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Gloss
**(Proscribed under article 43 of the Prevention of Narcotic
Dependence Act of April 24th 1997)**

On 21st May 2004 a bench of seven judges of the Criminal Law Division of the Polish Supreme Court passed the resolution I KZP 42/03 determining, that marketing of stupeficients, proscribed under article 43² of the Prevention of Narcotic Dependence Act of April 24th 1997, can be committed on the territory of a third state, in which case its illegality requirement shall be understood as referring to the law of the place, where the criminal act was committed.

A question concerning the criminal case of Ibrahim A. and others was referred by a court of three justices to an enlarged bench of the Supreme Court. “Is the territory of the Republic of Poland the only place of commission of the offence proscribed under article 43 of the Prevention of narcotic dependence act (PND), or does the said article penalise the act of trade and distribution of stupeficients, psychotropic substances, poppy seed milk and poppy seed or participation in such activities also on the territory of third states?” decided to give the above answer for the following reasons. The question upon which the interpretation of law of the Court has been requested aroused on the following facts of the case.

On the November 29th, 2002 the district court of K. found Ibrahim A. guilty of crime proscribed under art. 43 (1 and 2) PND, consisting of trafficking, in October 1999, on the territory of Turkey, together with, and in conspiracy with other persons, of considerable amounts of stupeficients³, in the form of several dozen kilograms of heroin, in the way of convincing, together with Serafin T. and Wanda K., Jaroslaw M. in Istanbul to carry with Waclaw K. the

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² Art. 43 (1) penalises, under penalty of imprisonment from six months to eight years and pecuniary penalty, acts of putting into trade and distribution of stupeficients, psychotropic substances, poppy seed milk and poppy seed.

³ “Considerable amount” constitutes a circumstance aggravating maximal penalty for the offence (Art. 43 (1)).

drugs through Germany to the Netherlands, using a Volkswagen Transporter car, in a hiding-place for drugs. It has been also acknowledged, that the said crime has been committed in the concurrence of crimes with another act, qualified under the same provision, consisting of putting into trade from mid October until October 24th 1999 in Cracow, Walcz as well as on the territory of Turkey and Bulgaria, considerable amounts of stupeficients, in the form of 20 Kg of heroin, by organising the carriage from Turkey to Bulgaria by Arkadiusz G. and Agnieszka K. in a car Opel Kadet adjusted for the purposes of drugs trafficking. The district court of K. sentenced the accused to six years and six months of imprisonment. Furthermore if found the accused guilty of committing a crime under art. 258 (1) k.k.⁴ consisting in participation, from at least October 10th 1999 until at least May 2000, on the territory of Poland, Turkey and Moldavia, in criminal bond with the object of trafficking and marketing of heroin between Turkey and Moldavia and other countries. For the said crimes the court ordered a collective punishment of six years and six months of imprisonment.

The defence counsel of Ibrahim A. lodged an appeal from the sentence, claiming, among others, infringement of articles 43 (1 and 3) PND and art. 258 (1) k.k., since application of those provisions is supposedly restricted to the Polish territory. He pointed out, that acts of the accused, inducing into drug trafficking, took place on the territory of Turkey. In the conclusion he pledged for a change in judgement and acquittal of the accused, or for reversal of a judgment and re-examination of the case. Adjudicating the appeal, the court of appeal of G. considered that the case involves a legal question, requiring interpretation of law, as formulated above.

According to the court of appeal, undertaking, on the grounds the single convention on the narcotic drugs⁵, concluded in New York on March 30th 1961, obligation to penalise stupeficients and psychotropic substances marketing, without permission, does not imply, that the said acts are punishable on the grounds of the convention. Ratification merely obliges Poland to consider such acts as criminal offences. Accordingly one must ask, whether the provision of art. 43 PND can be applied to acts committed out of Polish territory.

⁴ The Polish Penal Code, article 258 (1), considers participation in a organized group or association having for purpose the commission of offences as a crime. K.k. (Kodeks karny) – Polish Penal Code, http://www.era.int/domains/corpus-juris/public_pdf/polish_penal_code1.pdf (general part).

⁵ http://www.incb.org/pdf/e/conv/convention_1961_en.pdf.

As the court of appeal pointed out, only acts committed “against the law”, i.e. against provisions on the legalized trade, are considered as crime. Conditions of legalized stupeficients and psychotropic substances trade are set under articles 27 and 28 PND. Wholesale trade of stupeficients and psychotropic substances can only be conducted by an entrepreneur with a concession for opening of a pharmaceutical warehouse, after obtaining an appropriate permission from the Main Pharmaceutical Inspector. Lack of concession and permission constitutes an offence against article 43 (1) PND.

According to the court of appeal, wording of article 43 (1) PND does not allow an unambiguous estimate of the undertaken abroad actions of the accused, since the legislator refers each time to provisions on trade legalization. It seems, that conditions set under art. 43 (1) PND concern only the territory of Poland, since decisions of polish administrative authorities, such as concessions and permissions, are valid just within its territory.

The Public Prosecutor General Deputy, in a formal motion from December 23th 2003, petitioned for passing the following resolution: “*locus delicti* of the crime proscribed under art. 43 (1) PND is not restricted to the territory of the Republic of Poland”. In support of the motion, the Public Prosecutor General Deputy claimed, that element of incrimination “against the law” does not have to be necessarily interpreted, as restricting the crime scene to the territory of Poland. It refers rather to marketing in breach of regulations, contrary to the requirements of licit trade. According to him the said provision does not protect decisions of polish administrative authorities, but the rather defends the society from an uncontrolled, illegal introduction of such substances into distribution. Therefore application of art. 43 (1) PND shall be based upon art. 111 k.k.⁶ and the principle of conventional prosecution.

After investigating the case, the Supreme Court decided to hear it in an increased composition. The court reasoned, that art. 43 PND is a mean of implementation of polish international obligation, to prevent illegal marketing of stupeficients, psychotropic substances, poppy seed milk and poppy seed (the *single convention on the narcotic drugs*, concluded in New York the March 30th 1961– ratified by Poland on 21st December 1965; the *Convention on Psychotropic Substances*, concluded in Vienna on 21st February 1971 – ratified

⁶ Article 111. § 1. The liability for an act committed abroad is, however, subject to the condition that the liability for such an act is likewise recognised as an offence, by a law in force in the place of its commission. §2. If there are differences between the Polish penal law and the law in force in the place of commission, the court may take these differences into account in favour in the perpetrator.

by Poland on November 14th 1974; the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances⁷ concluded in Vienna on December 20th 1988 – ratified by Poland on April 30th 1994).

The first mentioned convention obliges state-parties to the convention to undertake all necessary measures in order to ensure, that actions like offering, offering for sale, dissemination, purchasing, selling, providing on whatever conditions or agency of stupeficients, contrary to the provisions of the convention and every other activity which in the view of the state-party infringe provisions of the convention, are punished, if committed intentionally. Furthermore, as the Supreme Court stressed, each of the said acts shall be considered – according to the convention – as a separate offence, if committed in different countries, and grievous crimes shall be penalised by the country on territory of which the crime was committed or by the country on territory of which criminal has been detained, regardless of the nationality of the person in question, if extradition cannot be effected on the grounds of internal law of the country, to which the extradition motion was brought. Other conventions put on Poland similar obligation.

The Supreme Court indicated also, art. 113 k.k.⁸ – which sets an exception from the double criminality principle – refers both to polish citizens and aliens; to the latter only if it was decided in favour of an extradition in view of prosecuting abroad. While considering possibility of application of the said provision, in the view of art. 43 PND, the Supreme Court has found two alternative interpretations.

First option implies assumption, that the act has been committed on the polish soil. The Supreme Court ascertained that such an interpretation of art. 113 k.k. allows holding the perpetrator criminally responsible in Poland for a criminal offence under art. 42 (1) PND⁹, even if the act in question was committed while crossing other than polish border.

⁷ http://www.unodc.org/pdf/convention_1988_en.pdf.

⁸ Article 113: “Notwithstanding regulations in force in the place of commission of the offence, the Polish penal law shall be applied to a Polish citizen or an alien, with respect to whom no decision on extradition has been taken, in the case of the commission abroad of an offence which the Republic of Poland is obligated to prosecute under international agreements”.

⁹ Article 42 (1) PND penalises, under the penalty of five years of imprisonment and pecuniary penalty, acts of import, export and carriage in transit of stupeficients, psychotropic substances, poppy seed milk and poppy seed.

Another option is that art. 43 PND excludes possibility of application of art. 113 k.k., since the wording “against the law”, referring to the polish law, makes its application impossible outside of the polish law local competence. In such case only a modification of art. 43 PND, in part referring to polish law, would allow application of art. 113 k.k.

The above doubts and the significance of the problem inclined the Supreme Court to judge upon the legal question, as formulated by the court of appeal, in enlarged bench.

The enlarged bench sentenced the following:

The phrasing of the question of the court of appeal refers to the *locus delicti* of the offence under art. 43 PND. The court of appeal was concerned, whether only the polish territory or equally territory of other states can constitute a crime scene. Answer to such a wording of the question seemingly doesn't pose any difficulty. Among the elements of crime, as proscribed under art. 43 (1 and 2) PND, the legislator did not include location of commission of the crime. In the light of general principles that shall signify, that offences can be committed at any place, just as a robbery or a manslaughter.

While analysing the provision more closely, however, the problem of the *locus delicti* appears indirectly, in connection with the phrase “against the law”. Phrases “against the provisions of the Prevention of narcotic dependence act of 1997” or “against the provisions of the Prevention of narcotic dependence act of 1997 and other polish statutes” indicate the *locus delicti*, since polish law, which regulates some part of social life or tend to solve some social problem (and in view of doing so provides state control measures), is not applicable outside polish territory.

Therefore the question posed by the court of appeal concerns in fact the meaning of the term “law” of art. 43 PND.

Language interpretation of this element does not provide an unequivocal solution. The word “law” may signify the Prevention of narcotic dependence act of 1997. While it is true, that the legislator did not use expression “against provisions of the present act”, this cannot be the decisive factor by itself. Since the act contains provisions (art. 27-28) concerning marketing of drugs, it may appeal, that the “law”, in the understanding of art. 43, signifies the Prevention of narcotic dependence act. On the other hand polish legal system knows regulations, which clearly send to other provisions of the statute they make part of. For instance provisions of the Act on Upbringing in Sobriety and Counteracting Alcoholism of 1982 use the expression “acting contrary to the prohibition under art. 14 (1)”. Similarly Law on the protection of public health against the

effects of tobacco use¹⁰ of 1995 states “whosoever sells tobacco products in defiance of bans defined in article 6”.

Another option is that the word “law”, as applied in art. 43 PND, encompasses not only the act on prevention of narcotic dependences, but also any other polish statute. Such an understanding cannot be excluded. This is how, with reference to other penal statutes or any other polish statute in general, art. 4 k.k.¹¹ employs the term as a synonym of entire polish law in force.

Now, articles 109-113 k.k. use expressions such as “the Polish penal law” or “the law in force in the place of commission of the offence”, which means that, on the grounds of the legal language, the term “law” is not restricted to polish statutes. It signifies a legislative act of certain importance, accompanied by descriptive adjectives depending on need. Finally on the grounds of the definition of Polish and foreign public officials of article 115 (19) k.k.¹², in connection with the concerning active bribery art. 229 (5)¹³ and art. 228 (6) k.k. (concerning venality)¹⁴, the term “law” refers both to polish and foreign law.

In conclusion of this thread it is clear, that the language interpretation of the phrase “against the law”, as it is applied in art. 43 PND, does not provide an unambiguous solution. In particular it does not proscribe reading of the

¹⁰ http://www.ensp.org/files/pl_law_protection_public_health.pdf.

¹¹ Article 4 § 1: “If at the time of adjudication the law in force is other than that in force at the time of the commission of the offence, the new law shall be applied. However, the former law should be applied if it is more lenient to the perpetrator”.

¹² Article 115 § 19: “A person performing public functions is a public official, a member of the local government authority, a person employed in an organisational unit which has access to public funds, unless this person performs exclusively service type work, as well as another person whose rights and obligations within the scope of public activity are defined or recognised by a law or an international agreement binding for the Republic of Poland”. http://www.oecd.org/document/40/0,3343,en_33873108_33844437_39779752_1_1_1_1,00.html, amendments to the Penal Code of 2003.

¹³ Article 229 § 5: “Accordingly, subject to the penalties specified in § 1-4 shall be also anyone who gives a material or personal benefit or promises to provide it to a person performing public functions in another country or an international organisation in connection with these functions”.

¹⁴ Article 228 § 6: “The penalties stipulated in § 1-5 shall also be imposed on a person who, in connection with discharging a public function in a foreign state or organization, accepts a financial or personal benefit, or a promise thereof, or demands such benefit, or makes the performance of an official act dependent on the receipt thereof”. http://www.oecd.org/document/20/0,3343,en_33873108_33844437_39779028_1_1_1_1,00.html, amendments to the Penal Code of 2005.

term as a synonym to “illegally”, “unlawfully” or “against regulations on drugs marketing, in force in the place of commission of the act”.

In case of linguistic ambiguity of a provision, other methods of interpretation shall be applied, in particular so-called functional, systematic and historical interpretation.

In order to apply the functional method of interpretation, it is necessary to ascertain what is the subject of the offence defined in article 43 and others of the PND. Scholars suggest it is “public health”.

Certainly it would be incorrect to state, that those are legal order and pecuniary interests which constitute the subject of those crimes. Regulation of drugs production and marketing does not serve public economy purposes. Such is the meaning, it may seem, of alcohol manufacturing and marketing regulations. In case of alcohol, state control does not seek to fight alcohol consumption, as it is being sold legally and without restraints. Analogy to drugs production and marketing regulation would subsist, only after introduction of prohibitory laws. Manufacturing and marketing of alcohol, both licit and illicit, is undertaken in view of offering alcohol beverages to consumers. It is just the opposite in case of drugs. Their legal production seeks broadly understood medicinal purposes. Illegal production and marketing serve other ends, and permission for the production and marketing of drugs in order to to render them accessible to addicted persons cannot be granted.

As those are not state economic purposes, which constitute the subject of protection of the provision of the Prevention of narcotic dependence act, including art. 43, motives lying behind criminalization of certain acts are the same as the *ratio legis* behind criminalisation of offences against life and health.

From that point of view there are no obstacles to qualify as infringing art. 43 PND the act of marketing, against the law, of drugs in a third state.

Arguments flowing from ratified by Poland international conventions, support such an interpretation. Those conventions constitute, on the grounds of art. 91 (10)¹⁵ of the Constitution of Poland, part of Polish legal system. The three mentioned above anti-narcotic conventions of 1961, 1971 and 1988, shall be recalled in relation to the fight against drug addiction. Conventions emphasize the need for cooperation between states-parties in view of struggle against drug dependency. For instance the 1988 convention states: “eradication of illicit traffic is a collective responsibility of all States and that, to that end, coordinated action within the framework of international co-operation is necessary”.

¹⁵ <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

Such kind of general declarations shall subsequently be realised in a number of provision of the said treaties, regulating particularly application of various instruments of international cooperation in criminal cases. The conventional provisions oblige thus the State-parties not only to penalise certain acts, such as drugs trafficking, but also to consider them as extradition offences. They also stipulate hand-over – interception mechanisms and execution of judgements of other states-parties. Conventions oblige to penalise offences related to production and trafficking of drugs, when extradition cannot be effected on the grounds of internal law of the country to which the extradition motion was brought, in particular for the nationality reasons. Also foreign sentences are to be taken into account while judging upon the relapse into crime.

All the above institutions are based upon the assumption of double criminality of the act. For instance extradition obligation can only be discharged in relation to perpetrator of an act committed abroad, if such an act constitutes an offence according to polish law. The same applies to the possibility of execution of a foreign sentence in Poland or to taking over legal proceedings instituted abroad.

In other words if to accept the view, that art. 43 PND refers merely to infringements of polish law, i.e. marketing of drugs in Poland, it results in breach of numerous polish conventional obligations, the common grounds of which is to create a legal environment for an international cooperation in fight against drugs production and marketing. *In principio* such contradiction is not impossible, though it would require convincing and rational explanation. Such reasons cannot be found in polish law (in particular amongst purposes and functions of the prevention of narcotic dependence act), much less in the appropriate international regulations. Undoubtedly internal non-contradiction of legal system shall be assumed at the very beginning. More precisely in the case currently under deliberation, there is a presumption of conformity of polish domestic legal order (here art. 43 PND) with international obligations flowing from ratified by Poland international conventions.

Another argument for interpretation of art. 43 PND in accordance with anti-narcotic conventions, on the grounds of historical interpretation, is that during preparatory works on the Prevention of narcotic dependence act, it has been acknowledged, that the reason behind penalising possession of drugs was to meet polish conventional obligations. Given the legislator's willingness to adjust internal law to the provisions of the convention, it is hard to assume, that it was to be done only partially, by removing one contradiction, while leav-

ing the others. The legislator must have been acting in belief, that that there are no other inconsistencies in the statute.

All the above arguments suggest, that art. 43 PND is applicable also to acts committed abroad, against the law of the place of their commission.

Such an interpretation of art. 43 PND requires to read one of the elements of the crime thereby defined, as referring to polish or foreign law in force, depending on where the alleged act (marketing of the drug) took place.