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# ADMINISTRATIVE-CRIMINAL RESPONSIBILITY IN POLAND AS AN ALTERNATIVE INVESTIGATION AND SANCTIONING SYSTEM*

# RESPONSABILIDADE ADMINISTRATIVO-CRIMINAL NA POLÔNIA COMO SISTEMA ALTERNATIVO DE INVESTIGAÇÃO E SANCIONAMENTO

# RESPONSABILIDAD ADMINISTRATIVA-PENAL EN POLONIA COMO SISTEMA ALTERNATIVO DE INVESTIGACIÓN Y SANCIONAMIENTO

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**ABSTRACT**
The system of penal law in Poland is complicated. It includes responsibility for crimes, misdemeanours, fiscal crimes and fiscal misdemeanour. Besides, there are administrative offences punishable with very severe sanctions. Their number has been increasing since the 1990s and now they play an important role as an alternative investigation and sanctioning system. They formally belong to administrative law, but their assessment from the perspective of the criteria of 'criminal charge' developed in the jurisprudence of the ECtHR allows to treat them as part of criminal law *sensu largissimo*. Therefore, this form of responsibility is also called administrative-criminal responsibility. This raises the question of the accordance of the rules regarding the administrative-criminal responsibility, belonging to administrative law, with the main criminal law guarantees. The aim of this paper is to present the general character of administrative-criminal responsibility and to evaluate the rules introduced in 2017 from the perspective of the certain safeguards appropriate for criminal responsibility.

**Keywords:** administrative-criminal responsibility; nullum crimen sine lege; nullum crimen sine culpa; right to defence; right to court.

**RESUMO**
O sistema punitivo na Polônia é complicado. Inclui a responsabilidade por crimes, contravenções, crimes fiscais e contravenções fiscais. Além disso, existem infrações administrativas que podem acarretar sanções muito severas. Seu número tem aumentado desde a década de 1990 e agora desempenham um papel importante como um sistema alternativo de investigação e sanção. Elas pertencem formalmente ao direito administrativo, mas sua análise do ponto de vista dos critérios de 'acusação criminal' desenvolvidos na jurisprudência do TEDH permite tratá-las como parte do direito penal *sensu largissimo*. Portanto, essa forma responsabilidade também é chamada de responsabilidade administrativo-criminal. Levanta-se, então, a questão da conformidade das normas relativas à responsabilidade administrativo-criminal, pertencentes ao direito administrativo, com as principais garantias do direito penal. O objetivo do artigo é apresentar o caráter geral da responsabilidade administrativo-criminal e avaliar as regras introduzidas em 2017 na perspectiva de algumas salvaguardas voltadas especificamente à responsabilidade criminal.

**Palavras-chave:** responsabilidade administrativo-criminal; nullum crimen sine lege; nullum crimen sine culpa; direito à defesa; direito ao acesso à justiça.

**RESUMEN**
El sistema punitivo en Polonia es complicado. Incluye responsabilidad por delitos, faltas, infracciones fiscales y faltas fiscales. Además, existen infracciones administrativas que pueden derivar en sanciones muy severas. Su número ha

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aumentado desde la década de 1990 y ahora desempeñan un papel importante como sistema alternativo de investigación y sanción. Pertenecen formalmente al derecho administrativo, pero su análisis desde el punto de vista de los criterios de 'persecución penal' desarrollados en la jurisprudencia del TEDH permite tratarlas como parte del derecho penal *sensu largissimo*. Por tanto, esta forma de responsabilidad también se denomina responsabilidad administrativo-penal. Surge, entonces, la cuestión de la conformidad de las normas relativas a la responsabilidad administrativo-penal, pertenecientes al derecho administrativo, con las principales garantías del derecho penal. El propósito del artículo es presentar el carácter general de la responsabilidad administrativo-penal y evaluar las normas introducidas en 2017 desde la perspectiva de algunas salvaguardas específicamente dirigidas a la responsabilidad penal.

**Palabras clave:** responsabilidad administrativo-penal; nullum crimen sine lege; nullum crimen sine culpa; derecho a la defensa; derecho al acceso a la justicia.

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# INTRODUCTION

The system of penal law in Poland is complicated. Its core is the responsibility for crimes[1], but it is important to note that there is a separate regime of responsibility for fiscal offences in the Polish law. The Criminal Fiscal Code[2] includes crimes and misdemeanours (petty offences) against: tax obligations and settlements for subsidies; customs duties and principles of foreign trade; foreign exchange transactions; the organisation of gambling. Besides fiscal offences, the responsibility for misdemeanours is also treated as part of criminal law. They are stipulated not only in the Code of Misdemeanours and in the Criminal Fiscal Code[3], but also in other acts related to specific areas of social life. The character of the last mentioned regime of penal responsibility evolved - from administrative to criminal one[4]. These three regimes of penal responsibility are often described as criminal law *sensu largo*[5]. Apart from these three regimes of criminal responsibility, there are many administrative offences endangered with very severe sanctions. The character of the responsibility is very problematic. Their number has been

[1] Crimes are formulated in Criminal Code (Act of 6 June 1997, consolidated text published in Journal of Laws 2017, item 2204) and in other acts - very often there are types of crimes formulated in the last provisions of an act and they are called criminal provisions.

[2] Act of 10 September 1999, consolidated text published in **Journal of Laws** 2021, item 408.

[3] Act of 20 May 1971, consolidated text published in **Journal of Laws** 2021, item 1023.

[4] See more about the evolution of the responsibility misdemeanors: W. Radecki, Wprowadzenie. Miejsce prawa wykroczeń w systemie prawa (in:) M. Bojarski, W. Radecki (eds.), **Kodeks wykroczeń**. Komentarz, Warszawa 2016, C.H. Beck, 23–36.

[5] See: A. Marek, Pojęcie prawa karnego, jego funkcje i podział, in: A. Marek (ed.), **System prawa karnego**. Vol. I. Zagadnienia ogólne, Warszawa 2010, C.H. Beck, 34.

increasing since the 1990s and. The reasons of their development are compound and presenting all of them would exceed the frame of the paper. However, such a phenomenon can be observed in many European countries.[6]

Among the offences are very often conducts that have been decriminalized and in the same act became administrative offences. Such changes took place in maritime law, energy law, atomic law, transport law and environmental law.[7] The process of converting criminal responsibility into administrative responsibility shows that the Polish legislator did not take the nature of behaviours into consideration when deciding about the form of penal responsibility. On one hand, one may conclude that the legislator pursued to more efficient solutions forgetting about the guarantees that should be in harmony especially with the severity of the sanctions.[8] On the other hand, the rules regarding the kind of responsibility changed in 2017. Therefore, the question of their accordance with the appropriate level of safeguards, should be formulated again.

## I. THE CONCEPT OF 'CRIMINAL CHARGE' IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Before presenting its characteristic and evaluation from the perspective of substantive and procedural guarantees, it has to be explained what is the base (reason) of calling the kind of responsibility as criminal one and evaluating it from the perspective of the standards characteristic for criminal law. Most often the qualification of the responsibility clearly stems from the branch of law that the legal act is enshrined in. Because administrative-criminal

[6] See: W. Huisman, M. Koemans, Administrative Measures in Crime Control, **Erasmus Law Review** 2008, vol. 1, issue 5, 121-122; M. Fauré, A. Gouritin, Blurring boundaries between administrative and criminal enforcement of environmental law, in: F. Galli, A. Weyembergh (eds.), **Do Labels Still Matter**: Blurring Boundaries Between Administrative and Criminal Law, The Influence of the EU, Bruxelles 2014, Institute d'etudes Europeennes, 109-136; A. Bailleux, The fiftyth shade of grey: Competition law, 'criministrative law' and 'fairly fair trials', in: F. Galli, A. Weyembergh (eds.), **Do Labels Still Matter**: Blurring Boundaries Between Administrative and Criminal Law, The Influence of the EU, Bruxelles 2014, Institute d'etudes Europeennes, 137-152; V. Franssen, Ch. Harding (eds.), **Criminal and Quasi-criminal Enforcement Mechanisms in Europe**. Origins, Concepts, Future, Hart Publishing 2022, London (forthcoming).

[7] More about the process see: W. Radecki, Wprowadzenie. Miejsce prawa wykroczeń w systemie prawa, in: M. Bojarski, W. Radecki (eds.), **Kodeks wykroczeń**. Komentarz, Warszawa 2016, C.H. Beck, 23–36.

[8] See more about the process of replacing criminal responsibility by administrative-criminal responsibility: D. Danecka, **Konwersja odpowiedzialności karnej w administracyjną**, Warszawa 2018, Wydawnictwo Wolters Kluwer, 272-273.

offences formally belong to administrative law, one may undermine the adopted perspective. However, the jurisprudence of the European Court of Human Rights (ECtHR) enables to perceive the character of the responsibility beyond its formal classification.

The ECtHR decided that a formal classification of an offence outside criminal law cannot be the way legislators avoid compliance of proceedings with the fair criminal trial standards formulated in Article 6 of the European Convention on Human Rights (ECHR or Convention)[9]. The mile stone in matter became the judgment of the ECtHR in the case of *Engel and others v the Netherlands*[10]. It formulated the criteria that should be taken into account when determining whether a person was 'charged with a criminal offence' and, in consequence, the aforementioned guarantees should be respected.

If an offence is classified as criminal under domestic national law, there is no doubt that the guarantees provided by Article 6 of the Convention should be applied. The formal classification of proceedings as not being a matter of criminal law is not decisive however, and does not exclude it being determined to be of a 'criminal character'. When, according to domestic law, a regulation providing for the imposition of certain punishments or sanctions is not classified as a matter of criminal law, the Court will concentrate on the nature of the offence and the nature and degree of severity of the penalty. The nature of the offence is a criterion that is very difficult to define. The ECtHR takes into consideration two issues. The first one is whether the ban concerns a certain group of people or is of a general nature. Only the second kind of norms have criminal character. The next issue is the aim of the norms. When their aim is punitive, the mere fact that it also aims to deterrence does not mean that it cannot be characterized as a criminal penalty. They both seek to punish and to deter unlawful conduct. By contrast, a measure that merely repairs the damage caused by the offence at issue is not criminal in nature.[11]

As regards the last criterion - severity of sanctions - there are some penalties that are usually treated as criminal because of their severity (for example imprisonment). However, the assessment of most of them, especially financial penalties, depends on its severity. There is no specific amount of money that may be treated as a border.[12] These three criteria: the statutory classification of the case under national law, the nature of the (criminal) offence, and the type

[9] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950.
[10] Application No 5100/71, the ECtHR Judgment of 8 June 1976, sec. 80-82.
[11] ECtHR judgment of 22 May 1990, Weber v Switzerland, application no. 11034/84, para. 33; CtHR judgment of 24 February 1994, Bendenoun v France, para. 47.
[12] ECtHR judgment of 22 May 1990, Weber v. Switzerland, application no. 11034/84, para. 34; ECtHR judgment of 22 February 1996, Putz v. Austria, application no. 18892/91, para. 37.

and severity of the penalties under the law, which have been formulated in the case of Engel and others v. the Netherlands, were repeated in later judgments of the ECtHR[13].

The analysis of the responsibility for administrative offences from the perspective of the aforementioned criteria allow to its assessment as criminal one. First of all the personal scope of the application of the administrative offences is broad, encompassing not only legal persons and natural persons who serve special functions, but also other natural persons. The severity of some sanctions, especially monetary penalties which higher than fines prescribed for crimes, is in itself an argument in favour of its criminal character. However, it speaks for identifying its aim as punitive one. Although legislator very often declares only preventive aims, the prevention is to be achieved through deterrence. Therefore, their real aims is also deterrence. Therefore, some scholars conclude that these administrative offences are criminal in nature and propose to label the liability as a part of penal law, criminal law *sensu largissimo* and call the responsibility as administrative-criminal one[14]. It is worthwhile pointing out that the Polish Constitutional Tribunal play an important role in the process of recognizing the real nature of administrative offences too. Although the Tribunal used different terminology and presented different criteria, many of the Tribunal's judgments highlight the compound character of the administrative liability[15]. According to the Constitutional Tribunal, not only the principle of rule of law and the principle of proportionality, but also the constitutional principles prescribed for criminal liability (principle of legality, principle of fault, presumption of innocence, right to defence) have to be applied accordingly in relation to specific examples of administrative liability. However, the Constitutional Tribunal is not consistent in its judgments and there are also judgments in which

[13] See ECtHR judgment of 23 July 2002 Janosevic v Sweden, application no. 34619/97, para. 67; ECtHR judgment of 21 February 1981 Öztürk v Germany, application no. 8544/79, paras. 48-50; ECtHR judgment of 24 February 1994 Bendenoun v France, application no. 12547/86, para. 45. The Court of Justice of the European Union adopted them in the Bonda case (the judgement of 5 June 2012, C-489/10), the Akerberg Fransson case (judgement of 26 February 2013, C-617/10) and in the Menci case (judgement of 20 March 2018, C-524/15).

[14] W. Radecki, Kary pieniężne w polskim systemie prawnym. Czy nowy rodzaj odpowiedzialności karnej?, **Przegląd Prawa Karnego** 1996, no 14-15, 5-18; M. Król-Bogomilska, **Kary pieniężne w prawie antymonopolowym**, Warszawa 2001, Scholar, 13; D Szumiło-Kulczycka, **Prawo administracyjno-karne**, Kraków 2004, Zakamycze; A. Błachnio-Parzych, The Nature of Responsibility of an Undertaking in Antitrust Proceedings and the Concept of 'Criminal Charge' in the Jurisprudence of the European Court of Human Rights, **Yearbook of Antitrust and Regulatory Studies** 2012, no. 5 no 6, 35-55; M. Mozgawa, M. Kulik, Wybrane zagadnienia z zakresu wzajemnego stosunku odpowiedzialności karnej i administracyjnej, **Ius Novum** 2016, no 3, 31-62.

[15] See the judgement of the Constitutional Tribunal of 1 March 1994, U 7/93, OTK 1994/1/5.

the Tribunal interprets criminal liability in a strict manner, that is, by adopting a formal approach rather than an autonomous meaning.[16]

Moreover, even the criteria of the 'autonomous meaning' are not understood in exactly the same way as the term 'criminal charge' developed in the case law of the ECtHR. The Constitution Tribunal most often refers to 'repressive' character or function of the examined liability.[17] The reference is criticized by scholars, because it is not clear how the Constitutional Tribunal understands the criterium.[18] Predominantly, the Tribunal concentrates on the aim of penalty, but the Tribunal sometimes uses the term for every sanction that constitutes penalty[19] and sometimes only for those that feature higher level of severity[20]. Because of the lack of uniformity in the jurisprudence of the Constitutional Tribunal, I will refer to provisions of the ECHR as the source of penal guarantees.

## II. SANCTIONS AND THEIR SUBSTANTIVE LAW REQUIREMENTS

As it was mentioned before, the responsibility for administrative offences endangered with severe monetary sanctions have a problematic character in the Polish law. Formally, the provisions related to the offences constitute a part of administrative law. The rules related to the kind of offences until 2017 were not formally separated from other administrative offences or even from the general category of 'administrative cases'. The same rules concerned even administrative cases which result in decisions on specific permissions and administrative cases which resulted in decisions imposing severe penalties.

The legislator only in 2017 introduced the separate Chapter IVa concerning "Administrative Monetary Sanctions" into the Code of Administrative Procedure.[21] However, they are not the only sanctions that may be treated as penal sanctions, and the rules relate only to some aspects of the imposition of this kind of sanctions. Moreover, the provisions of the Code, including Chapter IVa, are not applied if separate acts concerning administrative responsibility provide for

[16] See as example of such a position of the Constitutional Tribunal in judgment of 7 July 2009, K 13/08, OTK-A 2009/7/105.
[17] Judgments of the Constitutional Tribunal of: 8 December 1998, K 41/97, OTK 1998/7/117; 19 March 2007, K 47/05, OTK-A 2007/3/27; of 12 May 2009, P 66/07, OTK-A 2009/5/65.
[18] P. Burzyński, **Ustawowe określenie sankcji karnej**, Warszawa 2008, Wolters Kluwer, 65; M Sławiński, Pojęcie zw. przepisów o charakterze represyjnym – uwagi na tle dotychczasowego orzecznictwa Trybunału Konstytucyjnego, **Przegląd Sejmowy** 2013, no 5, 93.
[19] Judgment of the Constitutional Tribunal 1 March 1994 r., U 7/93, OTK-A 1994/1/5.
[20] Judgment of the Constitutional Tribunal of 18 kwietnia 2000 r., K 23/99, OTK-A 2000/3/89.
[21] Act on the novelty to the Code of Administrative Procedure and other acts of 7 April 2017, published in **Journal of Laws** 2017, 935 item.

rules on the same matter. Therefore, although I will mainly refer to the Code of Administrative Procedure. References to other administrative acts will be useful, especially to show legal solutions that are different to those deriving from the Code.

The fact that there are many types of administrative offences stipulated in different acts makes it difficult to describe sanctions that can be imposed for administrative offences in a general way. However, it can be stated that the most severe administrative sanctions are administrative monetary sanctions. Their extent is not prescribed in the general part of administrative law.

Furthermore, the sanctions that constitute monetary sanctions are not always called precisely that. The Polish legislator sometimes uses the term 'increased payment' (art. 276 of the Environmental Protection Act of 27 April 2001[22]) or additional tax liability (art. 111 par. 2 of the Act on Goods and Services Tax of 11 March 2004[23]). Their upper limits are also described in different ways. The maximum penalty may be defined as a precise amount of money (for example 50 million EUR in art. 106 par. 2 of the Act on Competition and Consumer Protection[24]), as a share of some economic values (up to 10 % of the entrepreneur's takeover gained in the previous year in art. 106 par. 1 of the Act on Competition and Consumer Protection), or alternatively as a precise amount and a share of takeover (up to EUR 15 000 000 or 15 % of the total annual turnover of the legal person according to the last available accounts approved by the management body in art. 30 par. 2j(i) of the regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation).[25]

Administrative sanctions are also prohibitions and orders formulated by the administrative authority as a reaction to the infringement of the law. It is very important to remember this fact, because there are many administrative decisions that correspond to the specific forms of administration. Therefore, decisions on payments for using some source or on fees for obtaining a license cannot be treated as decisions on imposing sanctions. The same applies to refusal decisions if the person does not comply with all the prescribed requirements. If one of the

[22] Consolidated text published in **Journal of Laws** 2020, 1219 item.
[23] Consolidated text published in **Journal of Laws** 2021, 685 item.
[24] Consolidated text published in **Journal of Laws** 2021, item 275.
[25] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, Official Journal of the European Union, L 173, 12.6.2014, 1–61. It is worth to mention that EU regulations are in force in every EU country without the need of its implementation into domestic law. They are directly applicable like domestic legal acts. See: https://www.europarl.europa.eu/factsheets/en/sheet/6/sources-and-scope-of-european-union-law (24.08.2021).

requirements is the lack of a criminal record or if a natural person has been punished in criminal proceedings with the penal measure of professional prohibition, the refusal decision is a consequence of criminal responsibility, and the reason for refusal is not a conduct that constitutes an administrative offence.

The prohibitions and orders that may be presented as examples of administrative sanctions are: the withdrawal of a concession by the concession-granting authority when an entrepreneur breaches in a serious way the conditions of the concession or other conditions. The examples are: the cancellation of the permission for investment fund corporation when the fund infringes law regulations or fails to fulfill the conditions defined in a permission (art. 228 par. 1 of the Investment Funds Act of 27 May 2004)[26]; the prohibition of the publication of information published by the management in relation to the investment fund that may be misleading and the order of its appropriate corrections (art. 229 par. 5 of the Investment Funds Act), the obligation of refraining from a specific activity (art. 337 of the Act on the Bank Guarantee Fund of 10 June 2016)[27], the prohibition of offering a retail collective investment product, issuing a public warning indicating the person responsible for the violation of the law and the nature of the violation (art. 3c par. 1.1 and 1.3 of the Act on Financial Market Supervision of 21 July 2006).[28] The legislator has introduced in many acts the sanction of the publication of decisions on responsibility. The forum of publication can be national daily newspapers (art. 228 par. 6 the Investment Funds Act), the website of FSA, and the website of the punished company (art. 339 par. 2 of the Act on the Bank Guarantee Fund), or as a public announcement (art. 25 of the Act on the Supervision of the capital market of 29 July 2005).[29]

The responsibility for administrative offences is regulated in different acts. Although the Polish legislator introduced the Chapter IVa entitled 'Administrative monetary sanctions' into the Code of Administrative Procedure (CAP), the provisions of this chapter are not applied to all administrative offences, only to those which concern monetary punishment. Because administrative monetary sanctions play the most important role as administrative sanctions, the substantive requirements and safeguards for imposing sanctions will be presented in relation to them.

According to art. 189b CAP, administrative monetary sanctions shall be imposed only when they are prescribed by the law. However, as regards other administrative offences not

[26] Consolidated text published in **Journal of Laws** 2021, item 605.
[27] Consolidated text published in **Journal of Laws** 2020, item 842.
[28] Consolidated text published in **Journal of Laws** 2020, item 2059.
[29] Consolidated text published in **Journal of Laws** 2020, item 1400.

endangered by monetary sanctions or those which are regulated in a separate way, these rules could be derived from art. 6 CAP. According to this provision, public administration bodies shall act in accordance with the law. As the principle lex retro non agit, it can be derived from art. 2 of the Constitution (the rule of law principle). Therefore, the principles nullum crimen sine lege and nullum poena sine lege, which are required as premises of criminal responsibility in art. 7 par. 1 the ECHR, are respected in this regime of penal responsibility.

The same cannot be stated with regard to the principle *nullum crimen sine culpa (principle of culpability)*. The principle constitutes a premise of criminal responsibility. As regards its source, according to art. 6 par. 2 the ECHR, everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. Although the provision includes mainly presumption of innocence, according to the ECtHR judgment passed in A.P., M.P. and T.P. v Switzerland case, its meaning relates also to guilt as a condition to be responsible for criminal offence.[30]

There is no requirement regarding the safety in the Chapter IVa of the Code of Administrative Procedure. The responsibility has an objective character. However, the legislator introduced in many separate acts the necessity of examining the kind and level of the fault. As an example may serve art. 106 par. 1 of the Act on Competition and Consumer Protection, according to which the punishment shall be imposed on the entrepreneur if he has committed one of the offences even unintentionally. Moreover, the subjective element of the act may influence the extent of the penalty imposed. According to art. 111 par. 3f of the Act on Competition and Consumer Protection, the case of infringement of the prohibition to enter into agreements restricting competition under the influence of coercion is treated as extenuating circumstances.

Although the responsibility analysed has objective character, the person responsible for the conduct is not punished if the infringement of the law occurred due to *force majeure* (art. 189e CAP). Similarly, the lack of social harmfulness of the conduct does not exclude responsibility, but, if the gravity of the infringement is low and the person refrained from breaking the law, the authority refrains from imposing a penalty and merely instructs the person (art. 189f CAP). Such a reaction on an administrative offence is also possible if the person performs specified duties imposed by the authority: removal of the infringement of law, passing information about the infringement to competent bodies (art. 189 f CAP). This is not enough to assess the responsibility

[30] ECtHR judgment of 29 August 1997 A.P., M.P. and T.P. v Switzerland, application no. 19958/92, par. 48. See more about problems regarding the sources of nulla poena sine lege in the ECHR: G. Panebianco, The nulla poena sine culpa principle in European courts case Law: The perspective of the italian criminal law, in: S. Rugeri (ed.), **Human Rights in European Criminal Law**, Berlin 2015, Springer, 47-78.

as consistent with the guilt principle, but the examples prove that facts relating to the situation of the perpetrator, his or her possibility to behave in a specific way, the attitude to the behaviour, are taken into consideration.

The general circumstances to be considered by the administrative authority when imposing a monetary penalty are prescribed in art. 189d CAP. According to this provision, the following factors are relevant for the extent of the penalty: the gravity and the circumstances of the infringement of law, especially the necessity of life and health protection, the protection of substantially valuable property, the protection of an important public interest or an especially important interest of the party, and the duration of the infringement; previous punishment for the same conduct, fiscal crime, misdemeanour and fiscal misdemeanour; the degree of contribution of the party to whom the penalty is imposed to a breach of law; actions taken by the perpetrator voluntarily in order to avoid the consequences of the infringement; the amount of benefit the perpetrator has achieved or the loss avoided; in the case of a natural person: personal conditions.

Regarding other kinds of penalties, the legislator has introduced directives related to a decision on the publication of information about the imposition of a penalty or the commission of an administrative offence. One of the factors that has to be taken into consideration by the authority is the influence of the measure on the effective protection against infringements of law (art. 228 par. 6 of the Act on Investment Funds). There are also obstacles for such a decision. Although the publication plays an important role in realising repressive and preventive aims, it may lead to damage to the person concerned that is disproportional to the gravity of the offence. In this case, the measure is not permissible (art. 25 par. 1a of the Act on the Supervision of Capital Market, art. 339 par. 3 point 3 of the Act on the Bank Guarantee Fund, deposit guarantee system and forced restructuring).

## III. PROCEDURAL LAW AND SAFEGUARDS

### 1. Right of access to a court

There are many different administrative authorities that are competent in the area of administrative offences. The important ones are the Financial Supervisory Authority (FSA) and the Office of Competition and Consumer Protection (OCCP). The FSA is entitled in cases related to offences primarily in the area of capital markets, banking, insurance, the pension market,

credit rating agencies. The task of the OCCP to protect competition and consumers. These authorities carry out investigations on administrative offences and they are responsible for both the investigation of natural person and companies. The administrative authorities competent in the area of specific economic offences are mainly specialised regulatory authorities, e.g., officials of the OCCP are specialists in the sphere of competition and consumer protection (mainly lawyers and economists). Having in mind the complexity a specific branch of economic, the fact that a decision is given by the specialist in the are constitutes an advantage of the responsibility. Furthermore, it helps in recognizing a case within a reasonable time.

It is difficult to generalise their scope of power, because there are many different authorities entitled to carry out proceedings. They are not only entitled to investigate. They also have jurisdictional power and are entitled to impose administrative sanctions. Not only the same authority investigates, prosecutes and decides on responsibility in administrative proceedings, but even within the offices (in their structures) of the authorities there are no divisions between specialists who investigate, prosecute and decide in administrative proceedings.

Taking into account the guarantee of right of an access to an independent and impartial court established by law (art. 6 par. 1 ECHR), the diversity of the administrative authorities makes it difficult to generalise the scope of their independence. As regards the authorities mentioned above, whereas the FSA enjoys a high level of independence with formal guarantees against the government's intervention, the OCCP is subordinated to the Prime Minister and relevant ministries. Moreover, even if the authority is independent, the fact that the same authority, without the separation of departments responsible for specific functions, investigate, prosecute and decide raises concerns as to their compliance with the right to an impartial court.

Having in mind that carrying out proceedings may constitute in itself a burden for legal or natural persons, the way administrative proceedings in cases of administrative-criminal offences can be initiated should be presented. Generally, it is done at the request of a party or ex officio (art. 61 par. 1 CAP). If there is no separate act providing for any other rule on the initiation of the proceedings, the general rule is applied. Therefore, any concrete suspicion shall be proven to justify the decision to initiate proceedings. An example of the regulation that differs from the rule is art. 48 par. 1 of the Act on Competition and Consumer Protection. According to this provision, the President of the OCCP may institute investigation proceedings ex officio when the circumstances indicate a possible infringement of the provisions of the Act in cases relating to a specific branch of the economy. Therefore, the scope of the authorities' discretion depends on the substantive administrative law.

Furthermore, the initiation of proceedings concerning responsibility for an administrative offence is very often preceded by control measures of the activity of the entrepreneur or other persons. A selection of controlled entities may be based on a risk analysis; see, e.g., art. 38 of the Act on payments under direct support schemes of 5 February 2015.[31] According to this provision, the President of the Agency for Restructuring and Modernisation of Agriculture selects the controlled persons based on risk factors.

As regards a possible scope of an interference of administrative proceedings into a natural person life or functioning of a legal entity it is needed to present what can constitute an evidence in the proceeding and what powers do administrative authorities have. According to art. 71 par. 1 CAP, every measure that can serve to clarify a case and does not infringe the law shall be accepted as evidence in the administrative proceedings. They may be in particular: documents, witness statements, expert opinions and inspection.

In the proceedings conducted by the FSA, specific pieces of evidence are not allowed, for example - expert opinions. On the other hand, the FSA has broader power than many other administrative authorities. During the inspection, the President of the FSA may order the seizure of documents and other data carriers. This authority is also entitled to require access to data from entities providing telecommunication services, but other than the content of messages. The FSA may also claim from the specific supervised entities the recordings of telephone conversations and other information registered. It is important to note that, although the initiation of the proceedings is not restricted by any premise, the use of the aforementioned measures needs a justified suspicion of the offence.

However, the administrative authority that has the most far-reaching investigatory competences is the OCCP. Among the administrative authorities, a search may be conducted only by the OCCP and tax authorities. The OCCP can also apply a so-called 'mystery shopper' institution (controlled purchase) in specific cases. Its powers are codified in a relatively detailed way. The matters concerning evidence, the regulations of the Civil Procedural Code apply, whereas regarding searches, the Code of Criminal Procedure applies. The solution provides for safeguards adequate to penal character of the proceedings and evidentiary measures undertaken during the proceedings. It is worth to mention that the Code of Administrative Procedure does not provide for any obligation to authorize the decisions on investigatory measures. Therefore, the administrative authority generally does not have to apply for the consent of any other

[31] Consolidated text published in **Journal of Laws** 2020, item 1341.

authority (a court or a prosecutor). However, extraordinary measures used by OCCP, like search and seizure and 'mystery shopper', have to be authorized by the Antimonopoly Court.

There are no formal restrictions related to the use of secret evidence to the detriment of the party to the administrative proceedings. However, persons bound by rules of State secrecy or professional privilege may be witnesses, if they have been exempted under the applicable rules or regulations (art. 82 CAP). Therefore, their testimony may be disclosed and become an evidence. Furthermore, the OCCP and the FSA have access to bank secrets, which includes all information relating to a banking operation.

As regards to a right to a court, according to the jurisprudence of the ECtHR, even if the deciding authority does not fulfil the standard of an independent and impartial tribunal, the standard may be satisfied by the character of the appellation body. The problem is that the ordinary remedy to review the administrative decision - appellation - is more often resolved by the same authority. Regarding decisions issued by the FSA, the appellation remedy (called application for reconsidering the case) is recognised by the same authority and it is, in fact, an internal administrative review. It worth to underline that the administrative decision can be reviewed by the appellation authorities to full extent. However, the Polish legislator has introduced different solutions with reference to decisions issued by the OCCP. The appellation authority for these decisions is a special antimonopoly court.

The decision taken after reviewing an appellation can be contested by a complaint to a district administrative court. The judgment of the court may be reviewed by the Supreme Administrative Court. The remedy is called a cassation complaint. These measures could satisfy the aforementioned standards, but the complaints do not allow a review of administrative decisions to full extent.[32] The complaint to a district administrative court may concern only infringements of law or legal interests. The next possible remedy, cassation complaint, may relate only to the infringement of substantive law and procedural law. The latter shall have affected the judgment contested.

[32] D. Szumiło-Kulczycka, **Prawo administracyjne-karne**, Kraków 2004, Zakamycze, 14-16; M. Wyrzykowski, M. Ziółkowski, §42. Sankcje administracyjne w orzecznictwie Trybunału Konstytucyjnego, in: R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), **Konstytucyjne podstawy funkcjonowania administracji publicznej**. System Prawa Administracyjnego. Tom 2, Warszawa 2012, C.H. Beck, 374-378.

## 2. Rights of the defence

The assessment of administrative proceedings from the perspective of the right to defence may be contested, because formally no one is accused in the proceedings. However, a functional analysis of the proceedings allow to evaluate the position of a party to the proceedings as a position of the 'accused' (charged). The accused in the administrative proceedings has a right to active participation in the proceedings, but is not obliged to do so (art. 10 CAP). The administrative authorities are required to ensure that parties to the administrative proceedings are actively involved in each stage of the proceedings, and they shall allow the parties to express an opinion on the evidence and materials collected and the claims filed, before any decision is issued. A party to the administrative proceedings has the right to participate in the evidentiary process, to ask questions of witnesses, experts and parties and to file explanations (art. 79 par. 2 CAP). The party may also demand taking evidence. The demand should be considered if the subject of such evidence is of significance to the case. The administrative authority does not have to take into consideration demands that have not been made during the evidentiary process or the hearing and demands relating to circumstances that have been proven by other evidence (unless they are of significance for the case).

As regards privileges against coercive powers, according to art. 83 CAP, no person may refuse to give evidence as a witness unless they are the accused's spouse, parents, issue, siblings or first-degree blood relatives, or have a connection to him by way of adoption, guardianship or receivership (mental incapacity). Moreover, a witness may refuse to answer a question if such answer could expose him or those persons to criminal liability, disgrace, direct damage to property or result in a breach of the obligation to maintain professional confidentiality. The witness shall be informed of the rights and criminal responsibility arising from perjury before taking evidence. The party to the administrative proceedings may refuse the answer to questions because of the same reasons (art. 86 CAP). The party shall be advised of this right and of criminal responsibility for perjury (art. 86 CAP and art. 83 CAP). It is controversial if the provisions provide for the right to refuse testimonies.[33]

On the other hand, separate acts provide for the obligation to cooperate. According to art. 50 of the Act on Competition and Consumer Protection, the entrepreneur shall provide any information and documents the President of the OCCP requires. If the entrepreneur does not

[33] P. M. Przybysz, **Kodeks postępowania administracyjnego**. Komentarz zaktualizowany, Komentarz do art. 86 KPA, tesis 3, Lex/el. 2018.

supply, even unintentionally, the information required, or supplies false or misleading information, the President of the OCCP may impose a financial penalty up to the equivalent of 50 million EUR. The relation between the right stipulated in the aforementioned regulations and the obligation to cooperate (e.g., art. 50 of the Act on Competition and Consumer Protection) raises doubts about the real scope of the right against self-incrimination.[34] Some reservations are formulated against using the evidence produced or gathered in administrative proceedings in criminal proceedings. However, there are no obstacles to using measures produced in criminal proceedings as evidence in administrative proceedings. The evidentiary rules in criminal proceedings provide for higher procedural standards, therefore such a transfer of evidence should not be questioned.

The right to be heard, prescribed in art. 6 par. 3 ECHR, shall be treated as one of manifestations of the right to defence. However, explanations of the party are not treated as evidence. Only testimonies have this status. The decision on taking the testimonies of the party depends on the level to which the material facts have been clarified after the exhaustion of all means of evidence (art. 86 CAP). Assuming that specific kinds of administrative proceedings have criminal character in a broad meaning of the term, art. 86 CAP does not provide the right to be heard, because the authority is not obliged to take a testimony. There is no such part of a hearing in administrative proceedings like final words. However, scholars have postulated that specific activities shall take place during a hearing. There shall be the part of the hearsay, before its closure, dedicated to the final words of the parties to the proceedings.[35]

For better understanding the shape of administrative proceedings, which is in force also in proceedings regarding responsibility for administrative-criminal offences, oral hearing is not the primary forum of resolving administrative cases. According to art. 89 CAP, the administrative authority shall hold a hearing as part of the proceedings in each case where this will speed up or simplify proceedings or produce some educational benefit or where the law requires it. Moreover, it shall be held when there is a need to reconcile the interests of the parties or where it is necessary to clarify the case with the involvement of witnesses or experts or by means of inspections.

[34] See: K. Kowalik-Bańczyk, Prawo do nieobciążania się w prawie unijnym i polskim w sprawach z zakresu ochrony konkurencji, in: W. Jasiński (ed.), **Standardy rzetelności postępowania w sprawach z zakresu ochrony konkurencji i konsumentów**, Warszawa 2016, Wolters Kluwer, 33–35.

[35] Z. Janowicz, **Kodeks postępowania administracyjnego**. Komentarz, Warszawa–Poznań 1992, Państwowe Wydawnictwo Naukowe, 233–235; M. Przybysz, **Kodeks postępowania administracyjnego**. Komentarz zaktualizowany, Komentarz do art. 93KPA, teza 2, Lex/el. 2018.

The burden of proof in administrative proceedings is derived from art. 7 and 77 CAP. According to art. 7 CAP, the public administration authority shall take all necessary steps to clarify the facts of a case and to resolve it. The second provision mentioned states that the authority is required to comprehensively collect and examine all evidential material. Although according to the wording of the provisions, the administrative authority bears the burden of proof, the position in the court judgments is not unified. Next to a rigorous position according to which the obligation to collect all evidence is usually incumbent on the administrative authority, a compromise is presented. According to the position, if the party does not provide evidence in support of its claims, then the public administration body does not always have to act ex officio.[36] It is not consistent with the guarantee of the presumption of innocence provided for in art. 6 par. 2 ECHR.

## 3. Ne bis in idem

According to the jurisprudence of the ECtHR the application of ne bis in idem rule is not restricted to the simulation of responsibility for crimes or even the same kind of penal responsibility. The infringement of the rule constitutes also carrying out administrative proceeding when the responsibility for the same act has been finally recognized by a court. The guarantee is formulated in art. 4 Protocol No 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms. It relates directly to 'criminal' proceeding, but according to the jurisprudence of the ECtHR the term should be understood in an autonomous way like in art. 6 and 7 ECHR.[37] In recent years an increased development of the *ne bis in idem* principle can be observed. However, the presentation of the evolution of understand the specific elements of the rule in the jurisprudence of the ECtHR is beyond the scope of the paper.[38]

Some of the acts provide for rules related to the cumulation of responsibility for the same conduct as crime (misdemeanour or fiscal crime, fiscal misdemeanour) and an administrative-

[36] See A. Wróbel, in: A. Wróbel, M. Jaśkowska (eds.), **Kodeks postępowania administracyjnego**. Komentarz, Warszawa 2016, Wolters Kluwer, 464–466.

[37] See among others: ECtHR judgment of 23 September 1998 Malige v France, application no 27812/95, par. 35; ECtHR judgment of 10 February 2009 Zolotukhin v Russia, application no. 14939/03, par. 29.

[38] See more: B. van Bockel, **The Ne Bis in Idem Principle in EU Law**, 2010, Wolters Kluwer 2010, Austin-Boston-Chicago-New York-The Netherlands, 1-2; A. Błachnio-Parzych, Gloss to the Judgement of the Court of Justice of the European Union in Case C-524/15, Criminal Proceedings against Luca Menci, **Review of European and Comparative Law** 2021, vol. 45, issue 2, 207-220.

criminal offence. Their analysis may lead to the formulation of four model solutions.[39] According to provisions related to administrative monetary sanctions introduced in the Code of Administrative Procedure in 2017, if in the earlier criminal proceedings a court has imposed a penalty on a perpetrator for the same conduct as for a crime, a misdemeanour, a fiscal crime or a fiscal misdemeanour, the administrative authority waives the imposition of an administrative monetary penalty. However, this is admissible only if the criminal penalty meets the requirements for which the administrative monetary penalty would be imposed (art. 189f CAP). If the administrative authority does not decide to waive a penalty, a mitigation of the penalty takes place (art. 189d CAP). The same applies for the earlier imposition of a financial penalty for an administrative offence.

Therefore, the rules are not in accordance with the ne bis in idem principle even within the regime of administrative criminal responsibility, when the responsibility for the same act (deed) is a reason of separate administrative proceedings. First of all, the rule regards only specific set of proceedings, when criminal proceedings is earlier finished. Secondly, even in the given set of proceedings the rule does not constitute an unconditional obstacle to carry out next proceedings. It is rather, especially taking account aforementioned art. 189d CAP, the rule that helps to avoid too severe, disproportional penalty. However, it is not enough from the perspective of ne bis in idem, that is mainly procedural rule. It is worth to underline that art. 4 of Protocol 7 to the ECHR comprises three distinct but interrelated guarantees: no one shall be liable to be tried, be tried or be punished for the same offence.[40]

## CONCLUSIONS

The responsibility for administrative offences endangered with severe sanctions has problematic character in the Polish law. Formally it belongs to administrative law. However, its character evaluated especially from the perspective of the criteria developed in the jurisprudence of the ECtHR allows to treat it as a kind of criminal responsibility in a broad sense of the term (called administrative-criminal responsibility). This kind of liability developed in a dynamic way at the beginning of the 1990s and till now the legislator very often replaces other

[39] See: A. Błachnio-Parzych, Solutions to the Accumulation of Different Penal Responsibility for the Same Act and their Assessment from the Perspective of the *Ne Bis in Idem* Principle, **New Journal of European Criminal Law** 2018 vol. 9, 366-385.

[40] See: ECtHR judgement of 29 May 2001 Franz Fischer v. Austria, application no. 37950/97, par. 29; ECtHR judgment of 10 February 2009 Zolotukhin v. Russia, application no. 14939/03, par. 110.

kinds of penal responsibility with administrative-criminal responsibility. It constitutes an alternative investigation and sanctioning system. The main reason for this is the need for greater effectiveness, if the pace of the proceedings and the specialisation of administrative authorities are seen as factors of effectiveness. Therefore the kind of responsibility currently plays an important role in the protection of legal goods in Poland.

However, taking into account the penal character of the responsibility, its rules shall be remodelled to be in accordance with the principles of a fair trial standards. Although the Polish legislator made a step in the direction by introducing into Code of Administrative Procedure in 2017 the Chapter IVa 'Administrative monetary sanctions', it can not be regarded as a complete solution to the problem of the lack appropriate safeguards in the administrative-criminal proceedings. The reason is not only the limited scope of the application of the provisions, but also their content.

An analysis of the safeguards regarding administrative-criminal responsibility makes it possible to conclude that not all safeguards fundamental for criminal law are ensured. The biggest reservations raise the lack of compliance with a right to a court and a right to defence. As it was mentioned before, it is admissible to review administrative decisions by administrative courts, however, they cannot be reviewed to full extent. The relation between the right to refuse to answer a question and an obligation to cooperate formulated in specific acts raises doubts about the real scope of the right against self-incrimination. Moreover, the right to be heard is not ensured too, because an authority is not obliged to take a testimony. As files of administrative proceedings can be used in criminal proceedings, it poses a risk to the exercise of the right of defence in criminal proceedings as well. Therefore, the rules regarding administrative-criminal responsibility require further changes.

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