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# THE RIGHT TO DEFENCE IN PROCEEDINGS IN THE CASE OF A FINANCIAL PENALTY BEING IMPOSED FOR INFRINGEMENT OF BANKING LAW BY A SUPERVISORY AUTHORITIES IN GERMANY AND POLAND[1]

**Abstract**

The article aims to present the model of proceedings in the case of a financial penalty being imposed for infringement of banking law in Poland and Germany and verify whether the parties' right to defence is ensured. The above issue is extremely topical, especially in light of the number and amount of financial penalties imposed by banking supervisory authorities. The article's thesis assumes that the legal regulations in force in Poland and Germany make the indicated guarantee a reality. The article highlights the role of financial market supervisory authorities, whose activities, including the imposition of financial penalties, translate into the safety of the banking sector. Detecting and then sanctioning banking law violations motivates financial market participants not to commit such violations. First, based on an analysis of judicial decisions and international law norms, the criteria that

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an exemplary model implementing the principle of the right to defence should meet were established. On the other hand, the following part of the article compares the legal framework in Poland and Germany and verifies whether the legal provisions provide the parties with the guarantees in question when imposing a financial penalty for violations of banking law.

**Keywords:** infringement of banking law, right to defence, financial penalties.

**JEL Classification:** K42

## 1. Introduction

Administrative-criminal offences - German Ordnungswidrigkeiten, in the Polish and German domestic law are part of criminal law in the broadest sense [Radecki 2014: 155-156]. In this respect, one should take into consideration the proceedings conducted by administrative authorities such as the Federal Financial Services Supervisory Authority, from hereinafter "BaFin" stands for "Die Bundesanstalt für Finanzdienstleistungsaufsicht" (The Federal Financial Services Supervisory Authority) or the Polish Financial Supervisory Authority, from hereinafter "KNF" stands for "Komisja Nadzoru Finansowego" (The Polish Financial Supervisory Authority), which, based on an increasing number of regulations in the banking law sector, impose high financial penalties on market participants for regulations violation [Renz, Hense, Marbeiter 2019: 207]. The European Court of Human Rights, from hereinafter "ECHR", in the case of Engel and others v. the Netherlands, indicated that the classification of a given act to a specific category of responsibility remains, in principle, legally irrelevant because, in each case, it is necessary to take into account not only the nature of the act but also the amount of a possible penalty [ECHR, Engel and others v. the Netherlands]. Both Polish and German legislators are aware of other forms of proceedings of a penal nature that may be conducted, at least in the initial phase, by bodies that are not courts [Constitutional Tribunal, P 12/01]. This procedure is precisely the procedure for the imposition of a financial penalties by an administrative authority for a breach of banking law.

The penal nature of this liability should result in respect for the fundamental procedural principles of penal law, which include the right of defence. This type of liability often occurs in the financial market. The importance of the issue increases, especially if one considers the number of sanctions that can be imposed by the supervisory authorities and the fact that a financial penalties actually affects the foundations of individual entities [Angelis, Moor 1994: 95]. The Constitutional Tribunal stated that repression through economic sanctions is often much more onerous than fines provided for by criminal law or the misdemeanours law. In

such circumstances, it is necessary to ensure the party's right of defence [Constitutional Tribunal, P 29/09].

## 2. BaFin and KNF – functions in the field of administrative and criminal liability

BaFin and KNF are public administration bodies [Komierzyńska-Orlińska 2018: 183-184] that control compliance with banking laws in Poland and Germany. Their supervision covers all areas of the financial system and the capital market. By equipping them with the ability to impose financial penalties in the event of a breach of banking law, they have the power to effectively combat abuses that cause significant inconvenience to the regulated financial market, which directly affects the safety of the banking sector [Schork, Groß 2013: 148]. In this respect, it is essential to note that in German law, banking law comprises a cross-section of different acts concerning legal relations in the credit system, banking transactions and banking supervision law [Derleder, Knops, Bamberger 2009: 4-5].

BaFin was established under the Federal Financial Services Supervisory Authority Act [FinDAG:§ 1]. In contrast, the KNF was established by the Act of 21 July 2006 on Financial Market Supervision [Financial Market Supervision Act: Art. 3]. If, during an inspection or due to BaFin's acceptance of a notification that an entity has failed to comply with banking legislation, BaFin is authorised to impose a financial penalty – die Geldbuße - for the breach in question, in the amount detailed in the sectoral act. The KNF, on the other hand, does so and imposes financial penalty [Financial Market Supervision Act: Art. 11] on members of the management board or authorities of the entities concerned [Ušák 2010: 128}. Nevertheless, in each case, it must be clear from the Act for which provisions the KNF may issue an administrative decision imposing a penalty. An example in this respect may be found in the banking law [Banking law: Art. 141].

## 3. Analysis of recent statistics

To conclude this part of the considerations, it is still necessary to point to the statistical data on violations of banking law and investigations carried out by BaFin. Each year BaFin prepares a report - Jahresbericht - which is publicly available on its official website. The report contains the results of BaFin's activities, including the supervisions carried out. The most recent report compiled and made available by BaFin is for 2020, which shows that in 2020 BaFin issued 19 decisions imposing financial penalties - Geldbußen in the total amount of EUR 8,499,000 across all areas. In terms of the number of investigations carried out, in

2020, BaFin initiated 220 proceedings to impose a financial penalties. 116 proceedings were related to banking supervision, anti-money laundering and insurance supervision, and 104 procedures were related to the area of securities and asset management [Annual reports of BaFin].

On the other hand, the statistics presented by the KNF show that in total, in 2020, KNF issued 37 decisions imposing financial penalties on individual entities, which amounted to PLN 28,028,300. Financial penalties were imposed on chairpersons and vice-chairpersons of management boards of joint-stock companies, members of management boards of joint-stock companies - banks, brokerage houses or investment fund companies, but also on joint-stock companies themselves - banks, insurance and reinsurance companies and natural persons who committed, for example, an omission in the form of failure to notify the KNF of exceeding a certain percentage of the total number of votes in a company [List of penalties imposed by the Polish Financial Supervision Authority in 2020].

## 4. Right to defence – analysis of publications and jurisprudence

The right to defence, being a fundamental principle of penal law, is anchored in norms of a constitutional nature. Constitutional principles on criminal liability apply to administrative and criminal offences such as violations of banking laws, as this liability regime is a model of criminal liability in the broad sense. Accordingly, the text of a law regulating proceedings of a penal nature should not provide for the right to defence to a narrower extent than the Constitution does [Matan 2009: 93]. The legal acts across borders also guarantee the right to defence. Poland and Germany are members of the European Union and the Council of Europe. Therefore, the parties to criminal proceedings in these countries enjoy the guarantees of the Charter of Fundamental Rights of the European Union, from hereinafter “CFR” [CFR: Art. 48] and of the European Convention on Human Rights, from hereinafter “ECHR”)[ECHR: Art.6(3)].

In a situation where an individual is subject to authoritative and punitive control and supervision exercised by the State through a specific administrative body [Mitsch 2008: 3], it is crucial that this control and supervision follow a procedure that guarantees the rights of the entities concerned. This happens when the procedure is equipped with certain legal instruments and mechanisms.

The ECHR, pointed out that the rules of international law do not prescribe the manner in which the right of defence is to be exercised and leave it to States to choose the means of ensuring that this right is respected in their legal systems. Nevertheless, based on the texts

of acts of international law, norms of a constitutional nature and judicial decisions, certain indicators have been singled out, the presence of which in legal regulations indicates that a party's right to defence is actually guaranteed [ECHR, 20310/02 Płonka v. Poland].

Therefore, when verifying whether a party is entitled to the right of defence, it is necessary to consider whether the party has the opportunity to defend its rights in a substantive as well as procedural manner, the right to be represented by an attorney from the beginning of the proceedings [ECHR, 20363/07 Sarıkaya v. Turkey, ECHR, 7377/03, Dayanan v. Turkey]. In addition, the implementation of the right of defence is also expressed by guaranteeing the party time to prepare for the defence, the opportunity to comment on the charges against him or her, or ensuring the possibility to participate in the evidentiary proceedings, including testifying as a party [Matan 2009: 91].

## 5. Principle of the right of defence in proceedings before BaFin and KNF – main research results

Taking into account the mechanisms mentioned above that make up the right to defence, which derive both from doctrine or norms of a constitutional nature and from judicial decisions of the ECHR, when analysing legal provisions, it is necessary to verify the right to:

1. use the services of a professional attorney,
2. be heard at every stage of the proceedings,
3. remain silent,
4. participate in the evidentiary proceedings, and whether:
5. a party has a duty to cooperate with the authority conducting the proceedings,
6. there is a presumption of innocence.

**Re. 1. Right to use the services of a professional attorney**

A party in BaFin proceedings has the right to be defended by a professional attorney but is not required to be informed prior to his/her hearing that he/she may use counsel of his/her choice. Nevertheless, § 60 of the Administrative Offenses Act from hereinafter “OWiG”, stands for “Ordnungswidrigkeitengesetz”, provides that there are certain situations in which the participation of a defence counsel is advisable [Klesczewski 2016: 248].

These are situations described in § 140 (2) Criminal Procedure Act, from hereinafter “StPO”, stands for “Strafprozeßordnung”, when due to the seriousness of the act or anticipated legal consequences or the difficulty of the factual or legal situation, the cooperation of the defence counsel appears to be necessary, and it is evident that the person concerned cannot

defend himself independently. In such situations, the administrative authority is competent to appoint a defence counsel [Mitsch 2005: 255].

In addition, the authority deciding on the financial penalty may also dismiss the defence counsel or admit other persons to the defence when one person defends more than one person at the same time for committing the same administrative and criminal offence.

A party may have a public defender [ECHR, 30358/04, Wersel v. Poland] when such a right has been granted to him. In a situation where a public defender has been appointed, the main hearing may take place without the person concerned being present. Such a regulation, in the light of ECHR judicial decisions, does not contradict a party's right of defence but, on the contrary, constitutes its implementation [ECHR, 26103/95, Geyseghem v. Belgium]. Since a professional attorney is supposed to defend the rights of the subject on whom the financial penalty is imposed, the defence counsel may independently exercise the permissible remedies within the time limit provided for the defendant, but not against the express will of the party.

Turning to the Polish legal framework, it should be pointed out that an attorney may also represent a party's rights in proceedings before the KNF. The institution of the power of attorney to appear before the KNF - is an authorisation to act in the case of a committed violation of some of the provisions of the banking law, including making declarations of will and knowledge and undertaking specific procedural actions on behalf of its mandatee [Knysiak-Sudyka 2020: 27].

The legislator, in Article 34 of the Code of Administrative Procedure, provided for an additional possibility, namely that in minor cases, a public administration body may not demand power of attorney if the attorney is a member of the party's closest family or a household member, and there is no doubt as to the existence and scope of authority to act on behalf of the party. If an attorney represents a party, all pleadings are served on that attorney. The procedural provisions of the Code of Administrative Procedure and the Law on proceedings before the Administrative Court do not expressly provide in what cases a party's interests must be represented by an attorney. A party may be represented by an attorney at any stage of the proceedings, up to the proceedings before the Supreme Administrative Court, from hereinafter “NSA” stands for “Naczelny Sąd Administracyjny” (Supreme Administrative Court), except that the preparation of a cassation appeal is subject to compulsory representation by a lawyer [Wyporska-Frankiewicz, Kulig-Wyporska 2015: 260].

The possibility that an attorney may represent a party's interests is an instrument that strengthens the guarantee of the rights of defence since a party acting alone may encounter specific difficulties, for example, in making the right procedural decisions. Nevertheless, also in the absence of a professional attorney, the party's interests do not remain at risk, as procedural provisions oblige administrative authorities to take care of and implement process guarantees, such as the right of defence, e.g. by instructing the party, providing information or ensuring active participation in the proceedings [Knysiak-Sudyka 2020: 19].

**Re. 2. Right to be heard**

In order to verify whether a party has the right to be heard at each stage of the proceedings, an account should be taken of the multi-stage nature of the proceedings. § 55 OWiG, which guarantees a party the opportunity to comment on the alleged act, even before the investigation is completed, while in simple cases, it is sufficient to allow the party to comment in writing [Klesczewski 2016: 267].

After an objection has been lodged, the administrative authority, using the self-control possibility provided for, may also, pursuant to § 69(2) of the OWiG, allow the party to be heard, and before the criminal court, the legislator has also provided for the right to be heard in § 71(2) of the OWiG.

It remains essential in this respect that both BaFin or the Court, at a later stage of the proceedings, should indicate to the party that it has the right to express its views on the allegations made against it and that it has the right to refuse to be heard. This is important insofar as failure to exercise this right may even result in the contested judgment being revoked by the court of the second instance (§ 80(1)(2) OWiG).

Furthermore, the right to be heard also applies to a party after conducting evidentiary proceedings. Evidentiary proceedings shall be conducted in accordance with the provisions of the StPO due to the lack of relevant regulations in the OWiG. Thus, according to § 257 StPO, after questioning each co-defendant and after each individual collection of evidence, the party must be asked if he or she wants to provide some explanations.

In view of the above, it must be stated that the right to be heard is guaranteed to the party at each stage of the proceedings. As an aside, it should only be pointed out that there is no need to hear the explanations of the person concerned at every stage of the proceedings, despite the existence of such a possibility, as this can be replaced by reading out the minutes of previous hearings under section 77a of OWiG. The above regulation proves that there is a free flow of evidence between the stages of proceedings.

It should additionally be pointed out that, once an objection has been lodged, the criminal court, pursuant to § 81 OWiG, is entitled to rule on an act under the Criminal Act - StGB, further applying the provisions of criminal procedure. This is possible if the Court informs the person concerned that the legal qualification of the act has been changed and then gives him/her the opportunity to respond to the change of qualification and to undertake a defence due to the changed circumstances– which is also to be seen as an opportunity to be heard at this stage of the proceedings [Lemke 1999: 181-182].

In Poland, in proceedings before a public administration body, a party has the right to be heard, which is directly articulated in Article 10 of the Code of Administrative Procedure, which stipulates that before issuing a decision, the body is obliged to give the party an opportunity to express its opinion on collected evidence and materials and submitted demands. However, this is not an absolute right, as § 2 provides for cases in which this may be waived, i.e. when the handling of the case is urgent due to the danger to human life or health or due to the threat of irreparable material damage.

In addition, the public administration body shall take the actions necessary for the hearing prior to the hearing, in particular, it shall call upon the parties to provide explanations, documents and other evidence before the hearing and to appear at the hearing in person or through representatives or attorneys.

The right to submit explanations is provided for in Article 50 of the Code of Administrative Procedure if necessary for resolving the case or performing official activities. However, in cases where the person summoned is prevented from appearing by sickness, disability or another insurmountable obstacle, an additional guarantee is provided, in that the authority may carry out a particular act or take an explanation or question the person summoned at his place of residence if the circumstances of that person allow so.

The right of a party to be heard in the situations referred to above should be distinguished from the right of a party to submit explanations. It is possible thanks to art. 86 of the Code of Administrative Procedure, according to which, if after exhausting documentary evidence or due to its lack, some facts significant for the settlement of the case remain unexplained, a public administration body may question a party to clarify them. The provisions on witnesses shall apply to the interrogation of the parties, except for the provisions on coercive measures. It should be borne in mind that the hearing of a party has the force of proof for the purposes of the proceedings, and the hearing is merely an institution that makes it possible to discern the circumstances of a given case [NSA, SA/Łd 3192/95].

The right of a party to be heard should not be depreciated, as it is not only a guarantee of the rights of the defence but also impacts the evidentiary proceedings. This influence is visible in Article 81 of the Code of Administrative Procedure, according to which factual circumstances may be considered proven if the party has had an opportunity to express its opinion on the evidence carried out unless the circumstances referred to in Article 10 § 2 occur.

**Re. 3. Right to remain silent**

When discussing the right to be heard at any stage of the proceedings, mention should also be made of the party's right to remain silent, which is unlimited and immanently linked to the status of the defendant not only in criminal proceedings but also in proceedings for the imposition of a financial penalty [Gassner, Seith 2020: 51].

The right of a party to remain silent is an expression of freedom from self-incrimination - kein Zwang zur Selbstbezichtigung, and that a party cannot be compelled to present evidence actively. It means that any kind of direct or indirect pressure on a party to make him admit to a breach of banking law - committing an administrative and criminal offence - is unacceptable. It is, therefore, not permissible to use techniques that will put the legal or factual perspective at a disadvantage if the person concerned refuses to contribute to the clarification of specific facts [Queck 2005: 21].

The right to remain silent shall be ensured to a party at any stage of the proceedings for the imposition of a financial penalty. An expression of ensuring a party's right to remain silent is, for example, § 69 (3) of the OWiG, which provides that the authority - BaFin in inter-institutional proceedings, at the same time as allowing a party to submit explanations and evidence, shall instruct it that it has the right to refuse to submit explanations. Similarly, a party has the right to refuse to be heard before the criminal court when it proceeds to examine the justifiability of the objection (§ 71 (3) sentence. 2 OWIG).

During the proceedings before the KNF, it is possible to examine the evidence from the hearing of a party - Article 86 of the Code of Administrative Procedure. It is important to note that the provisions on witnesses apply to the interrogation of the parties, except for the provisions on coercive measures. This means that the KNF, as the body conducting the proceedings, does not have any mechanism to influence a party to submit to a hearing, which should also be considered as a guarantee of the right to remain silent.

Moreover, the application of the provisions concerning witnesses to the questioning of parties means that Article 83 § 2 of the Code of Administrative Procedure is applicable, according to which a witness may refuse to answer questions if the answer could expose

him or his relatives listed in § 1 to criminal liability, disgrace or direct financial damage or cause a breach of the obligation to maintain legally protected professional secrecy.

Given the above, it should be stated that a party has the right to remain silent in the course of proceedings for imposing a financial penalty, which, in accordance with the judicial decisions of the The European Court of Justice, from hereinafter "ECJ", should be exercised in the course of proceedings in cases involving prohibited acts of an administrative nature, especially when a possible result of the proceedings is the imposition of a financial penalty on a given entity [ECJ, C 537/16].

**Re. 4. Right to take part in evidentiary proceedings**

This right is manifested in the fact that a party has the possibility to submit motions for evidence or to participate in processing the motions of evidence at any stage, including the possibility to ask questions based on Article 239 StPO. In this respect, the provisions of the StPO should also be applied [Wiegand, 1968: 14], given the lack of relevant regulations in OWiG [Kay, Keller 2016: 26]. However, this right has certain limitations, as the party should bear in mind that submitting evidence only at the court stage may cause the Court to reject the motion for evidence if the facts have already been clarified during the previous proceedings and the submitted motion for evidence will not contribute to clarifying the case, and if the Court determines that the motion for evidence was submitted too late.

The testimony of a party, undoubtedly from a technical point of view, is a form of hearing him or her, while, on the other hand, it is crucial documentary evidence. Thus, the interrogation of the accused person - Anhörung des Betroffenen has two functions. In view of the fact that the testimony of a party is an element serving to establish the material truth, the accused person may not refuse to accept court summons. When it does so, the administrative authority has the power to compel the participation of the accused in the proceedings by submitting an application to the court of local jurisdiction based on § 46 OWiG in conjunction with § 162 StPO. The accused may also be instructed to testify truthfully if their statements appear to be unreliable. In any case, however, the above does not escape the fact that the accused has every right to remain silent [Klesczewski 2016: 266].

In the proceedings before the KNF, the party's right to active participation in the administrative proceedings, including the evidentiary proceedings, is connected with the principle expressed in Article 10 of the Code of Administrative Procedure, i.e. the principle of active participation of the party in the proceedings. In accordance with the provision mentioned above, public administration bodies are obliged to ensure active participation of

the parties at every stage of the proceedings, and before issuing a decision, they should be given an opportunity to express their opinion on collected evidence and materials and submitted demands.

The provisions concerning the taking of evidence are placed in Articles 75-88a of the Code of Administrative Procedure. A party may adduce as evidence anything that may contribute to the clarification of the case and is not contrary to law. In particular, evidence may consist of documents, testimonies, expert testimonies and inspections.

However, it should be borne in mind that a public administration body may refuse a motion for the evidence if it was not submitted during the examination of evidence or at the hearing, and the request concerns circumstances already established by other evidence unless they are relevant to the case. However, in any event, to ensure the active participation of a party in the evidentiary proceedings, the party should be notified of the place and date of the taking of evidence of witnesses, experts or inspection at least seven days in advance. In addition, a party has the right to participate in the taking of evidence, to put questions to witnesses, experts and parties and to give explanations.

This is important because, in accordance with Article 81 of the Code of Administrative Procedure, a fact may be considered proven if the party has had an opportunity to express its opinion as to the evidence carried out unless circumstances referred to in Article 10 § 2 occur.

**Re. 5. Cooperation with the authority conducting proceedings**

There is no stipulated duty to cooperate with the authority in BaFin proceedings. On the contrary, ]the authority cannot force cooperation on the accused person [Queck 2005: 21].

Nevertheless, the issue of a party's cooperation in proceedings for an administrative and criminal offence must be viewed broadly. Therefore, one should bear in mind not only cooperation at the stage of proceedings before the administrative authority - BaFin, but also cooperation at the stage of court proceedings, where the provisions of the StPO apply. For the above reasons, it is appropriate to cite Section 257c StPO, which provides that in certain cases, the court may agree with the parties to the proceedings on the further course and outcome of the proceedings. Therefore, an agreement may cover legal consequences or the conduct of persons involved in proceedings. However, for there to be an agreement, the accused must plead guilty. An agreement is reached when the accused and the public prosecutor agree to the court's proposal. On the other hand, the court is not bound by the agreement if significant circumstances of a legal or factual nature have arisen or have been overlooked.

During the proceedings conducted by the KNF, the legislator has literally not provided for an obligation to cooperate with the authority. It is significant that in cases of financial penalties imposed by the KNF, the rules of criminal procedure are not applied accordingly, even at the judicial stage as in Germany, where the StPO provisions apply accordingly. Accordingly, the Polish Code of Criminal Procedure provisions on voluntary submission to penalty - which can be seen as an element of cooperation with the prosecuting authority - will not apply in this case. Likewise, at the judicial stage, where the procedure occurs in accordance with the Law on proceedings before Administrative Courts, no elements indicate the possibility, let alone the obligation, to cooperate.

**Re. 6. Presumption of innocence**

The presumption of innocence in German proceedings is called Unschuldsvermutung. The principle is confirmed in national standards and international law [European Convention on Human Rights, Art. 6(2)]. In this regard, it is emphasised that this principle also applies to proceedings on imposing a financial penalty as well as in criminal proceedings and is derived from the constitutional principle of the rule of law [Basic Law for the Federal Republic of Germany: Art. 20(3)].

Correlated to the presumption of innocence principle is the administrative authority's duty to verify whether the presumption of innocence in favour of a party has been rebutted in the light of the evidence obtained. In proceedings before the BaFin, the principle of the presumption of innocence is implemented - since a decision imposing a financial penalty may only be imposed if the evidence shows that there has been a breach of banking law. The same is valid at the later stages of the proceedings, where the criminal court also conducts an evidentiary proceeding to determine whether a violation has occurred. The doctrine emphasises that there is, in fact, no violation of the presumption of innocence when refraining from questioning witnesses if the evidence previously taken does not raise any doubts [Stuckenberg 1998: 63].

The principle of the presumption of innocence means that the accused person, i.e. the person alleged to have committed the act in question, is presumed innocent until proved guilty of that act. The constitutional source of this principle in Poland is Article 42(3), according to which everyone is presumed innocent until found guilty by a final court judgement. In the case of an administrative offence, the person who is a party to the proceedings shall be presumed innocent until a final decision in the form of a decision or judgement of the Court has been handed down [Constitution of the Republic of Poland, Art. 42(3)].

The NSA concluded that the constitutional concept of "criminal responsibility" has a broader meaning than that adopted by the Penal Code. In the judicial decisions of the Constitutional Court, it is accepted that the constitutional principle of the presumption of innocence has primarily a guaranteed character in relation to the suspect or the accused in the course of a criminal trial, however, its scope of application may also be extended to other repressive proceedings. The Court has consistently taken the position that the inclusion in the Constitution of a provision on the presumption of innocence among civil liberties and rights may lead to the extension of the scope of application of this principle beyond the criminal trial to other repressive proceedings as well [NSA, II GSK 741/17].

Proceedings before the KNF in respect of the imposition of a financial penalty for a breach of banking law are precisely proceedings of a repressive nature, as in such proceedings, the purpose of the financial penalty is to repress the offending entity [Administrative Court in Warsaw, VI SA/Wa 1629/17]. In the light of the above considerations, it should be stated that the principle of the presumption of innocence is valid in the proceedings conducted before the KNF and has a constitutional basis, and therefore all procedural guarantees and regulations should be interpreted under the principle of the presumption of innocence.

## 6. Conclusions

Based on the latest BaFin and KNF statistics from 2020, it is shown how many and how high the severity of financial penalties imposed for violations of banking laws is in Poland and Germany. In such circumstances, there is no doubt that this liability, which lies on the borderline between penal and administrative liability, bears the hallmarks of penal liability. Thus, a financial penalty imposed on a given entity performs a preventive function and motivates the addressees of banking law norms to comply with them, which directly translates into the safety of the banking sector. The penal nature of liability makes it necessary for the parties to be assured of the guarantees of criminal liability, such as the right of defence. This assertion is supported by the cited judicial decisions and doctrinal positions. Furthermore, the analysis of the judicial decisions of the ECHR, the ECJ and international rules has shown which factors should be present in a given legal system in order for the defendant to be provided with the guarantee in question. An analysis of Poland and Germany's procedural rules and banking laws, followed by a comparison between them, confirmed the thesis that during the imposition of a financial penalty for a breach of banking law in Poland and Germany, the parties are provided with the right of defence. Indeed, the parties have the possibility to challenge individual decisions, both at the stage before the

banking supervisory authority and at the jurisdictional stage [Majewski, Majewska 2019: 51-52]. Furthermore, the parties are given the opportunity to represent their interests by an attorney, to participate actively throughout the proceedings, to express themselves or to influence the shape of the evidentiary proceedings. The presence of the mechanisms presented in the article in the Polish and German legal systems demonstrates that the parties are guaranteed the right to defence in the process of imposing a financial penalty for infringement of banking law.

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