended.

⁵ I presented my position in a broader manner in paper *Refleksje na temat art. 62 ustawy o przeciwdziałaniu narkomanii na tle karnoprawnym i konstytucyjnym*, “Ius Novum” 2021, vol. 1. More on the topic in, inter alia: J. Konikowska-Kuczyńska, *Odpowiedzialność karna za posiadanie narkotyków*, “Alkoholizm i Narkomania” 2008, vol. 3 (21), p. 319; T.L. Chruściel, M. Preiss-Mysłowska, *Ustawa o przeciwdziałaniu narkomanii. Komentarz*, BECK 2000, p. 305; W. Kotowski, B. Kurzępa, A. Ważny (ed.), *Ustawa o przeciwdziałaniu narkomanii. Komentarz*, Wolters Kluwer 2019, p. 438; M. Mozgawa (ed.), *Pozakodeksowe przestępstwa przeciwko zdrowiu. Komentarz*, Wolters Kluwer 2017, p. 661; A. Piaczyńska, *Posiadanie jako znamię czynu zabronionego*, “Prokuratura i Prawo” 2010, vol. 7/8, p. 54; D. Wysocki, *Pojęcie posiadania w prawie karnym*, “Prokuratura i Prawo” 2000, vol. 2, p. 14; A. Muszyńska, *Problematyka granic odpowiedzialności karnej za posiadanie środków odurzających lub substancji psychotropowych w praktyce sądowej*, “Palestra” 2010, vol. 7/8, p. 122.

⁶ Critically K. Tkaczyk-Rymanowska, *Zasada wyłączności ustawy w kontekście pojęcia nowej substancji psychoaktywnej będącej znamieniem czynu zabronionego – kilka ogólnych uwag natury konstytucyjnej*, “Krytyka Prawa” 2020, vol. 1, pp. 272 et seq.

These issues merit a separate study. I concentrate only on the constituent element of ‘significant quantity’ and problems with interpretation thereof and evaluation of the position adopted in this matter by the judges of the Court of Justice of the European Union.

1. Significant quantity of drugs in Polish criminal law

In the light of domestic rules, the constituent element of ‘significant quantity’ of drugs is, in each description of the types of criminal offences, a circumstance comprising an aggravated offence. In European law, this issue is resolved in various manners. Some countries do not provide for aggravating offences due to significant quantity of drugs; however, the quantity is taken into consideration at the stage of awarding penalty by the court as an aggravating circumstance. Other countries provide for aggravated types and try to define boundary values or leave it to practitioners⁷. In Poland, the criterion of significant quantity is applied also to drug-related offences other than ‘possession’, e.g. manufacture of drugs under article 53 of the Act, drug trafficking as set out in article 56 of the Act, giving drugs to another person under article 58 of the Act. The most significant fact when analysing this constituent element is that the legislator provided solely for a quantitative criterion, leaving for the judges in a specific case to interpret the concept *in concreto*. However, the interpretation is not simple and the case-law not harmonised in this regard, which in the recent past exposed Poland to criticism by the EU authorities⁸. In this matter, also the Constitutional Tribunal expressed an opinion, however, in the judgment of 14 February 2012⁹, the Tribunal found the provisions of article 62(2) and article 56(3) of the Act compatible with article 42(1) read in conjunction with article 2 of the Constitution of the Republic of Poland, arguing that using the evaluative criterion by the legislator was necessary in order for a single legal norm to cover a number of various situations.

The basic interpretative issue that the concept of ‘significant quantity’ raises, is the absence of explicit agreement as to the boundary between a ‘normal’ and ‘significant’ quantity. In this context, it is indicated that case-law has developed three concepts: quantitative (with the weight of drugs being the decisive factor), quantitative and qualitative (not only the weight but also the number of attainable portions qualifies for more severe liability of the offender), quantitative and qualitative while taking into consideration the purpose of the substance (personal con-

⁷ More details on the issue in: K. Krajewski, *Sens i bezsens prohibicji, Prawo karne wobec narkotyków i narkomanii*, Zakamycze 2001, pp. 255 et seq.

⁸ <https://forsal.pl/artykuly/1450155,rzecznik-tsue-prawo-nie-musi-definiowac-pojecia-znacznych-ilosci-narkotykow.html> [21 April 2021].

⁹ Judgment by the Constitutional Tribunal of 14 February 2012, P 20/10, Journal of Laws Dz.U. 2012, item. 214.

sumption or commercial purposes)¹⁰. The Supreme Court, in the judgment of 17 June 1999, concluded that when qualifying the constituent element of the act as a ‘significant quantity’ it is impossible to take into consideration the type of the drug as, quite rightly, this would constitute a *contra legem* interpretation¹¹. The type of drug may be taken into account when considering the case of lesser significance which is a highly more evaluative criterion than the ‘significant quantity’. Whereas the quantitative criterion covers not only the weight of drugs, but also the number of portions that may be made from this quantity. Three years later, the Court of Appeals in Lublin, in its judgment of 17 December 2002¹², took the position that the criterion which decides whether or not the quantity of drugs is ‘significant’, ‘insignificant’ or ‘normal’ is not only the mass (grammes, kilogrammes), but also the number of portions used for inducing a ‘high’, that may be obtained from the quantity, as well as the type of drug and its purpose. This decision, however, raises major concerns. On one hand, it is obvious to take into account the quantity of drugs not only in terms of weight but also the number of attainable ‘fixes’ used to induce a ‘high’, but on the other, the remaining criteria are unacceptable due to the expanded interpretation. A similar opinion was expressed by the same Court of Appeals in Lublin in its judgment of 14 February 2006¹³, wherein the Court found that the harm associated with a specific type of drug inflicted to the human body is an important premise when qualifying the act under article 62(2) of the Act.

There are also decisions, wherein the ‘significant quantity’ is interpreted as the quantity that allows a one-time drugging of a thousand, a dozen or so thousand or several dozen people¹⁴. This is a more reasonable approach, although I doubt whether or not it narrows the interpretation of the discussed constituent factor. The legislator did not use the concept of ‘great’ but only a ‘significant’ amount. In the opinion of some authors, such an approach to the problem ‘promotes’ those offenders who hold above-average quantities of drugs but do not fit the limits specified above¹⁵. In practice, there are various drug-related offences which involve kilogrammes or tonnes of drugs and these are, undoubtedly, ‘significant’ quantities, therefore it is difficult to assume that at times the quantities specified

¹⁰ M. Kulik [in:] M. Mozgawa (ed.), *Pozakodeksowe...*, op. cit., p. 559 et seq. The author discusses these criteria in detail, indicating their advocates in literature, as well as arguments for and against the adoption thereof.

¹¹ Judgment by the Supreme Court of 17 June 1999, IV KKN 813/98, “Prokuratura i Prawo” 2000, vol. 1, p. 2.

¹² Judgment of the Court of Appeals in Lublin of 17 December 2002, II AKa 282/02, OSA 2003, vol. 9, p. 94.

¹³ Judgment of the Court of Appeals in Lublin of 14 February 2006, II AKa 14/06, LEX nr 196128.

¹⁴ E.g. the judgment by the Court of Appeals in Kraków of 31 August 2005, II AKa 167/05, KZS 2005, vol. 9, p. 28; judgment of the Court of Appeals in Lublin of 18 October 2012, II AKa 224/12, LEX nr 1237266.

¹⁵ T. Kozioł, *Znaczna ilość środka odurzającego*, “Prokuratura i Prawo” 2010, vol. 11, p. 72.

in grammes (e.g. 50 g of marijuana or amphetamine¹⁶) may constitute a significant quantity as set out in the Act. A significant quantity must not be too small as then the aggravated type of offence would dominate over the basic one¹⁷. Moreover, this would be contrary to the idea of just punishment. In the ruling of 23 September 2009, the Supreme Court found, however, that the tendency to limit the meaning of the term ‘significant quantity’ does not take into account that the boundaries of sanctions for aggravated types are broad from 3 to 15 years imprisonment (article 53(2), 55(3)); from 2 to 12 years imprisonment (article 56(3)) from one year 10 years (article 62(2)) and from 6 months to 8 years imprisonment (article 58(2) and 62(3)), apart from the fine, and that there is the institution or extraordinary mitigation of the imprisonment penalty (article 60 of the Criminal Code), and moreover, the grounds for conditional suspension of penalty for offences should be considered. Therefore, an adequate punitive response to these offences where the subject covered both significant and great quantities of drugs is possible. Therefore, there is no need to cover a growing number of behaviours with basic types of offences only because the scale of drug-related crime is on the rise. To the contrary, the generic and direct subject of protection under the said rules, such as public health and numerous international agreements which Poland is a party to and which comprise a part of the domestic legal order, oblige to the counteraction and prevention of drug addiction, also using the punitive legal instruments¹⁸.

In the ruling dated 19 October 2000¹⁹, the Court of Appeals in Kraków concluded that the possession of 200 g of amphetamine *in concreto* may be regarded as a ‘significant quantity’. As one dose of this drug is approximately 0.1 g, the aforementioned quantity will suffice to prepare 2,000 portions and induce a ‘high’ in the same number of people on a one-time basis. Similarly, the Court of Appeals in Lublin, in its judgment of 17 December 2002²⁰, ruled that 100 g of heroin constituted a significant quantity. On the other hand, however, according to the position of the Court of Appeals in Wrocław, also 5 g of amphetamine constitutes a significant quantity as it can be used to produce approximately 30 portions of 0.15 g each²¹. A measure of

¹⁶ For instance, the Court of Appeals in Lublin assumed that 50 g of amphetamine constitutes a significant quantity (Judgment of 17 December 2002, II AKa 282/02, OSA 2003, vol. 9, p. 94). But if 0.1 g is assumed as a ‘fix’ sufficient to induce a ‘high’, then 500 people could be intoxicated on a one-off basis. Thus, this is truly a significant quantity.

¹⁷ Judgment by the Court of Appeals in Kraków of 26 June 2012, II AKa 92/12, KZS 2012, vol. 7/8, p. 68.

¹⁸ Judgement by the Supreme Court dated 23 September 2009, I KZP 10/09, <http://www.sn.pl/sites/orzecznictwo/orzeczenia1/i%20kzp%2010-09.pdf> [21 April 2021]

¹⁹ Judgment by the Court of Appeals in Kraków of 19 October 2000, II AKa 124/00, KZS 2000, vol. 11, p. 48.

²⁰ Judgment by the Court of Appeals in Lublin of 17 December 2002, II AKa 282/02, OSA 2003, vol. 9, p. 94.

²¹ Judgment by the Court of Appeals in Wrocław of 2 February 2012, II AKa 413/11, [http://orzeczenia.wroclaw.sa.gov.pl/details/\\$N/15500000001006_II_AKa_000413_2011_Uz_2012-02-02_001](http://orzeczenia.wroclaw.sa.gov.pl/details/$N/15500000001006_II_AKa_000413_2011_Uz_2012-02-02_001) [21 April 2021].

this 'significance' may be the relation of the quantity of drugs to the needs of one addicted person. Therefore, if it is such a quantity that may satisfy the needs of at least several dozen people, then, in the opinion of some court and majority of legal academics, it should be assumed that this quantity is significant²². This criterion, however, has raised my doubts, as 'several dozen' covers the range from 20 to 99. Meanwhile, the constituent element of significant quantity, which is an aggravated one, requires a strict interpretation²³. On the other hand, the possible number of portions produced must refer to the amount of pure active substance²⁴. However, the Supreme Court, in its ruling of 16 July 2014, presented a completely different approach, by concluding that in order to impute liability under article 62(2) of the Act, it is not necessary to determine precisely the quantity of active substance in the drug in possession²⁵. This view cannot be agreed with. It may happen that in terms of weight, the quantity of drug is not significant, but having determined the contents of active substance in the drug, it transpires that a 'high' can be induced in a few hundred people on a one-time basis.

While recognising quantity as significant, the majority of legal academics favour the quantitative criterion and assume that a 'significant' quantity is such that is sufficient to induce a 'high' in several dozen people²⁶. However, I have some concerns as to such understanding of the constituent element of the act, I rather believe that the term 'significant quantity' should mean such quantity that is sufficient to induce a 'high' in a definitely larger number of people than 'several dozen'. Section 2 of article 62 of the Act provides for an aggravated type, which is *de facto* exceptional in relation to the basic type defined in section 1. By extending section 2 over a larger number of cases of possession, we question the sense of keeping article 62(1) of the Act in the legal order (having in mind that that there also is the regulation of the so-called act of lesser significance and the possibility of remission under article 68(a) of the Act, and treating it as a basic type, which becomes then more privileged against the 'basic' one provided for in section 2 of the Act. However, in this case, the intent of the legislator was different.

²² For instance: Judgment by the Court of Appeals in Lublin of 17 December 2002, II AKa 282/02, OSA 2003, vol. 9, p. 94; judgment by the Supreme Court of 1 March 2006, II KK 47/05, OSNKW 2006, vol. 6, p. 57; judgment by the Supreme Court of 14 July 2011, IV KK 127/11, LEX nr 897769; judgment by the Court of Appeals in Wrocław of 12 December 2012, II AKa 240/12, [http://orzeczenia.wroclaw.sa.gov.pl/details/\\$N/155000000001006_II_AKa_000240_2012_Uz_2012-09-12_001](http://orzeczenia.wroclaw.sa.gov.pl/details/$N/155000000001006_II_AKa_000240_2012_Uz_2012-09-12_001) [21 April 2021]; judgment of the Supreme Court of 14 July 2011, IV KK 127/11, LEX nr 897769; K. Łuczarski, A. Muszyńska, *Ustawa o przeciwdziałaniu narkomanii*. Komentarz, Warszawa 2008, p. 246.

²³ L. Morawski, *Zasady wykładni prawa*, Toruń 2006, p. 176.

²⁴ Judgment by the Court of Appeals in Kraków of 30 May 2007, II AKa 85/07, KZS 2007, vol. 6, p. 50.

²⁵ Ruling by the Supreme Court of 16 July 2014, III KK 208/14, <https://www.saos.org.pl/judgments/166396> [21 April 2021].

²⁶ Identically T. Koziół, *Znaczn...*, op. cit., p. 72; as well as: M. Rodzyńkiewicz, *Modelowanie pojęć w prawie karnym*, Kraków 1998, p. 49 et seq.

Moreover, I believe that building constituent elements based on numerical elements which must be interpreted by the courts (and, as can be seen, the interpretations may vary considerably), may at times result in creating non-legal constituent elements of a criminal offence, which is contrary to the *nullum crimen sine lege*. The quantitative criterion is not the only one employed for the interpretation of the ‘significant quantity’ concept. Still, voices can be heard calling for taking into account, e.g. the type and purpose of the drug, as well as its market value²⁷. On the other hand, when taking into consideration the quantitative criterion, it is suggested that a significant quantity should be recognised as such a quantity that allows to induce a ‘high’ in at least 10 people on a one-time basis²⁸. However, such opinions are isolated in the discussion that has been going for years. It should be remembered that the constituent element of significant quantity characterises the aggravated type of offence, which should be regarded as exceptional.

2. Possession of significant quantity of drugs in the light of the judgment by the Court of Justice of the European Union

This very brief overview of positions presented both in literature and case-law clearly indicates that the interpretation of the ‘significant quantity’ concept is not uniform. A certain hope that the principles of interpretation will be crystallised, appeared when preliminary questions were filed with the Court of Justice of the European Union in October 2018, but the analysis of the Court’s judgment showed that this was not the case and the discrepancies in the domestic legal order remained. In my view, the statements presented in the Court’s judgment deserve a critical approach. The Court of Justice of the European Union did not see the case-by-case interpretation of the ‘significant quantity’ concept by domestic courts as violating the rules binding all Member States – equality before the law, the principle of non-discrimination or the principles of legality in criminal matters²⁹. I have certain concerns as regards that.

Before the analysed judgment was made, the EU rather ruled against leaving to the discretion of individual courts to decide as to whether or not the constituent element of ‘significant quantity’ has been met. In January 2020 the Advocate General of the Court stressed that everyone should be able to predict what quantity of drugs will be qualified as significant and punished with a more severe penalty, but she also stressed that the member states are not required to explicitly provide for, in legal regulations, what quantity of drugs will be regarded as sig-

²⁷ For instance, T. Srogosz, *Ustawa o przeciwdziałaniu narkomanii. Komentarz*, Warszawa 2006, pp. 370–371.

²⁸ W. Radecki, *Glosa do wyroku SN z 1 marca 2006*, II KK 47/05, OSP 2006, vol. 12, p. 145.

²⁹ Judgment of the Court of Justice of the European Union, item 38.

nificant is the interpretation of said concept in case-law allows the individual to assess the quantity that carries liability for possession. She referred to the case-law of the European Court of Human Rights to note that the legal standards cannot always be accurate due to their general nature. The interpretation made by a domestic court “must, however, permit the person concerned to assess the existence and the extent of his criminal liability when found in possession of a certain quantity of drugs³⁰. A case-by-case interpretation of that concept by the national courts on the basis of a criterion which does not provide a reasonable degree of foreseeability and certainty is not compatible with the principle of legality of criminal offences and penalties enshrined in Article 49 of the Charter of Fundamental Rights. It is for the national court to determine whether that is in fact the situation that pertains within its national legal order³¹.” In her opinion, the Advocate General also stressed that a situation wherein the case-law does not allow an individual to determine whether or not the quantity of drugs they possess can be qualified as significant, “does not satisfy the criterion of foreseeability”. In this context, the Supreme Court was criticised for its case-law as not “generating a reasonably foreseeable application of the criminal law”. From the aforementioned rulings of the Supreme Court, at times contradictory, it actually transpired that this Court is unwilling to define the concept of ‘significant quantities’ more comprehensively, regarding that as usurping the role of the legislature. In those circumstances, the “unfettered case-by-case interpretation by the national courts of the aggravating circumstance of what constitutes ‘a significant quantity’ of drugs is not compatible with the principle of legality of criminal offences and penalties”³². I agree with this position. Also in the light of the Constitution of the Republic of Poland of 2 April 1997³³, the constituent element of significant quantity may cause concerns³⁴ as regards the principle of exclusivity of acts of law and the rule of law expressed in article 2 of the Constitution of the Republic of Poland (by means of failing to adhere to the principles of good legislation), principle of *nullum crimen sine lege carta* resulting from article 42(1) of the Constitution of the Republic of Poland (to the detriment of the guarantee function of the criminal law by violating the directive of legality in criminal proceedings) as well

³⁰ At this point another question comes to mind, namely to what extent does the statutory punishment decide what the qualification of the offence will be? Should it not be the other way round, that the qualification made previously, based on specific criteria, determines the severity and measure of punishment?

³¹ *Prawo nie musi definiować pojęcia znacznych ilości narkotyków*, <https://forsal.pl/artykuly/1450155,rzecznik-tsue-prawo-nie-musi-definiowac-pojecia-znacznych-ilosci-narkotykow.html> [30.01.2020].

³² *Ibidem*.

³³ The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws Dz.U. 2001, No. 28, item 319.

³⁴ Although in the light of the judgment of the Constitutional Tribunal of 2012 referred to above, the Court’s judges did not have such doubts.

as the principle of the triple division of power as laid down in article 10 of the Constitution of the Republic of Poland (by transferring the competences of the legislature into the hands of the judiciary).

Another thing is the difference (or absence thereof) in the treatment of the offender possessing a significant quantity of drugs. In the opinion of the Court of Justice of the European Union, article 62(2) does not introduce any difference in the treatment of offenders and does not violate articles 20-21 of the EU Charter of Fundamental Rights³⁵ which require that comparable situations be not treated differently, and that different situations be not treated identically³⁶. The current Framework Decision of 2004 (757/JHA)³⁷, in the opinion of the Court of Justice, only lays down the principles determining the constituent elements of offences and penalties in the context of drug-related crime³⁸ (drug trafficking, but also possession of drugs with the intent for further offering, sale etc. and does not cover cases of possession for personal consumption). In this context, it was raised that the decision only binds Member States to establish penalties of imprisonment for possession of 'large quantities' of narcotic drugs, the upper limit of which will be from 5 to 10 years.

The above statements also lead to the conclusion that the differences related to the implementation of the decision in individual member states may not be perceived as a violation of the non-discrimination principle³⁹. I have some concerns as to whether this is the right approach. The EU Charter of Fundamental Rights protects individuals against discrimination caused by the operation of various authorities as well as Member States to the extent that they apply EU law. Moreover, the rules of the Treaty on the functioning of the EU (article 18, former article 12 of the EC Treaty)⁴⁰ contain a general prohibition of discrimination on the grounds of nationality. And although the non-discrimination principle *per se* is common for all EU members, there are considerable differences in the guaranteed level of protection. Individuals possessing comparable quantities of narcotic drugs may be, after all, treated differently depending on how the courts hearing

³⁵ Judgment of the Court of Justice of the European Union, item 43.

³⁶ A. Śledzińska-Simon, *Zasada równości i zasada niedyskryminacji w prawie Unii Europejskiej*, Studia BAS 2011, vol. 2, p. 43.

³⁷ This decision was amended by the directive of the European Parliament and the Council no. 2017/2103 of 15 November 2017 which amended the Framework Decision of the Council no. 2004/757/JHA in order to include new definitions of psychoactive substances to the definition of narcotic drug and repealing the decision of the Council 2005/387/JHA; Official Journal of the EU L.2017.305.12.

³⁸ In line with article 2 of the Framework Decision, it is related to drug trafficking, but also drug possession for subsequent offering, sale etc. but it does not include cases of possession for personal consumption.

³⁹ Judgment of the Court of Justice of the European Union, item 44.

⁴⁰ Treaty on the Functioning of the European Union (Official Journal of the EU C 326 of 26.10.2012, p. 47, Official Journal of 2004 r. item 864/2, as amended).

the case interpret the concept. Moreover, as Member States retain far-reaching autonomy in the matter, it may happen that EU citizens are treated differently depending on where they commit the offence and before which court their case is heard. Framework decisions are, as a rule, binding for Member States as regards the result to be achieved, but this very result may depend on the entire legal system the holder of significant quantity of drugs finds him or herself. The EU's position in this matter is, however, quite consistent. There are series of rulings in which the Court of Justice of the European Union explicitly assumes that the differences between national regulations of individual member states do not violate the prohibition of discrimination. For example, in the judgment of 3 May 2007, the Court of Justice of the European Union decided that absence of accuracy in defining offences may result in discrepancies in the implementation of the Framework Decision in various national legal orders, but the purpose behind such a decision was not to harmonise the criminal law of Member States and no legal act adopted within the EU provides grounds for the harmonisation of criminal law of Member States⁴¹. Therefore, this situation should not be regarded as a violation of the non-discrimination principle. Thus, it transpires from the above that whenever the act which clearly defines offences and penalties which they attract, meets the requirements of availability and predictability, i.e. the person concerned may, based on the provision and, possibly, based on court interpretation, determine what actions attract criminal liability, then such an act of law does not infringe upon the principles of quality, non-discrimination and legality in criminal matters and therefore is compatible with EU law. Otherwise, when applying *a contrario* reasoning, such compatibility is absent.

In the interview for *Gazeta Prawna*, following the publication of the judgment of the Court of Justice of the EU, K. Krajewski stressed that the case-law of the Polish courts is so divergent as regards 'significant quantity', that if the referring court concludes that the sanction cannot be reasonably predicted based on the divergent rulings, it may apply the basic type under article 61(1) of the act. "On the other hand, there is still the issue of a systemic response to the judgment made in Luxembourg. In a normal country, it would be possible to draw up such guidelines that would support the harmonisation of case-law in this respect, with the participation of experts from various fields, but I suspect that at the moment no-one would be interested – he added"⁴². Similarly, in the opinion of P. Kładoczny from the Helsinki Foundation for Human Rights, in theory one can refer to the case-law of the Supreme Court, but it suggests that 'significant quantity' is the quantity that would intoxicate several dozen people, but also a few

⁴¹ Judgment of 3 May 2007 C-303/05, EU:C:2007:261, items 59-60. Similarly: judgments: of 11 February 2003 in joined cases C-187/01 and C-385/01, item 32 and of 28 September 2006 in case C-467/04, item 29.

⁴² *TSUE: orzecznictwo w sprawach narkotykowych musi być przewidywalne*, <https://prawo.gazetaprawna.pl/artykuly/1483454,narkotyki-orzecznictwo-tsue.html> [26 April 2021]

hundred or thousand. Therefore, when it comes to the clarity of the situation, in the opinion of P. Kładoczny, we are in the same spot as we were prior to the judgment. Moreover, the Court of Justice of the EU indicated that the penalisation of possession for personal consumption is beyond its area of concern and individual states have considerable freedom in this respect. Meanwhile, as the author claims, the problem of setting the limits to ‘significant’ or ‘insignificant’ quantity could be avoided by depenalising the possession for personal consumption. Then, not the quantity would be important, but the purpose of narcotic drugs in possession⁴³.

Conclusions

In the period between April and September 2009, the Institute of Public Affairs conducted a research study on the practical application of article 62 of the act⁴⁴. The research took on various forms (interviews, questionnaires, surveys) and covered a number of categories of respondents – police officers, prosecutors, judges. One of the questions asked pertained to article 62(2) of the act and the concept of significant quantity. One of the questions posed to all three categories of respondents was as follows: What is, in your opinion, the minimum number of portions⁴⁵ of psychoactive substance or narcotic drug you consider to be significant? The dominant view (84%) of police officers was that it was approximately 10 portions. The same question posed to prosecutors returned a higher result, as approx. 40% of respondents replied that it was between 21 and 50 (15% among police officers), whereas 31% of prosecutors chose the same response as the police officers – up to 10 portions. On the other hand, the opinion that dominated the judges’ group was that on average approx. 50 portions should be considered a significant quantity, but 50% of respondents replied that aggravated type should be applied from 30 portions up (14% of judges admitted, however, that the offence should be aggravated under article 62(2) of the act already in the event of possession of 5 portions)⁴⁶.

As transpires from the above, there is no explicit position regarding the recognition of a quantity of drugs as significant neither among the law enforcement officials nor the judiciary. On one hand, 10 portions allow the assumption of significant quantity (I think that such qualifications were made in these cases), on

⁴³ Ibidem.

⁴⁴ Research report was presented in the publication of Institute, edited by E. Kuźmicz, Z. Mielecka-Kubiś, D. Wiszejko-Wierzbicka, *Kara za posiadanie. Artykuł 62 ustawy o przeciwdziałaniu narkomanii – koszty, czas, opinie*, Warszawa 2009, p. 7 et seq.

⁴⁵ As ‘portion’, a unit for one-time consumption was assumed, sometimes referred to as a ‘fix’, e.g. 1 g for marijuana, 0.25 g for amphetamine. Ibidem, p. 43.

⁴⁶ Ibidem, pp. 43–44, 54, 69–70.

the other hand, in the opinion of a large group of respondents, an amount over 50 portions is an aggravated type. The discrepancies presented in the Report are also reflected in the view of legal academics presented earlier and in theses included in rulings. The Court of Justice of the European Union clearly stressed in its judgment that the case-by-case interpretation of the concept of ‘significant quantity’ made *in concreto* by individual courts is compatible with the EU laws, provided that such interpretation is reasonably foreseeable⁴⁷. As one judge from Inowrocław concluded “there are many various opinions as to whether or not a specific quantity is significant. The range of case-law is so broad, that for all intents and purposes, if either party wanted to support their position with relevant arguments grounded in case-law, they will surely find something”⁴⁸. “Differences in defining both a significant and insignificant quantity of psychoactive substances are considerable not only between individual appellate districts or instances. Even in a single department, one can find differing rulings in this respect. Moreover, I am under the impression that these differences are getting deeper” – a judge from Wrocław said⁴⁹. If the Court of Justice of the European Union recognises the national rules as compatible with the EU law, but ‘on condition that...’, then failure to meet this condition by a Member State should, in my opinion, raise concerns as to the compatibility of these regulations with the EU law, and therefore the recognition thereof by the Court of Justice as compatible with EU rules is too far-reaching.

Thus, to answer the question posed at the beginning – whether the judgment by the Court of Justice of the European Union, wherein the concept of ‘significant quantity’ under article 62(2) is recognised as compatible with the EU law as “reasonably foreseeable while applying the principles of interpretation”⁵⁰ is an adequate one, I conclude that it is not.

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⁴⁷ Judgment of the Court of Justice of the European Union, item 52.

⁴⁸ Report on the research conducted by the Institute of Public Affairs, p. 69.

⁴⁹ *Co oznacza znaczna ilość narkotyków. Płynne granice odpowiedzialności*, <https://for-sal.pl/artykuly/1450597,co-oznacza-znaczna-ilosc-narkotykow-plynnne-granice-odpowiedzialnosci.html> [22 April 2021].

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Posiadanie znacznej ilości narkotyków – zarys problem w kontekście wyroku Trybunału Sprawiedliwości Unii Europejskiej z dnia 11 czerwca 2020 r. C-634/18

Streszczenie

Wyrokiem z dnia 11 czerwca 2020 r.⁵¹ TSUE, stanął na stanowisku, iż nie jest sprzeczne ze wspólnotowymi regulacjami każdorazowe decydowanie przez sąd, czy w konkretnej sprawie uznać posiadaną przez oskarżonego ilość narkotyków za dużą i w związku z tym zaostrzyć karę, czy nie. Wykładnia bowiem pojęcia „znacznej ilości” narkotyków może być pozostawiona każdorazowo ocenie sądów krajowych, pod warunkiem, że wykładnię tę można racjonalnie przewidzieć. Prezentowany artykuł jest głosem w dyskusji dotyczącej problemów, jakie generuje w polskim prawie karnym pojęcie „znacznej ilości”, o którym mowa w art. 62 ust. 2 ustawy z 29 lipca 2005 r. o przeciwdziałaniu narkomanii⁵². Przede wszystkim jednak zaprezentowane zostały w nim wątpliwości, jakie orzeczenie TSUE może budzić w kontekście polskiego porządku prawnego i ukształtowanego (bardzo niejednolitego) orzecznictwa.

Słowa kluczowe: narkotyki, posiadanie, Unia Europejska, prawo, orzeczenie.

⁵¹ https://sip.lex.pl/orzeczenia-i-pisma-urzedowe/orzeczenia-sadow/c-634-18-minimalne-prze-pisy-okreslajace-znamiona-523105952?_ga=2.257134722.823947549.1619035428-2074907275.1606931684#xd_co_f=Z DRkYTIyZTgtNjdjMy00ZGRmLTgzNzQtMjQyYTUz-ZjE0MjJj~ (21 kwiecień 2021).

⁵² Dz.U. 2005, Nr 179, poz. 1485 ze zm.