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Constitutional Requirements Regarding the Use of Administrative Sanctions (Remarks with Regard to the Constitutional Tribunal's Rulings)

1. The expansion of regulations that provide for administrative sanctions, primarily monetary penalties, has been recognised and subjected to critical analysis in legal literature.[1] Sanctions used to be imposed in a hardly consistent manner in various laws regulating different branches of the public law, forcing the lawmakers to react. 2017 saw an extensive amendment to the Code of Administrative Procedure, which also included general rules for imposing and meting out administrative monetary penalties.[2] Before the amendment, administrative courts needed to resolve any doubts on their own, including those surrounding the automatic nature of administrative sanctions and their use in conjunction with penal sanctions. These issues were also repeatedly the subject of proceedings before the Constitutional Tribunal, with objections raised against, *inter alia*, a disproportionate reaction of the state against violations of law ("excessive repressiveness") and violation of the *ne bis in idem* principle.

1 See, *e.g.*, D. Szumiło-Kulczycka, *Prawo administracyjno-karne, czy nowa dziedzina prawa?*, "Państwo i Prawo" 2004, Issue 9, p. 3–16.

2 See Section IVa ("Administrative monetary penalties") of the Code of Administrative Procedure of 14th June 1960, Dziennik Ustaw (Official Journal of Laws of the Republic of Poland, hereinafter referred to as: "Dz.U.") 2017, item 1257, and Dz.U. 2018, item 149, consolidated text, as amended (hereinafter referred to as "the Code of Administrative Procedure," "CAP"), introduced pursuant to Art. 1(41) of the Act of 7th April 2017 on the Amendment to the Code of Administrative Procedure and certain other acts, Dz.U. 2017, item 935 (hereinafter referred to as "the Amendment to the Code of Administrative Procedure").

Although the issue of administrative liability has not been directly addressed in the Constitution,[3] it does not mean that it is constitutionally indifferent.[4] Provisions on which decisions of administrative bodies are based and which affect the rights and responsibilities of individuals need to meet constitutional conditions for the permissibility of interference with fundamental rights and freedoms. Every legal regulation is subject to an assessment from the perspective of the fundamental principles of the legal system pertaining to the status of an individual (*i.e.* the principle of dignity, liberty and equality) and the political system (which encompass principles that stem from the democratic state ruled by law clause, including the rule of good law).

The Constitutional Tribunal's rulings have undoubtedly had a considerable impact on legal changes aimed at standardising the rules of using administrative sanctions and reducing their severity.[5] However, the rulings have yet to provide a sufficiently unambiguous answer to all questions that arise from this issue, in particular from the perspective of constitutional requirements; in certain matters, they remain plainly inconsistent.[6]

2. From a constitutional point of view, it is beyond question that the aim of the lawmakers in a state governed by the rule of law is to shape, while complying with constitutional requirements, a legal regulation so as to ensure that objectives established by the lawmakers can be pursued effectively. The effectiveness of law constitutes a condition *sine qua non*

3 The Constitution of the Republic of Poland of 2nd April 1997, Dz.U. 1997, No. 78, item 483, as amended, hereinafter referred to as: "Constitution."

4 See A. Nałęcz, *Sankcje administracyjne w świetle Konstytucji RP*, in: *Sankcje administracyjne. Blaski i cienie*, ed. M. Stahl, R. Lewicka, M. Lewicki, Warszawa 2011, p. 637–645; M. Stahl, *Sankcje administracyjne w orzecznictwie Trybunału Konstytucyjnego*, in: *Instytucje współczesnego prawa administracyjnego. Księga jubileuszowa profesora zw. dra hab. Józefa Filipka*, ed. I. Skrzydło-Niżnik *et al.*, Kraków 2001, p. 651–659; M. Wiącek, *Nakładanie kar administracyjnych w świetle Konstytucji RP*, in: *Wdrożenie ogólne rozporządzenia o ochronie danych osobowych. Aspekty proceduralne*, ed. E. Bielak-Jomaa, U. Góral, Warszawa 2018, p. 123–141; M. Wyrzykowski, M. Ziółkowski, *Sankcje administracyjne w orzecznictwie Trybunału Konstytucyjnego*, in: *System Prawa Administracyjnego. Tom 2. Konstytucyjne podstawy funkcjonowania administracji publicznej*, ed. R. Hauser, Z. Niewiadomski, A. Wróbel, Warszawa 2012, p. 361–378.

5 See M. Stahl, *Sankcje…*, p. 659.

6 See A. Nałęcz, *Sankcje…*, p. 638.

of the rule of law.[7] A regulation that does not ensure the accomplishment of objectives established by the lawmakers violates the rule of good law.[8] Consequently, the lawmakers must take into consideration the risk of an occurrence of unlawful acts and therefore establish legal measures to enable public authorities to enforce the observance of law.[9] Without an appropriate sanction, a regulation becomes a dead letter, and failure to meet an obligation habitual.[10]

By virtue of Article 83, the Constitution explicitly imposes the obligation to comply with Polish law on every person. However, the provision does not determine the nature of measures that may be taken in order to enforce this obligation. The Constitution directly regulates the rules of punishment exclusively with regard to criminal liability (Articles 42–44). It allows for a punitive measure in the form of forfeiture of property in statutory cases and pursuant to a final and binding court ruling (Article 46); deprivation of public rights or suffrage pursuant to a court ruling (Article 62(2)); and, under certain conditions, extradition of a Polish citizen for an offence committed in another country (Article 55). Termination or limitation of parental rights are also allowed in statutory cases and pursuant to a final and binding court judgment (Article 48(2)). The Constitution specifies the conditions for banning political parties and other organisations (Article 13), setting forth the procedure for banning political parties (Article 188(4)). Lastly, it provides for the possibility of prosecution for causing environmental degradation, although it delegates the establishment of specific rules in that regard to the lawmakers (Article 86).

Obviously, the constitutional provisions indicated above must not be interpreted as depriving the lawmakers of the power to use legal sanctions in instances other than set out in those provisions; nor do they imply that the only possible response to a violation of law is criminal prosecution.

7 See, *e.g.*, Judgment of the Constitutional Tribunal (hereinafter referred to as: "CT") of 20th June 2017, P 124/15, OTK ZU-A 2017, item 50, pt III.3.1.

8 See, *e.g.*, Judgment of the CT of 30th November 2011, K 1/10, OTK ZU-A 2011, No. 9, item 99, pt III.2.1.

9 See, *e.g.*, Judgment of the CT of 9th October 2012, P 27/11, OTK ZU-A 2012, No. 9, item 104, pt III.4.

10 See, *e.g.*, Judgment of the CT of 25th March 2010, P 9/08, OTK ZU-A 2010, No. 3, item 26, pt III.4.

The lawmakers may derive their power to establish mechanisms of responding to a violation of law other than those belonging to the areas of criminal law directly from Article 83 in connection with Article 2 of the Constitution. Legal sanctions may therefore assume various forms and various degrees of severity. At the same time, they have to be commensurate with the nature of social or economic relationships and the degree of social harm.[11] Accordingly, each area of law is provided with its own instruments for responding to violations of substantive norms.

3. The permissibility of administrative sanctions, including monetary penalties,[12] as a response to a violation of administrative duties, has never raised doubts in the Constitutional Tribunal's rulings.[13] The Tribunal recognises the advantages[14] as well as disadvantages[15] of such sanctions. As a rule, it also accepts their constructional differences, which largely consist in the fact that administrative sanctions: (1) are imposed for a violation of an administrative duty itself and, consequently, with no regard to the motivation (fault) of the offender; (2) cannot be adjusted to match specific circumstances of a given case; (3) may be imposed on both natural persons and organisational units; (4) are imposed pursuant to decisions issued by administrative bodies; (5) are subject to judicial review exercised by administrative courts with regard to their legality.[16]

As a result of constructional differences, provisions regarding administrative sanctions may not, as a rule, be directly reviewed in the light of Article 42 of the Constitution, which sets forth the rules of criminal prosecution,[17] as Article 42(3) of the Constitution implies that guilt

11 See, *e.g.*, Judgment P 124/15, pt III.3.1.

12 See the definition included in Art. 189b of CAP.

13 See, *e.g.*, Judgment P 9/08, pt III.4. *Cf.* Judgment of the CT of 15th January 2007, P 19/06, OTK ZU-A 2007, No. 1, item 2, pt III.3; Judgment of the CT of 1st July 2014, SK 6/12, OTK ZU-A 2014, No. 7, item 68, pt III.5.

14 In particular, the promptness, effectiveness and cheapness of administrative proceedings on monetary penalties (see Judgment SK 6/12, pt III.5.2).

15 See Judgment of the CT of 18th November 2010, P 29/09, OTK ZU-A 2010, No. 9, item 104, pt III.5.4.

16 See, *e.g.*, Judgment of the CT of 21st October 2015, P 32/12, OTK ZU-A 2015, No. 9, item 148, pt III.3.5.

17 *Cf.* M. Wiącek, *Sankcje…*, p. 127.

is the basis of criminal liability.[18] The perpetrator of a criminal offence is presumed innocent until proven guilty under a final and binding judgment of a court (*i.e.*, pursuant to Article 45(1) of the Constitution, an independent and impartial body separate from the legislature and the executive). Criminal liability may not, *a contrario*, be enforced by administrative bodies that are subordinated to the executive, and in forms applicable to administration (*i.e.* pursuant to an administrative decision). As far as criminal liability is considered, an individual is protected by the following safeguards: (1) the statutory definition of attributes of a criminal offence and sentence; (2) the prohibition on *ex post facto* criminal laws and the retroactive application of more stringent criminal sanctions; (3) impermissibility of double jeopardy; (4) the right of defence; (5) presumption of innocence; (6) exclusive jurisdiction of a court to adjudicate guilt and carry out sentences.

Therefore, the Tribunal needed to seek models of constitutional review of provisions regarding administrative sanctions outside Article 42 of the Constitution. It invoked general principles of the legal system, in particular the principle of a democratic state under the rule of law. The Tribunal assumes that the prescription for a public authority to act in a manner that provides citizens with a sense of legal security arising from Article 2 of the Constitution is strictly associated with requirements such as: (1) the need for a clear and precise definition of administrative duties transgression of which constitutes the basis for imposing administrative sanctions (the principle of definiteness of an administrative transgression); (2) the impermissibility of introducing retroactive sanctions (*lex retro non agit*) or retroactive application of more stringent sanctions (*lex severior retro non agit*);[19] (3) the prohibition of double jeopardy; (4) the rule of proportionality of the sanction to the nature of the transgression (prohibition of excessive "repressiveness").[20] The lawmakers may not impose administrative sanctions that are "evidently inappropriate,

18 See Judgment of the CT of 3rd November 2004, K 18/03, OTK ZU-A 2014, No. 10, item 103, pt III.5.3.

19 See Judgment of the CT of 23rd July 2013, P 36/12, OTK ZU-A 2013, No. 6, item 81.

20 See, *e.g.*, Judgment P 124/15, pt III.3.3; also M. Wiącek, *Sankcje…*, p. 128 and 129; M. Wyrzykowski, M. Ziółkowski, *Sankcje…*, p. 365.

irrational or excessively severe, detached from the degree of culpability of an individual's conduct in relation to applicable law."[21]

It follows that the Tribunal's rulings share certain noticeable similarities regarding the requirements for criminal liability and administrative liability. Nevertheless, there are still marked differences, associated predominantly with the imposition of the burden of proving an individual guilty of a criminal offence on public authorities and exclusive jurisdiction of courts to adjudicate guilt and pass sentences for criminal offences.

When classifying a sanction as administrative or criminal in the light of constitutional requirements, the Tribunal is not bound by the lawmakers' will. If it finds that the lawmakers have authorised an administrative body to use sanctions in instances where criminal liability system would have applied, it may rule a violation of Article 42 of the Constitution, the reason being that an administrative law may be challenged on the grounds that it constitutes an attempt to bypass constitutional requirements regarding criminal liability. In that case, Article 42 becomes an appropriate model of constitutional review of provisions regarding formally administrative sanctions. Without doubt, Article 42 of the Constitution not only stipulates that criminal laws be formulated in compliance with safeguards listed therein but also prevents bypassing such safeguards by transferring the punitive instruments to laws formally outside the areas of criminal law.

4. Consequently, it is often debatable whether a given legal solution that provides for formally administrative sanctions should be subject to review from the perspective of constitutional principles of administrative liability derived from the democracy under the rule of law clause or Article 42, which sets forth the rules of criminal liability. Considering the above, the question which standard should apply cannot be determined by the lawmakers' decision whether to include provisions regarding a sanction in an administrative or criminal law (formal criterion). Under the Constitution, a sanction may not be classified as "administrative" only because the lawmakers have conferred the power to apply it on an administrative body acting under administrative procedure and under the supervision of an administrative court. It is true that:

21 See, *e.g.*, Judgment P 9/08, pt III.4.

> […] a line of reasoning that would only take into account the administrative nature of imposing sanctions or the position of authorities that adjudicate on sanctions within the public authority structure as criteria for identifying an administrative sanction should be deemed in contravention with the principle of autonomous interpretation of constitutional norms.[22]

Meanwhile, the Tribunal has yet to formulate unambiguous and consistent substantive criteria. The Tribunal admits that:

> […] there is no clear, universal substantive criterion that would determine the differentiation of situations where a given phenomenon or act is (pragmatically should be) qualified as subject to a criminal penalty or administrative (monetary) penalty.[23]

In practice, the Tribunal invokes criteria such as the basis for liability, function (purpose) of a sanction, its severity or social implications.

According to the Tribunal:

> […] the main criterion for assessing the legal nature of a specific type of legal measure is the analysis of the function that is attributed to it. If a specific legal measure fulfils the repressive function as the main function of a specific type of liability, that measure should be included in the area of broadly defined criminal law and provided with relevant constitutional safeguards required for criminal liability.[24]

> What distinguishes 'penalty' as defined in criminal regulations from 'penalty' understood as an administrative sanction is that the former needs to be individualised, *i.e.* may only be administered if a natural person has met the statutory criteria of a crime […] whereas the latter […] is applied automatically, on the grounds of strict liability, and is used primarily as a preventive measure. In this case, the fact that the administrative penalty is also a disciplinary and repressive measure is not of critical importance.[25]

22 See M. Wyrzykowski, M. Ziółkowski, *Sankcje…*, p. 369.

23 See Judgment of the CT of 14th October 2009, Kp 4/09, OTK ZU-A 2009, No. 9, item 134, pt 3.5.3; Judgment of the CT of 12th April 2011, P 90/08, OTK ZU-A 2011, No. 3, item 21, pt III.4.1.

24 Judgment of the CT of 21st October 2014, P 50/13, OTK ZU-A 2014, No. 9, item 103, pt III.5.4.

25 Judgment of the CT of 22nd September 2009, SK 3/08, OTK ZU-A 2009, No. 8, item 125, pt III.2.1.

Criminal liability:

> […] has strong moral implications that are essentially not involved where an administrative penalty is imposed. A conviction by a criminal court entails a certain stigmatisation and occasionally produces further, adverse effects for the person convicted, *e.g.* a partial or complete ban from public office or certain positions in other areas of employment. Therefore, administrative monetary penalties are generally perceived as less severe than fines for criminal offences, although their immediate financial severity may occasionally be greater.[26]

It seems that the substantive criteria applied by the Tribunal are of limited use.[27] A classification based on whether liability is fault-based or strict would make the classification dependent on the basis of liability adopted by the lawmakers. In addition:

> […] the notion of 'function' in the Tribunal's rulings is understood intuitively, without a definition of its meaning […] The Constitutional Tribunal does not elaborate on why and how the preventive function prevails over the repressive function in view of a specific sanctioning norm and thereby may be classified as a norm of administrative rather than criminal law.[28]

As a matter of fact, every sanction serves both the preventive and, as a measure that is a response to a violation of law, "repressive" function at the same time. It is also common that administrative sanctions, in particular monetary penalties, are immediately more severe than sentences carried out for criminal offences. On the other hand, the criterion of moral implications and social perception of sanctions is subjective.

As a differentiating criterion, authors have proposed the importance of rights protected by law. Rights of particular significance such as those strictly attached to human dignity (life, health, personal freedom) and the proper functioning of the state (independence, sovereignty, proper electoral procedures) should be protected with a criminal sanction.[29] In order to prove

26 Judgment SK 6/12, pt III.4.

27 See dissenting opinion of Justice T. Liszcz on Judgment P 32/12. See also M. Wiącek, *Sankcje…*, p. 132 and 133.

28 M. Wyrzykowski, M. Ziółkowski, *Sankcje…*, p. 374.

29 See M. Wiącek, *Sankcje…*, p. 129 and 130.

the lawmakers' decision to transfer a certain category of matters from the criminal liability system to the administrative liability system unconstitutional, one would have to demonstrate that "the importance of the given legal right is so great that introducing criminal liability for its violation is necessary and settling for administrative liability alone insufficient."[30]

The permissibility of conferring the power to use sanctions, in particular monetary penalties, on administrative bodies should primarily depend on whether the power is supposed to be exercised by those bodies in matters that can be linked to the constitutional sphere of the administration's responsibilities. It must therefore be related to the implementation of laws within the functions of public administration such as ensuring public services and public order policing.

> The function of public administration in respect of disciplining entities administered must be the execution of public administration responsibilities within the executive rather than the exercise of justice.[31]

Furthermore, administrative sanctions may only be imposed on a person who is the addressee of provisions defined in an administrative law in a precise manner, *i.e.* an entity remaining in a specific administrative relationship (administrative situation). As a result, even if a given category of matters is subject to jurisdiction of administrative bodies, administrative sanctions may not be deemed permissible against a person who is not the addressee of responsibilities explicitly set out in the administrative law.

From this point of view, a regulation that provides for imposing of a monetary penalty on a participant of gambling organised without a licence, permit or notification equal to 100% of their winnings should be considered constitutionally dubious.[32] The penalty is imposed by an administrative body regardless of whether the participant knew that the game was organised illegally or not.[33] Furthermore, the sanction is imposed automatically,

30 M. Wiącek, *Sankcje…*, p. 131.

31 M. Wincenciak, *Przesłanki wyłączające wymierzenie sankcji administracyjnej*, in: *Sankcje administracyjne. Blaski i cienie*, ed. M. Stahl, R. Lewicka, M. Lewicki, Warszawa 2011, p. 605.

32 See Art. 89(1)(6) and (4)(5) of the Gambling Act of 19th November 2009, Dz.U. 2018, item 165, hereinafter referred to as "Gambling Act," "GA."

33 For relevant doubts of constitutional nature, see K. Ryszard, in: M. Bik *et al.*, *Gry hazardowe. Komentarz do ustawy o grach hazardowych*, Warszawa 2013, p. 272.

as the regulations do not grant the head of the customs and tax office the power to discharge the offender or reduce the penalty due to the facts of the case. Most importantly, however, the monetary penalty is imposed not on a person who is the addressee of provisions defined in the Gambling Act but rather a person who is supposed to be protected by that act.[34] A monetary penalty is imposed on participants of gambling by an administrative body despite the fact that they are not an entity in an administrative relationship. The Gambling Act regulates the operation of professional gaming and betting operators, not consumers of such services. The *ratio legis* for monetary penalties provided for in the act is to prevent the professional operators from operating without adhering to statutory requirements.[35] Since it should be a rule that "an administrative penalty is inapplicable, if the act is not stipulated for by [an administrative] law,"[36] granting administrative bodies the power to impose monetary penalties on persons who are not the addressees of administrative duties constitutes a bypassing of constitutional standards of criminal liability defined primarily in Article 42 of the Constitution.[37] Regardless of formally administrative liability, anyone who participates in gambling organised or held against statutory regulations or terms of licence or permit is subject to a fine of up to 120 daily rates,[38] whereas the court obligatorily adjudges forfeiture[39] and may additionally publish the judgment.[40]

34 See Art. 1(1) of GA; also, *e.g.*, Art. 15(1d) of GA.

35 See statements of reasons for the draft Gambling Act, Sejm paper No. 2481, VI term, p. 46, < http://orka.sejm.gov.pl/proc6.nsf/opisy/2481.htm >.

36 A. Kisielewicz, *Kary administracyjne przewidziane ustawą z dnia 19 listopada 2009 r. o grach hazardowych w praktyce orzeczniczej sądów administracyjnych*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2013, No. 5, p. 10. See also P. Przybysz, *Funkcje sankcji administracyjnych*, in: *Sankcje administracyjne. Blaski i cienie*, ed. M. Stahl, R. Lewicka, M. Lewicki, Warszawa 2011, p. 162–170.

37 The problem of the permissibility of imposing an administrative monetary penalty in conjunction with a penalty for a tax offence on a participant of illegal gambling was the subject of the Polish Ombudsman's motion of 11th November 2013. The Tribunal discontinued proceedings on formal grounds. See Decision of the CT of 7th March 2017, K 40/13, OTK ZU-A 2017, No. A, item 12.

38 See Art. 109 of the Penal Fiscal Code of 10th September 1999, Dz.U. 2017, item 2226, and Dz.U. 2018, item 201, hereinafter referred to as "PFC."

39 See Art. 30 § 5 of PFC.

40 See Art. 35 of PFC.

5. Indicating the nature of an administrative sanction, the Tribunal highlights the principle of strict liability, where:

> […] imposing administrative monetary penalties is detached from the necessity to establish fault and other facts of the case. It is sufficient to establish the very fact of a violation of law or requirements of an administrative decision.[41]

Nonetheless, latest rulings have shown a gradual departure from the absolutisation of the strict liability principle. The Tribunal has even stated that:

> […] the use of administrative penalties must not be based on the idea of strict liability in its pure sense, entirely detached from the facts of a given case, including the offender's fault. […] In exceptional circumstances, substantive law should enable the body competent to impose monetary penalties to determine the amount of the penalty and even discharge the offender altogether.[42]

For this reason, regulations that oblige an administrative body to impose, "somewhat mechanically and rigidly, regardless of different causes and circumstances," a monetary penalty for the removal of a tree or shrub without a permit are an example of disproportionate interference with the ownership of real property.[43]

This position seems extreme, as it may blur the distinction between administrative and criminal liability. It is advisable to exercise caution when considering legal solutions that would grant administrative bodies the power to independently review exceptional circumstances of a specific case, including the offender's motivation, and independently determine the severity of the sanction, *e.g.* the amount of the monetary penalty, on those grounds.[44] Such solutions would require granting administrative courts greater control over the process of reviewing facts of the case and determining the severity of the sanction by administrative bodies. Article 45(1) of the Constitution stipulates that access must be ensured

41 Judgment of the CT of 5th May 2009, P 64/07, OTK ZU-A 2009, No. 5, item 64, pt III.5.

42 Judgment SK 6/12, pt III.5.2.

43 Judgment SK 6/12, pt III.6.2.

44 See dissenting opinion of Justice M. Zubik on Judgment SK 6/12.

to the "competent" court, *i.e.* the court that follows a procedure "suitable for the subject matter of the case being heard."[45]

In any event, it may undoubtedly be inferred from the analysis of the Tribunal's rulings that the strict liability principle must not be of absolute nature.[46] The Tribunal requires that the lawmakers enable a person facing a sanction to demonstrate the existence of facts beyond their control that release them from liability. According to the Tribunal:

> […] administrative law, as is the case with criminal law and law of contraventions, should take into account a possible conflict of rights, values and interests that justify an individual's failure to comply with rules set out in provisions of law the violation of which is governed by law […] The requirement to ensure a citizen a fair administrative procedure derived from Article 2 of the Constitution obligates the lawmakers, *inter alia*, to organise the procedure so as to allow the administrative body to thoroughly examine facts of the case and handle the case, taking into account and, if necessary, weighing the conflicting rights, values and interests […] A fair hearing [required under Article 45(1) of the Constitution requires that the court be provided with a statutory framework that would allow it to take into account all facts of the case, including those justifying a decision not to impose an administrative sanction.[47]

For these reasons, an administrative procedure whereby administrative bodies are not allowed to waive the sanction of seizing a driving licence, although they established that the speed limit in a built-up area was exceeded by over 50 km/h due to necessity, does not meet constitutional requirements. Nevertheless, "the necessity referred to herein must not be given a broad definition or be equated with 'exceptional cases'."[48]

Also within the system of administrative liability, imposing a penalty should only be regarded permissible if the relevant person's action can

45 See Judgment of the CT of 29th January 2013, SK 28/11, OTK ZU-A 2013, No. 1, item 5, pt III.3.2.

46 *Cf.* M. Wyrzykowski, M. Ziółkowski, *Sankcje…*, p. 373.

47 Judgment of the CT of 11th October 2016, K 24/15, OTK ZU-A 2016, item 77, pt III.7.4.

48 Judgment K 24/15, pt III.7.4. For definitions of "necessity" in administrative law, see M. Wincenciak, *Przesłanki…*, p. 607 and 608.

be classified as culpable in specific circumstances.[49] However, culpability denotes not only internal motivations of the offender and their attitude to the violation of law (fault) but also the fact that their behaviour was objectively harmful to society from the perspective of values protected by law.[50] The impossibility of avoiding the effects of a violation of a law or administrative decisions, if the violation was committed in order to protect another, at least equally significant value, or if the occurrence of the violation was beyond one's control, would be a sign of excessive "repressiveness" of law and would undermine the sense of fairness. Consequently, one should approach the permissibility of granting administrative bodies the power to individually determine the severity of sanctions (*e.g.* the type of sanction, the amount of the monetary penalty) with caution, administrative laws must confer on the bodies the power to waive sanctions, if the offender raises valid statutory defences. As stated by the Tribunal:

> […] a person who failed to comply with an administrative duty must have the possibility of avoiding liability by demonstrating that their failure to comply was caused by circumstances beyond their control (force majeure, necessity, actions of third parties for which they are not liable).[51]

6. Before the Amendment to the Code of Administrative Procedure came into force, certain administrative laws provided for the possibility of avoiding liability for violations of law. For instance, proceedings are not initiated in cases regarding monetary penalties imposed for a violation of duties or conditions of road transport, and proceedings initiated in such cases are discontinued, if evidence and facts of the case indicate that the person who provided transport or other transport-related services had no control over the occurrence of the violation and the violation occurred due to events and circumstances that the person could

49 See M. Wiącek, *Sankcje…*, p. 136.

50 Under the Declaration of the Rights of Man and of the Citizen of 1789, law can only prohibit such actions as are hurtful to society (Art. 5); and shall provide for such punishments only as are strictly and obviously necessary (Art. 8).

51 Judgment SK 6/12, pt III.5.2.

not foresee.[52] Thus, "the extremely stringent criteria of liability, based on objective guilt, were […] relaxed by introducing statutory defences, *i.e.* defences against liability of a given person, into the Road Transport Act."[53] However, the lawmakers recognised the need to lay down a general sentencing framework and standardise and adapt those penalties.[54] Drawing on the Constitutional Tribunal and the Supreme Administrative Court rulings, it was found that:

> […] the imposition of an administrative monetary penalty should be premised on the occurrence of a subjective element of fault, and a person who may be subject to administrative liability should have the right of defence, including by demonstrating that the violation was caused by circumstances beyond their control.[55]

Currently, provisions of Section IVa of CAP apply in all cases where other laws do not specify separate rules of imposing or meting out monetary penalties.[56] The minimum constitutional requirement is satisfied by the statutory rule that a party is not subject to a penalty, if the violation of law was caused by force majeure.[57] However, the lawmakers went much further, granting administrative bodies the power to (obligatorily) waive a monetary penalty, if the violation of law is "negligible" and the party ceased to commit the violation.[58] As a result, administrative bodies are to individually judge the "harmful effects" of an administrative transgression. The bodies also gained the right to refrain from imposing a penalty in other cases,

52 See Art. 92c(1)(1) of the Road Transport Act of 6th September 2001, Dz.U. 2017, item 2200, as amended, hereinafter referred to as "RTA"; M. Wincenciak, *Przesłanki…*, p. 612–616.

53 P. Daniel, *Odpowiedzialność administracyjna z tytułu naruszenia obowiązków lub warunków przewozu drogowego w świetle nowelizacji ustawy o transporcie drogowym*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2012, No. 5, p. 38 *et seq*.

54 Statement of reasons for the draft Amendment to the Code of Administrative Procedure, Sejm paper No. 1183, VIII term, p. 5, < http://sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?id=865EB634847B7E85C125809D004A32C9 >.

55 Statement of reasons for the draft Amendment…, p. 69. The authors invoked Ruling of 1st March 1994, U 7/93 (OTK ZU-A 1994, No. 1, item 5), where the Tribunal named "a subjective element of fault" as the basis for imposing an administrative sanction. The Tribunal also reaffirmed that ruling in Judgment SK 6/12.

56 See Art. 189a of CAP.

57 See Art. 189e of CAP.

58 See Art. 189f § 1(1) of CAP.

"if it fulfils the purposes for which the monetary penalty would otherwise have been imposed" and impose a time limit for the party to present evidence that the violation of law has been removed or notifying the relevant entities of the violation. If the party presents such evidence, the body waives the penalty.[59] The amendment to the Code of Administrative Procedure also introduced a rule that whichever administrative law is more lenient for the perpetrator of a violation is the applicable law[60] and defined the "statutes of limitations" for imposing and enforcing a penalty.[61] Wherever administrative laws grant administrative bodies the power to determine the amount of the monetary penalty, Article 189d of CAP obligates those bodies to take into account: (1) the severity and circumstances of the violation of law, in particular the need to protect life or health, defend valuable property or defend an important public interest or particularly important interest of the party, and the duration of the violation of law; (2) the frequency of failure to comply with a duty or breach of a ban of the same type as failure to comply with a duty, or punishable breach of a ban in the past; (3) a history of being sentenced for the same criminal offence, tax offence, contravention or fiscal contravention; (4) the degree of contribution of the party on whom the administrative monetary penalty is imposed to the violation of law; (5) actions willingly taken by the party in order to avoid the effects of the violation of law; (6) the amount of benefit the party received or loss they avoided; (7) personal conditions of the natural person on whom the monetary penalty is imposed. This solution is to ensure administrative bodies "appropriate levels of discretion."[62]

7. Another safeguard against the abuse of administrative sanctions by public authorities is the *ne bis in idem* principle, which prevents a person from

59 See Art. 189f § 2 and 3 of CAP.

60 Pursuant to Art. 189c of CAP, if the law applicable at the time when the decision on the administrative monetary penalty was issued was different than the law applicable at the time of the violation of law for which the penalty was imposed, the new law shall apply; however, the previous law shall apply, if it is more lenient for the party.

61 See Art. 189g–189j of CAP.

62 M. Niezgódka-Medek, M. Szubiakowski, *Przepisy dotyczące kar administracyjnych (art. 260g––260n)*, in: *Reforma prawa o postępowaniu administracyjnym. Raport zespołu eksperckiego*, Warszawa 2016, p. 269, < http://www.nsa.gov.pl/wydarzenia-wizyty-konferencje/raport-ekspercki-nt-reforma-prawa-o-postepowaniu-administracyjnym,news,24,313.php >.

being punished twice (or multiple times) for the same offence. Admittedly, the principle has not been explicitly stated in the Constitution, but the Constitutional Tribunal's rulings make it plain that it is not only an element of the general principle of a democratic state under the rule of law but also one of the fundamental guarantees in the area of criminal law and a constituent of the right to a fair trial.[63]

The Tribunal adopts a broad definition of the *ne bis in idem* principle, finding that it applies not only to sentences for criminal offences but also any other forms of punishment. The principle must therefore be considered both in the case of two (or more) concurrent criminal penalties and in the event of a concurrent criminal penalty and, for example, administrative sanction, provided that the sanction mainly fulfils a "repressive" function. In practice, this condition makes it possible to determine the permissibility of aggregating penalties imposed in different proceedings. Thus, criminal prosecution does not stand in the way of initiating a disciplinary procedure against the same person.[64] Furthermore:

> […] criminal liability and administrative liability are not [as a rule] unconstitutional punishment for the same offence. As they are different effects of an offence that infringes different rights protected by law, it is reasonable to use different sanctions.[65]

It is therefore permissible to, for instance, impose an administrative sanction in the form of seizing a driving licence in concurrence with a fine for a contravention on a driver who exceeded the speed limit in a built-up area by more than 50 km/h.[66] It is even constitutional for an administrative body to impose a monetary penalty on the organiser of illegal gambling who has previously been sentenced by a final and binding judgment of a court to pay a fine for the same offence constituting a fiscal contravention under Article 107 of PFC.[67]

63 See, *e.g.*, Judgment P 50/13, pt III.3.1; Judgment P 32/12, pt III.7.1. See also Judgment of the CT of 21st April 2015, P 40/13, Dz.U. 2015, item 601, pt III.5.1.

64 Judgment of the CT of 8th October 2002, K 36/00, OTK ZU-A 2002, No. 5, item 63, pt III.4.

65 Judgment P 32/12, pt III.7.3.

66 Judgment K 24/15.

67 Judgment P 32/12.

The Tribunal's rulings have established a test used to verify whether challenged regulations violate the *ne bis in idem* principle. According to the Tribunal, the first step should be to determine whether the nature of specific measures provided for by the lawmakers as a response to specific behaviour is "repressive." If it is true for two (or more) measures, it is necessary to establish whether they fulfil the same or different purposes. The fact that various "repressive" measures serve the same purposes should lead to a conclusion that the *ne bis in idem* principle has been violated.[68] On the other hand, if cumulated sanctions serve different purposes, there is no reason to rule a violation of the said principle, even if the sanctions were "repressive." The *ne bis in idem* principle is only violated, if sanctions of criminal law as defined by the Constitution that serve the same purpose (to protect the same socially significant interest) are imposed twice (or multiple times) on the same person in connection with the same offence.

The criteria adopted by the Tribunal, *i.e.* the obligatory "repressive" function of cumulated sanctions and, secondly, identical purposes of the sanctions, give the lawmakers excessive freedom to punish the same person for the same offence.[69] From the perspective of the principle of citizens' trust in government and legislation, it is difficult to accept a situation where someone is punished with a monetary penalty by the competent administrative body for a violation of an administrative duty and then, upon notification by that body, law enforcement authorities initiate a criminal procedure against the same person for the same offence. It seems more appropriate to adopt an approach, which is incidentally detectable in the Tribunal's rulings, where "the cumulation of administrative liability and liability for fiscal contraventions reflects excessive fiscalism and shows no regard for the interest of the taxpayer on whom the said administrative penalty was imposed."[70] Instead, mechanisms should be proposed whereby proceedings on administrative

68 *Cf.* Judgment P 50/13, pt III.3.3; Judgment P 40/13, pt III.5.1; and Judgment of the CT of 1st December 2016, K 45/14, OTK ZU-A 2016, item 99, pt III.4.1.

69 See dissenting opinion of Justice T. Liszcz on Judgment P 32/12. *Cf.* M. Wiącek, *Sankcje…*, p. 139.

70 Judgment of the CT of 29th April 1998, K 17/97, OTK ZU 1998, No. 3, item 30, pt III. See also Judgment of the CT of of 4th September 2007, P 43/06, OTK ZU-A 2007, No. 8, item 95, pt III.6.

sanctions may be suspended until the criminal procedure is concluded (and discontinue the administrative proceedings, at least in the case of a conviction) or the administrative sanction may be taken into account when imposing the sentence for a criminal offence. The omission of this solution in regulations on sanctions for certifying untruth in a shipping document[71] was ruled by the Tribunal to be a violation of the *ne bis in idem* principle and the principle of proportionate justice derived from Article 2 of the Constitution.[72]

After the amendment to the Code of Administrative Procedure came into force, the possibility of cumulating administrative and criminal liability was restricted by Article 189f § 1(2) of CAP, which stipulates that an administrative body waives an administrative monetary penalty, if another administrative monetary penalty has previously been imposed on the perpetrator of a violation for the same offence by another administrative body or if the perpetrator has been sentenced by a final and binding ruling for a criminal offence and the previous penalty fulfils the purpose for which the administrative monetary penalty would have been imposed. However, the protection arising from this provision is limited.[73] Firstly, it only applies to administrative sanctions in the form of monetary penalties. Secondly, the exclusion of liability cumulation depends on the authority's opinion whether the previous penalty fulfilled the purpose.

8. The Tribunal's rulings as well as successive legislative changes, most importantly the amendment to the Code of Administrative Procedure, cause a gradual blurring of differences between administrative liability

71 Pursuant to Art. 92a(5) of RTA, if a violation of duties or conditions of road transport also meets the statutory criteria of a contraventions, only regulations on administrative liability apply in the case of a natural person. This exclusion does not apply to cases where the violation may also be qualified as a criminal offence, *e.g.* certyfing untruth in a document (see Art. 271 § 1 of the Criminal Code of 6th June 1997, Dz.U. 2017, item 2204, as amended).

72 Judgment P 124/15.

73 This is confirmed by the provisions of Art. 189d(3) of CAP, which stipulates that by meting out an administrative penalty, the authority only takes into consideration the previous penalty for the same criminal offence, fiscal offence, contravention or fiscal contravention. Therefore, the previous penalty does not always have to rule out the permissibility of a concurrent administrative monetary penalty. See P. Przybysz, *Kodeks postępowania administracyjnego. Komentarz aktualizowany*, Serwis Informacji Prawnej LEX/el. 2018, note 3 to Art. 189b.

and criminal liability. Contrary to what might seem, however, the process has not dispelled doubts surrounding the use of administrative sanctions. From the systemic point of view, there arises the question of whether it is permissible to create a separate, relatively consistent punitive system parallel to the system of criminal liability, yet without the need to retain all guarantees arising from Article 42 of the Constitution. Another issue is the permissible scope of transferring the power to impose penalties for violations of law to administrative bodies at the cost of the exclusive power of courts to exercise justice (Article 175(1) in connection with Article 45(1) of the Constitution), in particular to establish fault (Article 42(3) of the Constitution). Last but not least, there is the recurrent issue of whether administrative courts, which should meet the constitutional requirement of being the "competent court," have sufficient tools to exercise effective control over the review of premises for the use of administrative sanctions and their severity by administrative bodies (Article 184 in connection with Article 45(1) of the Constitution).

Summary

The aim of the article is to present the constitutional limits for the application of administrative sanctions in the Polish legal system. Although the issue of administrative liability has not been directly addressed in the Constitution, it does not mean that it is constitutionally indifferent. Polish Constitutional Tribunal has developed significant case law posing several conditions which are to be taken into account by the lawmakers and the administrative courts. In 2017 the lawmakers have made an effort to unify rules of the application of administrative sanctions by adopting a wide amendment to the Code of Administrative Procedure. This amendment provides for, *i.e.*, the principle of non-responsibility for violations of law caused by force majeure, the power of an administrative body to determine the amount of the monetary penalty in according to conditions set forth by this Code, the principle of application of a law more lenient for the perpetrator of a violation of law and the *ne bis in idem* principle. Despite the development of the constitutional case law and the recent legislative intervention, several questions concerning administrative sanction remain, above all the permissible scope of transferring the power to impose penalties for violations of law to administrative bodies at the cost of exclusive power of courts

to exercise justice and the adequacy of tools used by the administrative courts to exercise control over decisions of these bodies in this field.

Keywords: Administrative sanctions, Code of Administrative Procedure, Polish constitutional law, Polish Constitutional Tribunal's case law

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