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Criminal liability for doping in sport

Authors' Contribution:
A Study Design
B Data Collection
C Statistical Analysis
D Data Interpretation
E Manuscript Preparation
F Literature Search

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abstract

The author describes the problem of legislative changes in the field of criminal law in combating illegal forms of doping in sport. Particular provisions of Polish anti-doping regulations in the international context are described and analysed.

A detailed interpretation of the regulations is made along with an attempt to show their practical context. The author based on doctrine publications and his own analysis of the legal text. In particular, the Polish Act on Combating Doping in Sport and international regulations are considered as the basis for the analysis.

The author claims that the current regulation is conservative, and it will be possible to intensify the criminal liability for the use of doping in sport. The author emphasizes that at the level of criminal responsibility, the introduction of the provisions of the Act on combating doping in sport has not changed anything de facto. Still, the use of doping in both professional and amateur sport is not a crime.

Key words: illegal doping in sport, sports' offences, sports law.

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INTRODUCTION

For years, combating doping in sport has been reflected in the regulations of sports federations, the Olympic Movement or administrative regulations regulating the broadly understood "sports law". However, the importance of sport in human life – not only at the level of health or entertainment, but also at the level of social or business fraud in general – makes us believe that sport fraud is increasingly similar to typical economic crimes at the level of social harm. We see it both at the level of corruption in sport [1–3] and from the perspective of using illegal support, whether pharmaceutical or e.g. genetic. The specificity of doping in sport, in which perpetrators repeatedly use legal substances and substances available in the treatment of a number of diseases, e.g. asthma, requires regulation of specific actions of perpetrators, tailored to the "ingenuity" of their actions. We can also see a clear tendency to introduce criminal law as a means of combating illegal doping practices: directly speaking, individual behaviours related to doping in sport become crimes. As can be seen, internal regulations of sporting organisations or the Olympic Movement, related even to the lifetime disqualification of an athlete, do not constitute a sufficient obstacle in pharmacological (and other) prohibited support of sports competition participants. A number of countries, including Poland, have therefore reached for the normatively strictest weapon – criminal law. However, the criminal reaction concerned only some aspects of the use of doping in sport, evolving to exacerbate the repression.

The aim of this paper is to present the issue of criminal liability for the use of doping in sport from the perspective of Polish law affecting professional sport. At the same time, consideration is also given to the extent to which "sport fraud" at the level of formally amateur sport is penalised. The analysis was based on the current and previous provisions of the Polish sports law.

THE ACT OF 21 APRIL 2017 ON COMBATING DOPING IN SPORT

It should be emphasized that criminal liability for illegal doping in sport is not strictly related to the Act of 21 April 2017 on combating doping in sport [4]. Some of its manifestations of commercialization of doping in sport were connected with criminal liability for equally on the basis of the provisions of the sports law as well as general provisions – this refers in particular to liability provided for in the pharmaceutical law as well as in general provisions – the Criminal Code. It should be pointed out, therefore, that in the case of medicinal products (and veterinary medicinal products which are also used as pharmacological doping), trade in them is strictly regulated by the Act of 6 September 2001 – Pharmaceutical law [5].

This Act provides for criminal liability (among others, Article 124) for, *inter alia*, the introduction to the market or storage without authorisation of medicinal products indicated therein, falsification of such products, performance of the indicated commercial activity without authorisation, violation of distribution rules and other rules. Therefore, the legislator penalised the sale without the official pharmacy procedure and related to wholesalers of all forms of doping substances which are both "human" and veterinary medicinal products. Criminal threats were minimal here – as a rule up to 2 years imprisonment; however, in the case of larger transactions, criminal liability for participation in organised crime or money laundering groups could be involved.

Moreover, as indicated by A. Szwarc, on the grounds prior to the Act on Combating Doping in Sport, "Without the existence of special types of doping offences, the penalisation of doping in sport is in principle limited to cases of enforcement of criminal liability for crimes causing death or injury to another person in this way, or for exposing another person to direct danger of loss of life or serious injury. In the Polish criminal law, these are acts prohibited under threat of penalty, specified respectively in Articles 148, 155, 156 and 160 of the Code of Criminal Procedure, if all the conditions for the enforcement of criminal liability are met, especially the statutory characteristics of these crimes" [6, p. 537]. Criminal liability under the Penal Code could also refer to the manufacturing or marketing of substances, foodstuffs or other articles of common use harmful to health or pharmaceuticals not complying with the binding quality conditions (Article 165 § 1.2) – on the basis of this provision, the so-called "afterburners" were prosecuted (slightly stretching its interpretation). M. Iwański also pointed out that forcing a minor to use a prohibited substance may result in criminal liability under Article 191, paragraph 1 of the Code of Criminal Procedure. The indicated levels of criminal liability for code crimes could potentially be related to the cumulative classification of the following types of prohibited acts (both Article 50 of the Sport Act) and subsequent criminal anti-doping provisions [7].

The strictly criminal liability for the use of doping in sport is quite new nature - yet the Act on Qualified Sport of 29 July 2005 provided in its Article 55 that "athletes, coaches and other persons shall be liable to disciplinary action for violation of anti-doping provisions laid down by international sports organisations". Therefore, it was not a criminal liability, but only a disciplinary one, depending on the internal regulations of individual federations. The Act on Qualified Sport was repealed on 16 October 2010 by the provisions of the Act of 25 June 2010 on Sport [8]. Since the entry into force of the Act on Sport for the first time, a crime strictly describing doping behaviour in sport has been introduced into Polish criminal law. Although only to a limited extent, this provision reads as follows until 10 August 2016: "Whoever gives a minor competitor a prohibited substance or applies a prohibited method to him/her within the meaning of the provisions on combating doping in sport shall be subject to a fine, penalty of restriction of liberty or deprivation of liberty for up to 2 years. From 11 August 2016 whoever administers a prohibited substance to a minor competitor or applies a prohibited method to him/her within the meaning of the regulations on combating doping in sport shall be subject to a fine, penalty of restriction of liberty or deprivation of liberty for up to 2 years. The legislative reasoning for the amendment was to modify the content of Article 43, paragraph 1 of the Act on Sport. The entire amendment, which entered into force on 11 August 2016, was aimed at adapting Polish regulations to the principles of the World Anti-Doping Code, to which Article 4(1) of the International Convention on Combating Doping in Sport, drawn up in Paris on 19 October 2005 [9].

The Convention was established under the aegis of UNESCO and referred to previous international agreements such as the Council of Europe Anti-Doping Convention of 16 November 1989 [10] and its Additional Protocol of 12 September 2002 [11]. The Council of Europe Convention was the first international instrument to provide for obligations on parties to the Convention to combat illegal doping in sport. This resulted in a number of regulations in European countries prohibiting and criminalising illegal doping in sport. A. Szwarc [6, p. 534] mentions here (for example): Austria, Belgium, Denmark, France, Germany, Italy, the Netherlands, Switzerland, Spain, Sweden, Sweden and Poland.

The International Convention for the Fighting of Doping in Sport (UNESCO) did not provide for obligations of States - its signatories – to create criminal-law regulations. Furthermore, the World Anti-Doping Code, which is an appendix to the Convention, states that "Anti-Doping laws are not to be subordinated to or restricted by the legal requirements and standards applicable to criminal proceedings or employment matters. The policies and minimum standards set out in the Code constitute a consensus among a wide range of partners interested in clean sport and should be respected by all courts and adjudicating bodies. Paradoxically, therefore, it would seem that the introduction of criminal law regulations would impose certain procedural restrictions in reaching the truth. Of course, this is a kind of a mental shortcut – recognition that the perpetrator did not commit a "doping" crime does not exclude his responsibility at the level of sports and disciplinary regulations.

The Sport Act therefore penalised doping a minor (regardless of his or her awareness) and unconscious doping an adult competitor. Therefore, it was not allowed to penalize the possession of the substances indicated in the Act, also trade in the substances indicated in the Act and administration of these substances and the implementation of prohibited doping methods were not penalised if it was done in accordance with the will of the competitor.

The entry into force of the Act of 21 April 2017 on combating doping in sport re-modelled the liability model in the discussed scope, although in principle this change was insignificant in the scope of criminal law. These regulations are of a detailed special nature, and the aforementioned norms of the Penal Code and the Pharmaceutical Law may be applied only to the extent that the subject matter is not regulated by the subject matter of this Act. It should be immediately pointed out that the provisions of the Act of 21 April 2017 refer to the Pharmaceutical Law. It should also be assumed that the new anti-doping regulations should refer exclusively to sports competition – by trivialising mass Internet trade in substances for potency, it will be penalised without any changes.

Turning to the various types of prohibited acts, it should be emphasized that they still penalize only part of the doping reality. In particular, it is still in principle not a crime to possess or consume a prohibited substance for one's own use (Apart from the provisions of the Anti-Drug Prevention Act, which provides for penalisation of the measures described in it. In principle, most of the measures prohibited by this law are also prohibited substances). From the perspective of criminal law, evasion of anti-doping control or illegal influence on its results (e.g. by substitution of samples) is not a crime (Unlike, for example, in France, this is regulated in Article L232-26 in conjunction with Article L232-9 of the French Sport Code or in § 4(1)(4) and (5) of the German Doping Act of 10 December 2015. – see: [1, p. 543]. Importantly, the Act does not criminalise the use of prohibited methods (the Convention indicates that these include manipulation of blood and blood components, chemical and physical manipulation, gene and cellular doping).

Article 48 of the Act on combating doping in sport states: "Whoever gives a minor competitor a prohibited substance, specified in group S1, S2 or S4 of Appendix No. 1 to the convention referred to in Article 2.1, shall be subject to a fine, penalty of restriction of liberty or penalty of deprivation of liberty for up to 3 years. 2. Whoever gives a competitor, without his knowledge, a prohibited substance, specified in group S1, S2 or S4 of Appendix No. 1 to the convention

referred to in Article 2.1, shall be subject to the same penalty". Therefore, this provision has an incomplete disposition, similar to the regulation of Article 50 of the Act on Sport. That provision (with regard to both paragraphs of the provision in question) refers to Annex 1 to the abovementioned International Convention against Doping in Sport, done at Paris on 19 October 2005.

Article 48, paragraph 1 refers to giving a prohibited substance to a minor competitor (a person under 18 years of age – See Article 10 of the Civil Code. An exception to this rule is the fact that a woman who at the age of 16, with the consent of the court, entered into a marriage, has reached the age of majority.). Firstly, it should be pointed out that such a substance is listed in that annex - an extremely broad catalogue, which is amended almost every year and, as such, constitutes the sole reference point for interpreting the provisions in question. Importantly, at the level of evidence, it is necessary, when determining liability for acts under Article 48, to appoint an expert in at least toxicology, possibly biology or medicine, including sports medicine. Establishing the consumption of a prohibited substance certainly requires special knowledge from the court. Especially with regard to some substances (e.g. salbutamol), the anti-doping law is only infringed if a specific dose is exceeded.

Interestingly, the concept of an athlete is not defined either in the Act on Sport or in the Act on Combating Doping in Sport. However, a broad definition of this concept can be found in the World Anti-Doping Code (Annex 2 to the 2005 Convention). It provides that a competitor is "Any person who participates in sport at the international level (as defined by the international federation concerned) or at the national level (as defined by the national anti-doping organisation). An anti-doping organisation has the right to apply the anti-doping rules to players who are not international or national players and thus to include them in the definition of a player. Furthermore, "For a player who is neither an international nor a national competitor, the anti-doping organisation may decide: to carry out limited or no tests, to analyse samples for only selected prohibited substances, to require limited information on whereabouts, or to require no information on whereabouts, or to require no advance notice to the TEU. However, if any competitor subject to the Anti-Doping Organisation participating in a competition of a rank lower than the international or national level violates the antidoping rules set out in Articles 2.1, 2.3 or 2.5, then the penalties set out in the Code shall apply (except for Article 14.3.2). For the purposes of Article 2.8 and Article 2.9 and for the purposes of anti-doping information and education, a competitor is any person who participates in a sport under the authority of any signatory, government or other sporting organisation recognising the Code. A thesis that this is a competition within a sports club should be derived from the Sport Act (Article 3).

From this perspective, the timing of the administration of the prohibited substance or the context (national or international competitions, organised by a Polish or international association) is irrelevant. From the perspective of a minor, the issue of his or her awareness of the prohibited substance does not affect the punishability of the act under Article 48(1); however, first of all, it may influence the assessment of the degree of social harmfulness of the act, and secondly, it may also be connected with the liability provided for in the Criminal Code related to the aforementioned provisions.

For an adult athlete, the liability of the person administering the prohibited substance is based on the lack of knowledge on the part of the athlete that he

is receiving the prohibited substance. Under the repealed Article 50 of the Act on Sport, doubts arose as to whether the criminal liability excludes informing the competitor that a given substance is not on the list of prohibited substances. M. Iwański [7, p. 107] adopted such a position; M. Badura, H. Basiński, G. Kałużny, M. Wojcieszak were of a different opinion and assumed that "the condition for applying the provision of Article 50, paragraph 2 (of the Act on Sport) is not the lack of awareness on the part of the competitor of administering any substance or applying any method to him, but his lack of awareness that such substances or methods remaining on the list are prohibited" [12]. For the existence of a crime it is also irrelevant whether the substance was given by deception, e.g. as an element of consciously taken "legal" medicines or by misleading an athlete that he is given a "legal" measure.

In Article 49 of the Act on Combating Doping in Sport, the legislator extended the scope of penalisation in relation to the Act on Sport and introduced new types of crimes, closely related to the content of the Pharmaceutical Law. In this respect, sporting regulations may even be considered a lex specialis provision in relation to general regulations concerning trade in pharmaceuticals. Therefore, the content of the provision is somewhat unfriendly to a recipient who is unfamiliar with the regulations of the pharmaceutical law: Article 49 1. Whoever makes a prohibited substance, specified in group S1, S2 or S4 of Annex 1 to the convention referred to in Article 2(1), available to third parties, against payment or free of charge, or stores it in order to make it available to third parties, without a marketing authorisation issued pursuant to Article 3(1) or (2) of the Act of 6 September 2001, available to third parties, does not hold a marketing authorisation issued pursuant to Article 3(1) or (2) of the Act of 6 September 2001. - The pharmaceutical law (Journal of Laws of 2016, items 2142 and 2003) shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 3 years. The same penalty shall apply to anyone who, without the permit referred to in Article 70, section 4, Article 74, section 1 or Article 99, section 1 of the Act of 6 September 2001, is subject to the same penalty. Pharmaceutical law conducts trade in a prohibited substance, specified in group S1, S2 or S4 of Appendix No. 1 to the convention referred to in Article 2, item 1.3. The same penalty shall be imposed on anyone who, in a manner inconsistent with Article 68 of the Act of 6 September 2001, is subject to the same penalty. The pharmaceutical law imports or imports into the territory of the Republic of Poland a prohibited substance specified in group S1, S2 or S4 of Appendix No. 1 to the Convention referred to in Article 2.1.

The legislator in Article 49 refers to the 2005 Convention, which has already been mentioned. It should also be noted that the omitted group S3 of Annex 1 to the Convention is Beta-2 Agonists.

Article 49(1) refers to Article 3(1) and (2) of the Pharmaceutical Law, whose provisions require authorisation to market a medicinal product, either through the President of the Office for Medicinal Products, Medical Devices and Biocidal Products (paragraph 1) or through the Council of the European Union or the European Commission. Thus, we are discussing the existing medicinal products which have not been made available without the required permission – this regulation seems unnecessary – Article 124 of the Pharmaceutical Law has for years provided for responsibility for placing on the market or storing in order to place on the market a medicinal product which does not have a marketing authorization. Such an act is subject to a fine, the penalty of

restriction of liberty or imprisonment for up to 2 years. When transferring the considerations of the applicable Pharmaceutical Law to the anti-doping act, it should be pointed out that "The Pharmaceutical Law does not define the notion of trade in medicinal products. Literature emphasizes that there is no doubt that it concerns civil law transactions carried out by way of legal transactions [13]. In other words, from the discussed perspective, it refers to trade in prohibited substances in a similar way to a typical trade in legal products, regardless of the method of concluding an agreement (via the Internet or in person). Here, of course, there is a practical problem - prosecution of persons trading in prohibited substances via the Internet outside the country's borders. As a rule, the issue of prosecuting the perpetrator of trade in any foreign means is related to the principle of double criminality. However, if an offence has been committed, even indirectly, it is possible to prosecute a "trafficker" regardless of the provisions in force in the place where the offence was committed.

Article 49(2) of the Act on combating doping in sport refers to Article 70(4), Article 74(1) or Article 99(1) of the Pharmaceutical Law Act. These provisions define the principles of running pharmacies and to pharmaceutical wholesalers. Again, we find an appropriate provision in the Pharmaceutical Law, which provides for an administrative penalty (it is not a penalty for a crime) for running specified entities without the required permit.

Article 49 paragraph 3 of the Anti-Doping Act refers to Article 68 of the Pharmaceutical Law in the scope of transporting or importing a prohibited substance on the territory of the Republic of Poland. In this respect, it is possible to qualify from individual provisions of the pharmaceutical law, e.g. 127a or 126b.

CONCLUSIONS

The above comments clearly indicate that in the area of penalisation of doping in sport, Polish law has not changed much. On the contrary, the current Act on Combating Doping in Sport petrifies the criminal liability model applicable to pharmaceutical law regulations when repeating the provisions of the Act on Sport. It is still not a crime for athletes to use doping (unless, of course, we fall under the anti-drug law). On the other hand, the above remarks should be contextually related to amateur sport. While Article 48 of the Anti-doping Act refers only to the perpetrator's relationship with competitors, the provisions of Article 49 as well as other provisions mentioned in this study are applicable to all persons regardless of their sports status. At this point it should also be pointed out that also at the amateur level there are works on the creation of anti-doping practices. This is a bottom-up initiative, albeit with a growing response, especially in the cycling community. Organizers of amateur bicycle races Bike Marathon, Eurobike Kaczmarek, Electric MTB, Via Dolny Śląsk, Energa Cyklo Cup have undertaken the initiative "Race without doping". Within the framework of these competitions, in 2019 an anti-doping control is carried out, the consequences of which are connected with exclusion from races or loss of prizes. As mentioned above, amateur use of doping can be a crime only if we "fall under" the common rules concerning e.g. possession of drugs.

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