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Tailor-Made Rules Needed: a Balanced Approach to Imposition of Administrative Sanctions in Poland

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**TAILOR-MADE RULES NEEDED: A BALANCED APPROACH TO IMPOSITION OF
ADMINISTRATIVE SANCTIONS IN POLAND**

By Maciej Bernatt *

Abstract

The paper analyzes Polish legal system under which administrative sanctions are imposed. It is claimed that the efficiency of functioning of this system should be balanced with the appropriate level of observance of procedural fairness as well as with the appropriate rules governing the imputation of administrative liability. The paper provides the analysis of three areas where the balanced approach is needed. The first one concerns the premises of administrative liability, the second the scope of procedural rights, the third the institutional arrangement of the system. The paper points two factors that should be taken into consideration by Polish legislator and the Polish Constitutional Court when deciding how to reconcile efficiency with the procedural fairness and with the adequate construction of the premises of administrative liability. First the complexity of the category of administrative law area and second the severity of the sanctions should be taken into account.

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1. Introduction

Polish administrative law regulates numerous areas of private behavior. Economic activity is an obvious example here. The level of obedience of administrative laws by private actors is related to the existence of administrative sanctions employed when these laws are violated¹. Administrative sanctions by performing their preventive, deterrent, repressive, coercive and educational functions may enhance significantly the effectiveness of administrative laws – increase the level of its obedience and thus contribute to the achievement of the goals of these laws.

This paper analyzes Polish legal system under which administrative sanctions are imposed. It is claimed that the efficiency of functioning of this system should be reconciled with the appropriate level of observance of procedural fairness² as well as with the appropriate rules governing the imputation of administrative liability. Only then such system may be considered to play its role—serve to impose administrative sanctions when this is justified (accuracy) and so contribute to the accomplishment of administrative laws' goals³. In other words the administrative sanctions should not be imposed when the requirements of procedural fairness are sacrificed for the sake of time, money or other resources. For instance disproportionate limitation of a right to be heard of the party charged with administrative law violation may result in sanctioning the behavior that was neutral from the legal point of view and thus wrongly discourage (over-deter) others from taking similar activity. On the other hand conferring too extensive procedural rights (such as a right to appeal a decision in a three-layer system) or conditioning the legal liability on the proof of direct intent may result respectively in the lengthiness of the proceedings and near impossibility of proving the breach of law.

¹ Administrative sanctions are imposed in Poland by the administrative agencies usually in the pecuniary form on both natural and legal persons. They have to be distinguished from fines imposed in criminal proceedings where such fine is one of the criminal penalties that may be imposed by criminal court in case of committing the crime in violation of the Criminal Code or other provisions of criminal character (see Article 32 of the Act of 6 June 1997 Code of Criminal Procedure, *Journal of Laws* No. 89, item 555, with amendments). Administrative sanctions never involve imprisonment.

² Already in 1991 the Committee of Ministers of Council of Europe noted that administrative authorities enjoy considerable powers of sanction as a result of the growth of administrative state and decided that the proliferation of these sanctions should be accompanied by the set of procedural principles, see the preamble to the *Recommendation* No. R (91) 1. of the Committee of Ministers of Council of Europe on Administrative Sanctions of 13 February 1991.

³ The paper does not aim at analyzing to what extent administrative sanctions enhance in practice the effectiveness of administrative laws, namely achievement of the goals of these laws presumed by lawmaker.

This may translate into the limitation of deterrence of administrative sanctions and so may encourage others' behavior that has negative impact on society (for instance harms consumers).

The paper provides the analysis of three areas where the balanced, flexible approach in the system under which administrative sanctions are imposed is needed. The first one concerns the premises of administrative liability that must be met in order for administrative sanctions to be imposed. The second one is the scope of procedural rights of the parties that are charged with administrative law violation. The third one is the institutional arrangement of the system: the division of prosecutorial and adjudicative functions when it comes to the internal structure of the administrative agency and the scope of judicial review of the decisions imposing administrative sanctions.

The paper points two factors that should be taken into consideration by the Polish lawmaker and the Polish Constitutional Court (deliberating on the constitutionality of the administrative law's provision) when deciding how to reconcile efficiency with the procedural fairness and the adequate construction of the premises of administrative liability. It is claimed that first the complexity of the category of administrative law area and second the severity of the sanctions should be considered by the lawmaker and the Constitutional Court when constructing the system under which administrative sanctions are imposed. The more complex the case is and the more severe sanctions are the greater the scope of parties' procedural rights, the less automatic rules governing the imputation of liability and the greater division of prosecutorial and adjudicative functions should be. The factors of complexity and severity of sanctions influence also the scope of judicial review. It should extend over the amount of fine and over all procedural violations committed by the administrative agency during the proceedings.

The structure of the paper is as follows. Part 2 provides a short theoretical overview of procedural fairness and efficiency. This analysis is followed in part 3 where the study of procedural fairness and efficiency in the jurisprudence of the Polish Constitutional Court is provided. It is argued that these two concepts are complementary and not alternative. Part 4 suggest the need for a balanced and flexible approach in the constitutional determination of the scope of parties' procedural rights

and the rules regulating the imputation of liability. The arguments of comparative character are presented to support such approach. Part 5 covers the three areas where the balanced approach is recommended. The analysis covers rules governing imputation of liability in Poland, the procedural rights of the parties to the administrative proceedings and institutional arrangement of the system in which sanctions are imposed. Competition law – an especially complex area of administrative law that is characterized by the presence of severe financial sanctions⁴ is used often in this part of the paper as a point of reference.

The jurisprudence of Polish Constitutional Court (the CC) serves as paper's main study material⁵. Additionally the standards derived from the jurisprudence of the European Court of Human Rights (the ECtHR), the Court of Justice of the EU (the CJEU), the US Supreme Court and Polish Supreme Court are discussed. This jurisprudence is however invoked only comparatively to the approach taken by the Constitutional Court.

2. Basic concepts

Tadeusz Kotarbiński, a Polish praxiologist, developed the concept of efficient action⁶. According to Kotarbiński an action is efficient when it is based on a measure that is adequate to the goal pursued and when the goal is achieved with the use of minimal resources (time, material, energy, and money) needed⁷. In this paper the efficiency is understood in a way proposed by Kotarbiński. It is asked how the system under which

⁴ A fine imposed on company that violates the prohibition of anticompetitive practices may be as high as 10 % of the revenue earned in the accounting year preceding the year within which the fine is imposed (Article 106(1) of the Act of 16 February 2007 on Competition and Consumer Protection, *Journal of Laws* No. 50, item 331, as amended) and in practice goes up to billions of Euro. In the decision of Polish competition authority of 24 May 2010, DOK-4/2010, the fines imposed of the members of cartel amounted to 158 829 000 PLN (around 40 000 000 EUR). A fine of 30 000 000 EUR was imposed on undertaking in the decision of 4 November 2010, DOK-9/2010, for obstructing the authority's inspection.

⁵ All the CC judgments mentioned in the paper are available in Polish at: <http://otk.trybunal.gov.pl/orzeczenia/>.

⁶ TADEUSZ KOTARBIŃSKI, TRAKTAT O DOBREJ ROBOCIE [*TREATY OF WORK WELL DONE*] (1975). See in English: TADEUSZ KOTARBIŃSKI, PRAXIOLOGY. AN INTRODUCTION TO THE SCIENCE OF EFFICIENT ACTION (1965). See also: TADEUSZ KOTARBIŃSKI, HASŁO DOBREJ ROBOTY [GOOD WORK] 13 (1975); Wojciech Gasparski, *Comments on the Concept of Efficiency* in PRAXIOLOGICAL STUDIES. POLISH CONTRIBUTIONS TO THE SCIENCE OF EFFICIENT ACTION, WOJCIECH GASPARIKI, TADEUSZ PSZCZOŁOWSKI (eds), 67 (1983); TADEUSZ PSZCZOŁOWSKI, ZASADY SPRAWNEGO DZIAŁANIA [RULES OF EFFICIENT ACTION] 248 (1982).

⁷ TADEUSZ KOTARBIŃSKI, HASŁO DOBREJ ROBOTY [THE SLOGAN OF A GOOD WORK] 13 (1975).

administrative sanctions are imposed balances time (length of the proceedings), money (the costs of long, extensive evidentiary hearing) and other resources against the requirements of procedural fairness. It is presumed that administrative proceedings before an administrative agency is in Kotarbiński's words a measure that is adequate to the goal pursued that being imposition of administrative sanctions when this is justified and so contribution to the accomplishment of administrative laws' goals⁸. At the same time I see the procedural fairness as a value that should be reconciled with the pursuance of the accomplishment of this goal with the use of minimal resources needed⁹. The process of imposition of administrative sanctions should not be concerned only about efficiency. Procedures should be both fair and efficient¹⁰.

In this paper procedural fairness is understood correspondingly with the concept of process values elaborated by Robert Summers. He claims that every legal process can be seen not only from the perspective of its result but also from the point of view of the process in itself¹¹. Thus the process values are distinguished by him "to refer to standards of value by which we may judge a legal process to be good as a process, apart from any 'good result efficacy' it may have"¹². Such approach is in line with the socio-psychological studies that show that participants of the legal process assess it not only by its final result but also from the perspective of the respect for the process values¹³. However, respecting the process values may influence positively achievement of

⁸ These goals are different depending on the type of administrative law in question. Construction and road law may be concerned about safety, competition law about protection of consumer welfare, environmental law about the preservation of nature etc. In the judgment of 25 March 2010, P 9/08, the CC pointed at the importance of "effective measures" that would induce the addressee of legal norms to observe them. Administrative sanctions are considered in the jurisprudence of the CC as such effective measures, the judgment of 14 June 2004, SK 21/03. See also the judgment of 1 March 1994, U 7/93.

⁹ In the EU literature it is rightly pointed that the presence of procedural guarantees may translate into greater effectiveness of the system by building its greater legitimacy. It is argued that parties to the proceedings who are content with the level of procedural rights accorded might be less inclined to appeal the decision or raise against it due-process charges. See ANDREAS SCORDAMAGLIA-TOUSIS, *EU CARTEL ENFORCEMENT: RECONCILING EFFECTIVE PUBLIC ENFORCEMENT WITH FUNDAMENTAL RIGHTS* 14-15 (2013).

¹⁰ Henry J. Friendly when discussing different areas of U.S. law aptly observed that "the problem is always the same—to devise procedures that are both fair and feasible", Henry J. Friendly, *supra* note 10, at 1315.

¹¹ Robert S. Summers, *Evaluating and Improving Legal Process—A Plea for „Process Values”*, 60 CORNELL L.R., 1, 1 (1974).

¹² *Id.*, at 3.

¹³ In this respect see E. ALLAN LIND, TOM R. TYLOR, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 217 (1988). Thus procedural fairness enhances the legitimacy of the proceedings in question. Both parties and general public is more likely to accept the outcome of such proceedings when procedural fairness is guaranteed.

presumed result¹⁴. In the context of administrative proceedings parties' right to be heard plays an important role in presenting to adjudicator counter-arguments and counter-evidence that may be indispensable for making an accurate decision (whether the administrative law was violated and whether there are grounds for the imposition of the sanction). Therefore in this paper procedural fairness is understood as a group of values that shall be protected by the procedural guarantees such as right to be heard, right of defense, right to a hearing before impartial and independent adjudicator or right to judicial review¹⁵. In parallel, it is also borne in mind the greater is the presence of legal guarantees of procedural fairness the greater is the risk that the process will become less efficient—longer and more costly what may adversely affect private parties¹⁶. What is more additional layers of procedural guarantees do not ensure that a right result will be reached. Despite their existence adjudicator may still make for variety of reasons a wrong decision. Hence, procedural fairness has to be reconciled with efficiency¹⁷.

This paper is also concerned with the question how to reconcile efficiency of the system under which administrative sanctions are imposed with the adequate construction of the premises of administrative liability. The more rigorous they are (more favorable to the parties to the proceedings) the more difficult (more time-consuming and costly) it is for administrative agency to meet the standard giving

¹⁴ Wojciech Sadurski is of the opinion that the implementation of the fair procedure cannot be seen as the indispensable and sufficient condition to obtain the right result of the process (a just one); according to him it can however help in reaching such result - see WOJCIECH SADURSKI, *TEORIA SPRAWIEDLIWOŚCI. PODSTAWOWE ZAGADNIENIA* [A THEORY OF JUSTICE. PRINCIPAL PROBLEMS] 81 (1988). The different approach was taken by John Rawls who in his model of *pure procedural justice* describes situations in which there is no criterion for what constitutes a just outcome other than the procedure itself - see JOHN RAWLS, *A THEORY OF JUSTICE* 122 (1994).

¹⁵ See MACIEJ BERNATT, *SPRAWIEDLIWOŚĆ PROCEDURALNA W POSTĘPOWANIU PRZED ORGANEM OCHRONY KONKURENCJI* [PROCEDURAL FAIRNESS IN THE PROCEEDINGS BEFORE THE COMPETITION AUTHORITY] 91-98 (2011).

¹⁶ The U.S. history of the approach to the scope of procedural guarantees required for depriving somebody of welfare benefits may be seen as a proof for that. In *Goldberg v. Kelly*, 397 U.S., 254 (1970) the U.S. Supreme Court prescribed fixed procedural requirements (a pre-decision hearing) for taking away welfare benefits, without regard to the costs the procedures would entail. The result was it became more difficult to qualify for welfare benefits because administrators were reluctant to resolve doubts in favor of awarding these benefits when they knew it would be very hard to deprive them. In consequence in *Mathews v. Eldridge*, 424 U.S. 319 (1976) the Supreme Court offered a more flexible approach to the required level of procedural guarantees, see more point 4.3. of the paper.

¹⁷ Judge Henry J. Friendly relied on Chief Justice Burger's dissent in *Wheeler v. Montgomery* to observe that “procedural requirements entail the expenditure of limited resources, that at some point the benefit to individuals from an additional safeguard is substantially outweighed by the cost of providing such protection, and that the expense of protecting those likely to be found undeserving will probably come out of the pockets of the deserving” Henry J. Friendly, *supra* note 10, at 1276.

ground for the imposition of sanction. The model of automatic liability where the sole violation of law prejudices the establishment of one's liability (no exonerative factors are taken into consideration) is on one side. The liability based on direct intent of the culprit is on the other.

3. Efficiency and procedural fairness as constitutionally complementary values

The preamble to Polish Constitution¹⁸ points that it is necessary to ensure that the work of public institutions is both efficient and fair. However, as the preamble is not a binding legal source of constitutional principles the analysis of efficiency and procedural fairness requires the study of the first chapter of Polish Constitution (titled: "The Republic") where these principles are listed. In this chapter neither the efficiency nor the procedural fairness are mentioned directly. However, they may be interpreted from the principle of the democratic-state-of-law prescribed in Article 2 of Polish Constitution¹⁹. A vast jurisprudence of the Polish Constitutional Court identifies procedural fairness exactly so as a part of the democratic-state-of-law clause. The CC underlines that the principle of the democratic-state-of-law demands that all the proceedings—that are conducted by state institutions to decide the individual cases (so not only judicial proceedings)—should meet the requirements of the procedural fairness²⁰. This approach corresponds with the notion of formal state of law under which the state is responsible for the creation of organizational and procedural institutions that limit potential abuse of power by state against individuals²¹. The CC has identified the values of procedural fairness that shall always be guaranteed by any procedure²². The first value is the possibility to be heard. It shall be guaranteed at least by the right to have access to the

¹⁸ The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483, as amended.

¹⁹ The democratic-state-of-law principle is the main source for the identification in the Constitution of the principles that are not directly mentioned in its text; see the CC judgment of 13 April 1999, K 36/98.

²⁰ The CC judgments of: 14 June 2006, K 53/05; 15 December 2008, P 57/07; 11 June 2002, SK 5/02; 10 June 2003, SK 37/02; 22 September 2009, P 46/07; 28 July 2004, P 2/04.

²¹ Mirosław Wyrzykowski, *Zasada demokratycznego państwa prawnego – kilka uwag [The Principle of the Democratic-State-of-Law]* in KSIĘGA XX-LECIA ORZECZNICTWA TRYBUNAŁU KONSTITUCYJNEGO [A BOOK OF 20-YEAR ANNIVERSARY OF CONSTITUTIONAL COURT'S JURISPRUDENCE] 237 (2006).

²² The CC accepts differentiation of level of the guarantees depending on the procedure and the case decided; see the judgment of 1 July 2008, SK 40/07. Nonetheless unfounded restriction of the procedural rights violates procedural fairness, the judgment of 28 July 2004, P 2/04.

case file and the right to comment on the evidence contained in it as well as the right to file the motion for evidence²³. The second value is the precise and understandable justification of the decision²⁴. Third, the CC is of the opinion that in case of administrative bodies the review of their decisions by a court must be guaranteed; the court should exercise the control over the legality of the administrative proceedings²⁵. Fourth, the duration of the proceedings should be reasonable²⁶.

Differently to procedural fairness the notion of efficiency has not been fully elaborated in the jurisprudence of the CC as an independent principle. Still the fast pace of proceedings is surely not constitutionally irrelevant—in the democratic state of law public institutions should act not only fair but also efficiently so as to guarantee the obedience of law. The fact that the reasonable time of the duration of the proceedings is considered by the CC as an element of procedural fairness²⁷ confirms that efficiency should not be seen as conflicting, alternative value. Rather the Constitution requires the balance between the scope of procedural rights the parties have and duration of the proceedings²⁸. Such observation finds its confirmation as to the constitutional standards of judicial proceedings under the Article 45(1) of the Polish Constitution that guarantees the right to a fair and public hearing, without undue delay, before a competent, impartial and independent court. The CC pointed that additional procedural limitations imposed on the party represented by the counsel (in the view of his/her expertise) meant to expedite the proceedings cannot be too far reaching so as to disproportionately limit parties' right to protect their interests by means of judicial proceedings²⁹. Rather the compromise between the pursuance to the acceleration of the proceedings and

²³ The CC judgments of: 11 June 2002, SK 5/02; 6 December 2004, SK 29/04 and in case K 53/05, *supra* note 20.

²⁴ The CC judgment in case K 53/05, *supra* note 20; the judgment of 16 January 2006, SK 30/05 and 13 May 2007, SK 68/06. Justification is considered as the way for counteracting discretion and arbitrariness of the state organs.

²⁵ The CC judgments: of 7 July 2009, K 13/08 and in cases: P 46/07, *supra* note 20; P 57/07, *supra* note 20.

²⁶ The CC judgments: of 26 February 2008, SK 89/06 and in case P 57/07, *supra* note 20.

²⁷ The CC judgments in cases SK 89/06, *supra* note 26 and P 57/07, *supra* note 20.

²⁸ Piotr Hofmański, *Prawo do sądu w ujęciu Konstytucji i ustaw oraz standardów prawa międzynarodowego [Right to Court in the Light of the Constitution, Statutes and Standards of International Law]* in WOLNOŚCI I PRAWA JEDNOSTKI ORAZ ICH GWARANCJE W PRAKTYCE [INDIVIDUAL FREEDOMS AND RIGHTS AND THEIR GUARANTEES IN PRACTICE] 276 (2006).

²⁹ The CC judgment of 18 February 2009 r., Kp 3/08.

possibility for the parties' to have use of their procedural rights should be built³⁰. The ECtHR posits similarly that the efficient conduct of an investigation, albeit a legitimate goal, cannot be pursued at the expense of substantial restrictions of the rights of the defense³¹.

Consequently, efficiency and procedural fairness are constitutionally complementary values. Thus, administrative proceedings leading to the imposition of administrative sanctions should be built in a way that both of them are taken adequately into account.

4. Possible approaches: abstract vs. balanced one

4.1. The Constitutional Court abstract approach

The Polish law lacks a full regulation of administrative sanctions. The Polish Constitution does not provide direct regulation neither of administrative sanctions nor of rules governing the imputation of administrative liability. Also legislation hierarchically lower than Constitution does not regulate administrative sanctions³². Lack of general, coherent legislative standard regulating administrative sanctions and the procedure under which they are imposed increases the role of Polish Constitutional Court in defining the constitutional standards that govern procedure and liability rules under which administrative sanctions are imposed.

The CC decided on many occasions about the constitutionality of administrative laws prescribing the grounds for the imposition of administrative sanctions³³. The CC was faced with constitutional questions concerning the rules of liability and the scope of

³⁰ The CC judgment of 6 December 2004, SK 29/04.

³¹ The ECtHR judgment of 18 September 2012 in case *Dochnal v. Poland*, no. 31622/07, paragraph 87.

³² Different legal acts give diverse Polish public authorities a power to impose administrative sanctions. This includes i.a. the areas of construction, environmental, antitrust, road, financial, tax, pharmaceutical, energy, telecommunication and railway transport law. These laws provide always only legal basis for the imposition of sanctions. Instead they do not regulate or regulate only randomly the rules under which administrative liability is determined.

³³ As to the constitutional basis of administrative sanctions the CC sees the power to impose sanctions by administrative bodies as a consequence of the obligation to obey the law (Article 83 of the Constitution). The CC underlines that administrative law would remain ineffective without the possibility to impose sanctions on those who violate it. The CC judgments of: 18 April 2000, K 23/99; 12 January 1999, P 2/98; 22 September 2009, SK 3/08; 24 January 2006 r., SK 52/04; 15 January 2007, P 19/06. This is also the opinion of Marek Szydło, *Charakter i struktura prawna administracyjnych kar pieniężnych [The Character and Legal Structure of Administrative Pecuniary Sanctions]* 4 *Studia Prawnicze* 123, 123-125 (2003).

procedural rights the parties to administrative proceedings have. The CC attempted to establish abstract criteria that distinguish administrative liability and administrative sanctions from criminal liability and criminal penalties and so clarify when the more automatic rules of imputation of liability and more limited scope of procedural rights characteristic for Polish administrative regime are constitutionally acceptable. In the literature the doubts were raised whether the CC managed to establish clear and convincing way to distinguish administrative regime from criminal one³⁴. Such opinion was also expressed in the CC jurisprudence itself³⁵.

The CC uses three criteria to distinguish criminal liability (and criminal penalties) from administrative liability (and administrative sanctions)³⁶. The first is the scope of entities that may be sanctioned. The CC sees the scope of entities that may be sanctioned under the administrative liability as broader than in case of criminal one³⁷. Such approach is taken despite the fact that criminal liability is not only limited to natural persons but covers also legal ones³⁸ and that natural persons may also be punished by means of administrative sanctions. The second criterion is the function of the sanction is also not convincing³⁹. The CC underlines that criminal sanctions play mainly a repressive role. Differently according to CC the main role of administrative sanctions is the prevention where the sanction is not meant as a retribution for the committed act but as a measure that enables the realization of the function of administrative bodies as enforcers⁴⁰. However, the CC notes that administrative sanctions may also play other

³⁴ See Mirosław Wyrzykowski, Michał Ziółkowski, *Sanckje administracyjne w orzecznictwie Trybunału Konstytucyjnego* [Administrative Sanctions in the Jurisprudence of the Constitutional Court] in KONSTYTUCYJNE PODSTAWY FUNKCJONOWANIA ADMINISTRACJI PUBLICZNEJ, SYSTEM PRAWA ADMINISTRACYJNEGO [CONSTITUTIONAL FOUNDATIONS OF THE FUNCTIONING OF PUBLIC ADMINISTRATION, THE SYSTEM OF ADMINISTRATIVE LAW], ROMAN HAUSER, ZYGMUNT NIEWIADOMSKI, ANDRZEJ WRÓBEL (eds.), 370-374 (2012).

³⁵ The CC judgment of 14 October 2009, Kp 4/09.

³⁶ Mirosław Wyrzykowski, Michał Ziółkowski, *supra note 34*, at 370.

³⁷ See the CC judgment of: 29 April 1998, K 17/97 and in case SK 52/04, *supra note 33*.

³⁸ See the Act of 28 October 2002 on the liability of collective entities for offences, Journal of Laws No. 197, sec. 1661, as amended.

³⁹ In the literature this criterion is criticized as not precise enough, Anna Błachnio-Parzych, *Sanckja administracyjna a sanckja karna w orzecznictwie Trybunału Konstytucyjnego oraz Europejskiego Trybunału Praw Człowieka* [Administrative Sanction and Criminal Sanction in the Jurisprudence of the Constitutional Court and the European Court of Human Rights] in SANKCJE ADMINISTRACYJNE [ADMINISTRATIVE SANCTIONS], MAŁGORZATA STAHL, RENATA LEWICKA, MAREK LEWICKI (eds.), 661-662 (2011) and Mirosław Wyrzykowski, Michał Ziółkowski, *supra note 34*, at 374.

⁴⁰ The CC judgment in case P 19/06, *supra note 33*.

roles⁴¹ including the preventive one⁴². What is more in the literature of criminal law the preventive function of criminal sanctions and not only retributive one is underlined⁴³. On the other hand some of the administrative sanctions are clearly meant to punish the infringer on ex post basis and not to force private entity to meet its obligation determined in regulatory, pro futuro decision of administrative body. This is the case of competition law where fines are imposed by the competition authority when commitment of practice limiting free competition is proven. The third criterion is the character of liability. The CC considers the administrative liability as the objective one. Under this concept the imputation of liability is based only on the establishment of the action that is classified in the public law as the infringement⁴⁴. Contrary to criminal liability fault of the perpetrator is irrelevant for the imputation of liability. In some of the judgments the CC understands this objective liability as an automatic one⁴⁵ and in fact almost close to absolute one⁴⁶. The sole violation of law prejudices the establishment of one's liability. No exonerative factors may be taken into consideration⁴⁷. The contribution of the third person to the infringement, extraordinary circumstances or vis maior does not play any role⁴⁸. Differently, in other judgments the CC states that the entity that violated public law may be released of liability if it proves that all was done what could be reasonably expected in order not to violate the law⁴⁹.

⁴¹ *Id.* In the literature it is underlined that preventive function of administrative sanctions is practically always accompanied by the repressive one – Renata Lewicka, Marek Lewicki, Joanna Wyporska-Frankiewicz, *Kilka uwag na temat przedawnienia sankcji administracyjnych [A Couple of Comments about the Statute of Limitations of Administrative Sanctions]*, in: SANKCJE ADMINISTRACYJNE, *supra* note 39, at 548. See also Małgorzata Stahl, *Sankcje administracyjne – problemy węzłowe [Administrative Sanctions–Main Problems]*, in: SANKCJE ADMINISTRACYJNE, *supra* note 39, at 28. See also Supreme Court judgment of 14 February 2012, III SK 24/11.

⁴² The CC judgment of 31 March 2008, SK 75/06.

⁴³ WŁODZIMIERZ WRÓBEL, ANDRZEJ ZOLL, POLSKIE PRAWO KARNE. CZĘŚĆ OGÓLNA [POLISH CRIMINAL LAW. GENERAL PART] 415-417 (2010).

⁴⁴ The CC judgment in cases P 9/08, *supra* note 8 and P 19/06, *supra* note 33 as well as the judgment of 26 March 2002, SK 2/01.

⁴⁵ See for instance the CC judgment of 5 May 2009, P 64/07.

⁴⁶ See Mirosław Wyrzykowski, Michał Ziółkowski, *supra* note 34, at 373.

⁴⁷ Possibility of exoneration is the cornerstone of objective liability in civil law.

⁴⁸ Different approach is suggested by MIROSŁAW WINCENCIAK, SANKCJE W PRAWIE ADMINISTRACYJNYM I PROCEDURA ICH WYMIERZANIA [THE SANCTIONS IN ADMINISTRATIVE LAW AND THE PROCEDURE OF THEIR IMPOSITION], 152 (2008).

⁴⁹ The CC judgments of: 4 July 2002, P 12/01 and in case SK 3/08, *supra* note 33. In other words it should be established whether the entity in question exercised due diligence, see the judgment of Court of Appeal in Warsaw of 17 May 2012, VI ACa 1428/11.

As pointed above it is disputable whether the abstract criteria elaborated by the CC to distinguish administrative regime from criminal one are correct and coherent. In any case CC's distinction does not solve a problem of how to adapt the level of procedural guarantees and rules of imputation of liability to different in terms of complexity and severity of sanctions areas of administrative law⁵⁰. An abstract, the same approach to different areas of administrative law should be rejected.

4.2. Suggested balanced approach

This paper is meant to suggest a different approach. Rather than attempting to distinguish in abstracto the criminal from administrative regime (and so decide generally about the scope of procedural guarantees and rigorism of liability rules) lawmaker when passing the new law and the Constitutional Court when deciding about the constitutionality of the law should take a more flexible, more balanced approach. For the category of administrative law area in question the lawmaker and the CC should determine what the appropriate scope of parties' procedural rights is so as the procedural fairness and efficiency is properly balanced. Similarly, the rules for the imputation of liability should be constructed in a way that the level of their rigorism is weighed against the requirement of efficiency. This determination should depend on the complexity of the category of administrative law area as well as the severity of sanctions imposed for the violation in question. The greater complexity is and the more severe sanctions are the greater the scope of parties' procedural rights, the less automatic premises governing the imputation of liability and the greater division of prosecutorial and adjudicative functions should be. The complexity and severity of sanctions should also influence the scope of judicial review⁵¹.

This proposal should not be seen as a call for abandonment in Poland of the division between criminal and administrative regime. There are categories of cases that are clearly criminal and to which well-established principles governing the liability, level

⁵⁰ See point 5 of the paper.

⁵¹ The complicated nature of the given area of administrative law may require the specialized knowledge that the administrative agencies possess more likely than generalist court. This fact has to be taken into consideration when deciding about the required scope of judicial review as to the substance of the administrative agencies decisions, see point 5.3. of the paper.

of procedural guarantees and institutional requirements are applicable⁵². Rather the proposal made may be used in broad area of administrative law where the category of cases regulated by administrative laws differ significantly between each other in terms of complexity and severity of sanctions. For instance it would be unreasonable to require the same level of procedural guarantees in case of complicated cases concerning the abuse of dominant position under the competition law (where the pecuniary sanction may be very high) and simple, insignificant road law violation. The arguments of comparative character may be raised in favor of the proposed, more flexible approach.

4.3. Comparative look

In U.S. the scope of procedural guarantees available under the Fifth Amendment Due Process Clause may vary depending on a case. The U.S. Supreme Court was addressed with the question whether due process requires an evidentiary hearing prior to the deprivation of some type of property interest even if such a hearing is provided thereafter. Originally in *Goldberg v. Kelly* the Court held that a hearing closely approximating a judicial trial is necessary⁵³. Different approach was taken in *Mathews v. Eldridge*. In this seminal case the Supreme Court recalled that “(d)ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances”⁵⁴ and that “due process is flexible and calls for such procedural protections as the particular situation demands”⁵⁵. According to the Supreme Court the identification of the specific dictates of due process “requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function

⁵² The rules of criminal liability accompanied by full-range guarantees should govern the most severe violations of administrative law prohibitions by individuals. In the judgment of 18 November, P 29/09 the CC noted that the CC's special attention is needed in connection with the growing trend in Poland to punish the violations of law with the use of administrative pecuniary sanctions that are often more severe than they criminal counterparts.

⁵³ *Goldberg v. Kelly*, supra note 16 at 266-271.

⁵⁴ *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961).

⁵⁵ *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail”⁵⁶.

In the words of this paper this test requires balance between efficiency and procedural fairness. It asks about likelihood of reaching a presumed result—non-erroneous decision (in our case accurate imposition of sanction) under the procedure used and about the cost entailed with the use of such procedure. It also asks how additional or substitute procedural safeguards improve the decision process (in reaching non-erroneous decision⁵⁷) and what costs will this involve. The question about the private interest that will be affected by the official action may be associated in our proposal with the severity of sanction—the more severe it is the greater is the intrusion in the sphere of private interest. The complexity of the category of administrative law area is instead a factor that should be taken into consideration when deciding about the need for introducing given level of procedural guarantees (additional or substitute).

Also in the jurisprudence of the ECtHR one can identify flexible approach to the way of determining standards governing the required scope of procedural guarantees. In the established jurisprudence of the ECtHR the notion of criminal charge used in the Article 6(1) of the European Convention on Human Rights (ECHR)⁵⁸ is understood broadly what results in the application of Article 6 criminal procedural standards to the proceedings that are not classified so in the domestic law. Given proceedings are classified as criminal under Article 6 of the ECHR when they meet Engel criteria⁵⁹. The criteria are as follows: classification under domestic law, the nature of the offence and the degree of severity of the penalty⁶⁰. Even if the case is considered to be criminal

⁵⁶ *Mathews v. Eldridge*, supra note 16 at 335.

⁵⁷ Such approach is in line with that the presence of procedural guarantees (especially such as right to be heard) may be helpful in achieving the presumed result – see point 2.2. of the paper.

⁵⁸ The Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13.

⁵⁹ The *Engel* criteria were established in the ECtHR judgment of 8 June 1976 in *Engel and others v the Netherlands*, no. 5100/71, paragraph 82; see also the ECtHR judgment of 21 February 1984 in *Öztürk v Germany*, no. 8544/79, paragraph 50. The CJEU is following ECtHR jurisprudence: “Next, three criteria are relevant for the purpose of assessing whether tax penalties are criminal in nature. The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur” see case C-617/10 *Åklagaren*, not yet reported, paragraph 39 relying on case C-489/10 *Bonda* [2012] ECR I-0000, paragraph 37.

⁶⁰ In the judgment of 24 February 1994 in case *Bendenoun v. France*, no. 12547/86, the ECtHR took into consideration firstly the fact that the offence in question was charged under the provisions applicable to all citizens, secondly that penalty in question (tax surcharge) was intended not as pecuniary compensation

under the ECHR, ECtHR is still ready to differentiate the standard when the case falls out of the scope of “hard core of criminal law” (imposition of administrative sanctions will normally be out of this scope)⁶¹. In *Jussila v. Finland* the ECtHR noted that “tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency”⁶². For these reasons lack of access by the party to an oral hearing aimed at cross-examining the tax inspector and obtaining supporting testimony was found to be in accordance with the ECHR. In *Menarini v. Italy* the ECtHR accepted instead the imposition of the sanction by the administrative body and not a court despite the fact it classified the Italian regime of competition law as criminal in a sense of Article 6⁶³.

The ECtHR’s flexible approach gives an ample opportunity for balancing the efficiency and the procedural fairness when deciding about appropriate level of procedural guarantees in the proceedings leading to the imposition of administrative sanctions⁶⁴. Especially the high amount of sanction imposed for the violations in the given area of administrative law (the severity of penalty in the ECtHR’s *Engel* words) may suggest that the scope of procedural guarantees provided to the parties of administrative proceedings should be broader (closer to that of criminal proceedings).

for damage but essentially as a punishment to deter reoffending, thirdly, that they were imposed under a general rule, whose purpose is both deterrent and punitive and lastly that penalty was substantially high (paragraph 47).

⁶¹ A flexible approach to the classification of the given area of law as criminal or administrative (civil) characterizes also the U.S. and the Canadian legal system, Renato Nazzini, *Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law: A Comparative Contextual-Functionalist Perspective*, 49 *CMLR* 2012, 971, 977-979. Thus pecuniary civil penalties (in US administrative sanctions are referred to as civil penalties) may be imposed by the administrative agencies. In case of U.S. the Sixth Amendment's guarantees reserved to criminal prosecutions are not applicable in such situation, *id.* at 978.

⁶² The ECtHR judgment of 23 November 2006 in case *Jussila v. Finland*, no. 73053/01, paragraph 43.

⁶³ The ECtHR judgment of 27 September 2011 in case *Menarini v. Italy*, no. 43509/08, paragraph 59. For the discussion in the field of competition law see Wouter P.J. Wils, *The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights*, 33 *World Competition* 5, 15-19 (2010); Maciej Bernatt, *Convergence of Procedural Standards in the European Competition Proceedings*, 8 *Competition Law Review*, 255, 273-274 (2012).

⁶⁴ See point 5.2. of the paper.

5. Three areas requiring a balanced approach

5.1. Imputation of liability

The first area where the balanced, flexible approach in the system under which administrative sanctions are imposed concerns the premises administrative liability that must be met in order for administrative sanctions to be imposed. It is claimed that the more complex the category of administrative law is and the more severe the sanctions are the less automatic (more favorable for the parties) rules governing the administrative liability should be.

The CC generally associates administrative law regime with the objective liability where the imputation of liability is based only on the establishment of the action that is classified in the public law as the infringement⁶⁵. Such clear-cut approach makes it difficult to adapt the level of rigorism of the liability system vis a vis efficiency of the proceedings to the category of administrative law area in question.

The CC in case Kp 4/09 concerning the new administrative system of road law violations expressed the opinion that a lawmaker by establishing administrative liability in a given area aims at improving the efficiency of the process of the imposition of sanctions⁶⁶. This is achieved by the lack of the obligation to prove one's guilt⁶⁷. Thus the introduction of objective liability is seen as a measure guaranteeing the effectiveness of administrative law⁶⁸. Efficiency of the system based on lack of requirement to prove somebody's guilt leads to the greater effectiveness of the road law (builds its obedience). Such approach is correct in case of petty road law violations (such as speeding) that are numerous and repetitive—the cases in question are usually not complicated (complex) and the fines are not extremely high.

There are however other areas of administrative law where approach of road law may not be appropriate. This is especially true because in some of the judgments the CC understands the objective liability as in fact an absolute one—no exonerative factors (such as the contribution of the third person to the infringement, extraordinary circumstances or *vis maior*) can be taken into consideration by the administrative

⁶⁵ See point 4.1. of the paper.

⁶⁶ The CC judgment in case Kp 4/09, *supra* note 35. See similarly MIROSŁAW WINCENCIAK, *supra* note 48, at 36.

⁶⁷ The CC judgment in case Kp 4/09, *supra* note 35.

⁶⁸ The CC understood in such way *ratio legis* of an amendment to road law that change the character of liability for speeding from criminal to administrative one (*id.*).

agency whatsoever. In case P 64/07 the CC dealt with the question whether in the construction law for finding a violation and imposition of a sanction it is sufficient to establish that somebody started using given construction without informing the construction authority about the termination of work or without obtaining the administrative permission for the use of the construction. The permissibility of the individualization of fine has been rejected. Though the sanctions might have been in individual case very harsh, the CC accepted automatic administrative liability where the beginning of use of the property was a prejudging premise. Efficiency of the process seems to be underlying decisive factor in this case. Such approach is in line with the earlier CC's judgment in case P 19/06 where the liability under the same provision of construction law was assessed⁶⁹.

The approach taken in these two cases has been followed in the subsequent CC's judgments. For instance in case P 9/08 the CC found that the liability based on a sole fact that the user of controlled lorry is not able to present the receipt confirming the payment for the use of motorways is not in violation of the constitutional standards⁷⁰. The CC rejected the possibility of defense by delivering the proof of payment after the control is terminated (especially during appeal procedure) as well as the argument that such approach discriminate those who paid the fee (and could not prove it during control) from those who did not pay the fee at all. The CC expressed a view that the same, fixed amount of fine imposed in each of these two situations disciplines people to obey the law in question. Thus in this case the CC accepted the combination of automatic liability despite the fact that fine in question might have been considered to be very severe in case when in fact the payment was done. Such approach may be contrasted with ECJ's conclusion that "treating a person who has failed to have a license exchanged as if he were a person driving without a license, thereby causing criminal penalties (...) would also be disproportionate to the gravity of that infringement in view of the ensuing consequences"⁷¹. In these judgments the CC rejected also the possibility

⁶⁹ See also the CC judgment in case SK 52/04, *supra* note 33.

⁷⁰ The CC judgment in case P 9/08, *supra* note 33. See also the judgment of 9 July 2012, P 8/10.

⁷¹ Case C-193/94 *Skanavi* [1996] ECR I-00929, paragraph 37.

of relying on defense suggested in case Kp 4/09 that the violation in question might have been inevitable in given circumstances⁷².

Automatic administrative liability should be rejected in these areas of administrative law that involve cases that are substantially or factually complex. The competition law area where economic determinations play a crucial role is surely the one. In this area even if the liability is considered by Polish Supreme Court to be objective in a sense of being a non-fault based⁷³ the firms charged with an anticompetitive behavior may rely on both substantive⁷⁴ and factual⁷⁵ defenses. However, even in case of competition law it is possible to distinguish such its area that are more complex and such that are less and so differentiate the rigorism of liability rules. Cartels⁷⁶ are the only area of competition law where the substance of the practice is not complex—they are considered to have almost always anticompetitive effects⁷⁷. In order to build the efficient system on combating the cartels the U.S. Supreme Court considers them to be a per se unreasonable restraint of trade under Section 1 of the Sherman Act⁷⁸. This irrebuttable presumption highly limits the scope of defenses

⁷² See also MIROSLAW WINCENCIK, *supra* note 48, at 152.

⁷³ The Supreme Court judgment of 21 April 2011, III SK 45/10. The fault is taken into consideration at the later stage of imposition of sanction. The Supreme Court requires from the competition agency and courts the analysis whether the entity in question was aware that its behavior violated public law or could—as professional business actor—presuppose so. The imposition of administrative sanction is also precluded when the violation of law took place independently from the behavior of the entity that is accused of this violation; the Supreme Court judgment of 4 November 2010, III SK 21/10.

⁷⁴ In case of agreements restricting competition firms may rely on Article 6(3) of the Competition Act and so claim that this agreement has procompetitive justifications. Similar defense is possible when it comes to abuse of dominant position under Article 9 of the Competition Act.

⁷⁵ For instance they may offer counter-evidence to prove that they did not participated in the meeting during which supposedly the horizontal agreement restricting prices on the market was formed.

⁷⁶ Cartels are horizontal agreements between competitors usually to restrict prices, divide markets or allocate customers.

⁷⁷ “The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition”; *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927). For these reason anticompetitive effect – a category that involves complicated economic inquiry, does not have to be proven. Also under the Article 101(1) of the Treaty on the Functioning of the European Union (Official Journal C 83, 30.3.2010., p. 47) cartels in the EU law are prohibited only by its object (for such a conclusion when it comes to horizontal agreement in which competitors share the markets see the case 41/69 *ACF Chemiefarma* [1970] ECR 661, paragraphs 127-128).

⁷⁸ In case *Arizona v. Maricopa County Medical Society* the Supreme Court noted “(o)nce experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable. As in every rule of general application, the match between the presumed and the actual is imperfect. For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a full-blown inquiry might have proved to be reasonable”; *Arizona v. Maricopa Cnty. Med. Soc.*, 457 U.S. 332, 342-45 (1982).

available to the firms accused of forming a cartel. In fact they may only invoke facts that show that cartel was not formed or that they did not participate in it. After this is established presumption of per se illegality of the cartel is employed⁷⁹.

5.2. The scope of procedural rights

The scope of procedural rights is the other area that should be adjusted according to the complexity of the category of administrative law and severity of sanctions involved so as the procedural fairness and efficiency are properly (for this category of administrative law area) balanced.

Under Polish constitutional framework the level of procedural guarantees accorded depends on the prior determinations whether a law scrutinized by the Constitutional Court is criminal or administrative. Differently to the approach taken by the ECtHR⁸⁰, the CC understands the criminal notion in much narrower way. The proceedings leading to the imposition of administrative sanctions are classified by the CC as administrative and not criminal in nature, and so the CC concludes that Article 42 regulating at the constitutional level right of defense and presumption of innocence⁸¹ is not applicable to these proceedings⁸². In many cases the CC pointed directly that the application of Article 42 of the Constitution⁸³ is limited to criminal proceedings only⁸⁴.

⁷⁹ The US Supreme Courts notes “(t)hus the Court in *Standard Oil* recognized that inquiry under its rule of reason ended once a price-fixing agreement was proved, for there was a conclusive presumption which brought [such agreements] within the statute”; *Arizona v. Maricopa*, *supra* note 78 at 344-45.

⁸⁰ See point 4.3. of the paper.

⁸¹ See Article 42(2) and 42(3) respectively.

⁸² The CC judgment in case SK 3/08, *supra* note 33. See also the decision of 9 December 2008 in case P 52/07 and judgment in case P 19/06, *supra* note 33. The CC approach is followed in the jurisprudence of the courts dealing with the appeals against administrative decisions in which sanctions are imposed; see the judgment the Regional Court in Warsaw (the Court of Competition and Consumer Protection) of 3 October 2011, XVII AmA 8/10 and of 11 June 2012, XVII AmA 197/10. The application of Article 42 to the proceedings in which administrative sanctions are imposed is still raised in the constitutional complaints – see the pending constitutional complaint in case SK 15/12.

⁸³ Article 42(2) stipulates that “(a)nyone against whom criminal proceedings have been brought shall have the right of defense at all stages of such proceedings”.

⁸⁴ The CC judgment in cases: P 19/06, *supra* note 33; K 13/08, *supra* note 25 and SK 3/08, *supra* note 33. See also the judgments in cases: P 12/01, *supra* note 49; SK 52/04, *supra* note 33 and the decision in case P 52/07, *supra* note 82; for the proceedings concerning minor offences see the judgment of 8 July 2003, P 10/02. Article 42 of the Constitution is applicable in case of disciplinary proceedings as they are considered to have a repressive character – see the CC judgments of: 8 December 1998, K 41/97; 1 December 2009, K 4/08. See also the judgment of 3 November 2004, K 18/03, where Article 42 of the Constitution was found applicable in case constitutional control of the Act on the liability of collective entities for offences and the judgment of 28 November 2007 r., K 39/07, concerning judicial immunity proceedings. Article 42 of the Constitution is not applicable in case of administrative proceedings in which

Still the rejection of application of Article 42 in case of proceedings leading to the imposition of administrative sanctions does not mean that there are no constitutional grounds for the assessment whether the law under the constitutional scrutiny provides the adequate level of procedural guarantees so as the procedural fairness is not sacrificed for the efficiency of the proceedings (or other way round). Article 2 of the Constitution (discussed above as a main source for the identification of the values of procedural fairness) can provide a ground for this⁸⁵. For instance in case K 13/08 the CC despite finding the Article 42 of the Constitution as inapplicable in case of proceedings leading to the imposition of administrative sanctions in fishing industry relied on Article 2 of the Constitution to find a law in question to be unconstitutional. Similarly, in case P 29/09 Article 2 of the Constitution served as a source for the identification of the *ne bis in idem* principle and so enabled to strike down as unconstitutional the provisions of the criminal code and the social security system act that provided—in parallel—the liability for the non-payment of insurance premium⁸⁶. Thus the procedural guarantees associated with Article 42 may be referred on analogous basis—when this is dictated by the complexity of the category of administrative law area and the severity of sanctions in questions—also to administrative proceedings leading to the imposition of such sanctions⁸⁷.

It may be argued that the CC should follow the jurisprudence of the ECtHR in its flexible approach as to the level of guarantees accorded to the parties of the proceedings

financial sanctions are imposed; see the CC judgments in cases: SK 3/08, *supra* note 33; SK 52/04, *supra* note 33; K 13/08, *supra* note 25; P 19/06, *supra* note 33; P 52/07, *supra* note 82 and SK 75/06, *supra* note 42. In the area falling out of the scope of administrative sanctions the CC is ready to accept significant limitations of procedural rights if this is required by public interest (construction of motorways in Poland), see the CC judgment of 16 October 2012, K 4/10.

⁸⁵ See point 3. of the paper.

⁸⁶ The CC judgment in case P 29/09, *supra* note 52. The CC jurisprudence concerning *ne bis in idem* principle does not always correspond with the approach taken by the CC in case P 29/09. More often the CC accepts parallel criminal and administrative liability for the same behavior (the CC judgments of: 12 April 2011, P 90/08 and 9 October 2012, P 27/11) even if it observes that such cumulation may be considered controversial from the point of view of proportionality (the CC judgments of: 29 April 1998, K 17/97; 30 November 2004 SK 31/04; 12 April 2011, P 90/08). Also in the EU law the cumulation of administrative liability and criminal liability for the same behavior is not precluded. The ECJ held that Article 50 of the Charter of Fundamental Rights does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of VAT, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine (the case C-617/10 *Åklagaren*, *supra* note 59, paragraph 37).

⁸⁷ See the principle 6. of the *Recommendation* No. R (91) 1. of the Committee of Ministers of Council of Europe on Administrative Sanctions.

especially as the CC generally considers ECHR standards as an important source for the interpretation of constitutional provisions⁸⁸. Most probably the ECtHR would identify many of the proceedings classified in Polish law as an administrative as a criminal in a sense of Article 6 of the ECHR⁸⁹ but falling out of the scope of the hard core of criminal law. Following such approach by the CC might give the CC an opportunity for establishing what level of guarantees is necessary for the category of administrative law area in question.

Probably the best example of such approach may be found in the CC judgment in case Kp 4/09 concerning decriminalization of road law⁹⁰. In this case the CC may be seen to be unsatisfied with the way the lawmaker reconciled efficiency and procedural fairness⁹¹. In case Kp 4/09 the CC court (sitting full camera) underlined that decriminalization of the infringements of road law and the change of criminal sanctions to administrative ones aimed at achieving faster and more effective reaction for the violation of law cannot result in the deprivation of parties' procedural rights such as right to be heard⁹². The CC noted that even if the proceedings are run under the Code of Administrative Procedure⁹³ (and not the Code of Criminal Procedure⁹⁴) the parties

⁸⁸ See the CC judgments of: 18 October 2004, P 8/04; 19 July 2011 r., K 11/10; 11 December 2012, K 37/11.

⁸⁹ The nature of the offence for which administrative sanctions is imposed, general and abstract application of the norms prescribing administrative liability, both repressive and preventive character of administrative sanctions demonstrate that the proceedings leading to the imposition of these sanctions concern criminal charge in a sense of Article 6 of the ECHR. For the discussion in this respect when it comes to competition proceedings and market regulation proceedings in the energy, telecommunication, railway and postal sector in Poland, see M. Bernatt, *Prawo do rzetelnego procesu w sprawach konkurencji i regulacji rynku [Right to a Fair Hearing in Competition and Market Regulation Matters]*, 791(1) Państwo i Prawo 50, 55-58 (2012) and Anna 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*, 5(6) Yearbook of Antitrust and Regulatory Studies, 35, 35-55 (2012). Comparatively, for analysis of similar Italian competition law see *Menarini v Italy*, *supra* note 63, at paragraphs 38-44.

⁹⁰ See also point 5.1. of the paper.

⁹¹ The CC judgment in case Kp 4/09, *supra* note 35.

⁹² The CC invoked *Recommendation* No. R (91) 1. of the Committee of Ministers of Council of Europe on Administrative Sanctions.

⁹³ Administrative sanctions are imposed in Poland by administrative agencies in administrative proceedings. Divergent procedures prescribed in different legal acts regulate these administrative proceedings. These acts modify or exclude to some extent the application of the provisions of the Act of 14 June 1960 Code of Administrative Procedure (Journal of Laws 1960, No. 30, item 168, the CAP). However, this Code is applicable as to general principles of administrative proceedings (Articles 6-16), most notably the principle legalism and the principle of the objective truth, the obligation to provide information to the parties, the principle of active participation of the party in the administrative proceedings and the possibility to contest an administrative decision before the court circumscribe parties' rights to administrative proceedings. See Zbigniew Kmiecik, *Idea sprawiedliwości*

should be given an opportunity for a hearing so as the facts may be adequately established⁹⁵. Lack of access to a hearing where the person accused of violations of road law could present his/her views and so influence the result of the process was a reason for the CC to find a new law unconstitutional.

It may be disputed whether the area of administrative liability for road law violations involves high fines nowadays in Poland. In any case the facts of such cases are usually not complex. Because of that some limitations of parties' procedural rights in this area may well be accepted. There are however other areas of administrative law where the greater complexity may be seen as a reason for broader procedural guarantees. Competition law for the reasons given above is the one. In this area one can observe interesting jurisprudence of Polish Supreme Court that in fact requires the presence of such guarantees that are interpreted on constitutional level from Article 42 of the Constitution⁹⁶. Such approach is in line with the jurisprudence of the EU Courts which in case of competition proceedings conducted by the EU Commission require a presumption of innocence to be respected⁹⁷.

Also the EU Courts approach to the scope of privilege against self-incrimination is instructing for a discussion about the balance between the efficiency and procedural fairness. The EU Courts see the need for the observance of this privilege but they accept that its scope may be more limited when compared with the general standards

proceduralnej w postępowaniu administracyjnym [The Idea of Procedural Fairness in Administrative Proceedings], 10 Państwo i Prawo 55, 58-59 (1994).

⁹⁴ Proceedings conducted under the Code of Criminal Procedure offer a broader scope of procedural guarantees.

⁹⁵ This was seen by the CC to be required by the principle of objective truth prescribed in Article 7 of the Code of Administrative Procedure. According to this principle public administration bodies are expected to uphold the rule of law during proceedings and take all necessary steps to clarify the facts of a case and to resolve it.

⁹⁶ See the Polish Supreme Court judgments of: 14 April 2010, III SK 1/10; 1 June 2010, III SK 5/10; 21 September 2010, III SK 8/10; 21 October 2010, III SK 7/10; 10 November 2010, III SK 27/08; 21 April 2011, III SK 45/10. According to this line of cases judicial control of the administrative decision in which financial sanctions are imposed should meet the standards analogous to these applicable in case of criminal proceedings.

⁹⁷ Case C-199/92 P *Hüls v Commission*, [1999] ECR I-4287, paragraphs 149–150; case C-235/95 P *Montecatini v Commission*, [1999] ECR I-4539, paragraphs 175–176; case T-279/02 *Degussa v Commission*, [2006] ECR II-0000, paragraph 115. Differently, in the light of the CC jurisprudence the presumption of innocence is not protected in case of imposition of administrative sanctions, see the CC judgments in cases: SK 52/04, *supra* note 33; P 19/06, *supra* note 33; SK 3/08, *supra* note 33. See also the CC reasoning in judgments of: 17 December 2003 r., SK 15/02; 24 February 2010, K 6/09.

elaborated by the ECtHR in cases falling into the scope of hard core of criminal law⁹⁸. The EU Commission cannot compel the company under its investigation to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove⁹⁹. However, the Commission may “in order to preserve the useful effect of Article 11(2) and (5) of Regulation No 17 (EU law that regulated the competition proceedings—MB) (...) compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct”¹⁰⁰. Differently, under the general ECHR standards concerning purely criminal cases a compulsion to reveal incriminatory evidence against the will of the investigative party is impermissible¹⁰¹. Such slight departure by the EU Courts from the general ECHR standards may be a consequence of the character of competition law cases. Even if they are very complex they do not involve an extreme sanction: incarceration of individuals¹⁰². Thus more limited scope of principle against self-incrimination may be seen as adequate result of balancing the procedural fairness with the efficiency of the proceedings—full scope of the privilege would make the collection of evidence much more difficult and in some cases the violation of competition law could not be effectively proven.

⁹⁸ See case 374/87 *Orkem v Commission*, [1989] ECR 3283, paragraphs 34-35. See also the case C-238, 244–245, 247, 250, 251–251 and 254/99 *Limburgse Vinyl Maatschappij NV and others v Commission*, [2002] ECR I-8375. For ECHR standards compare the ECtHR's judgement of 17 December 1996 in case *Saunders v United Kingdom*, no. 19187/91, paragraphs 68-69. For a good discussion of the scope of privilege against self-incrimination in EU competition proceedings see Bartosz Turno, Agata Zawłocka-Turno, *Legal Professional Privilege and Privilege Against Self-Incrimination in EU Competition Law after the Lisbon Treaty - Is there a need for a substantial change?*, 5(6) Yearbook of Antitrust and Regulatory Studies 193 (2012).

⁹⁹ *Orkem*, supra note 98 at paragraph 35.

¹⁰⁰ *Id.*, paragraph 34.

¹⁰¹ In *Saunders v United Kingdom*, supra note 98, the ECHR noted that the right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (paragraph 68). The privilege does not extend to the use of material that exist independent of the will of the suspect such as, *inter alia*, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing (*id.*, paragraph 69).

¹⁰² In U.S. where the violation of Sherman Act may result in the incarceration the privilege against self-incrimination is guaranteed in case of criminal proceedings concerning individuals (but not companies).

5.3. Institutional arrangement of the system

The third area where the balanced, flexible approach is to be recommended concerns the institutional arrangement of the system under which administrative sanctions are imposed. Here two spheres are of special importance. The first one concerns impartiality—the level of the division of prosecutorial and adjudicative functions provided in the structure of administrative agency. The second concerns the scope of judicial review of the decisions imposing administrative sanctions. Again it may be argued that the more complex the category of given administrative law area is and the heavier the sanctions are the greater the division of above mentioned functions should be. Additionally the level of severity of sanctions and observance of procedural rules during administrative proceedings should be fully reviewed by the court. Instead the complicated, specialized character of the particular area of administrative law may be seen as an argument for the efficiency-driven approval for more deferential judicial review as to the substance of administrative expert-agencies decisions.

The question of division of prosecutorial and adjudicative functions has not been yet discussed in the jurisprudence of the Polish Constitutional Court concerning administrative sanctions. It seems to be a consequence of generalist approach to the classification of the Polish administrative sanctions system as an administrative and not criminal¹⁰³. The conclusion that generally administrative system is in accordance with the Constitution implies the acceptance of most common institutional shape of Polish administrative agencies where a single-person administrative body (more rarely a collective one) imposes a fine and where there is a very little room for internal division of prosecutorial and adjudicative functions. Notably, there are usually no legal counter-indications for having the same case-handlers being responsible for investigation, running the whole proceedings and preparing the final draft of the decision (there are no “internal walls” in the structure of the agency). The same person may be responsible for the initiation of the proceedings (raising charges), collection of evidence and preparation of the final draft of the decision (that is subject to acceptance by the head of the agency).

¹⁰³ See point 4.1. of the paper.

In the EU law the Commission has been very often criticized by the competition law scholars and practitioners for cumulation of prosecutorial and adjudicative functions¹⁰⁴. Some changes of the institutional model have been introduced in last years¹⁰⁵. However, many scholars call for further changes¹⁰⁶ even if the ECtHR has generally accepted the model in which the fines for violation of competition law (classified as criminal under the Article 6 of the ECHR) are imposed by the administrative agency (and not a court)¹⁰⁷. Comparative studies¹⁰⁸ prove that the imposition of sanctions when these two functions are divided (at least to some extent) does not necessarily have to bring a risk for the efficiency of the system. The U.S. Federal Trade Commission provides an example of a model that better guarantees the impartiality of decision-maker (at least at the initial level of the proceedings)¹⁰⁹ what is not considered to adversely affect FTC's performance. Polish legislator might take this into account when constructing internal structure of administrative agencies that have a power to impose administrative sanctions¹¹⁰.

When it comes to the scope of judicial review, the ECHR-standards require the observance of party's right to bring an administrative decision in which administrative sanctions are imposed before a judicial body that has full jurisdiction¹¹¹. Full jurisdiction

¹⁰⁴ See for example Ian S. Forrester, *Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures*, 34 ELR 817, 836-839 (2009). In U.S. the Federal Trade Commission despite offering greater institutional impartiality happens also to be criticised as acting as both prosecutor and a judge, see for instance David A. Balto, *The FTC at a Crossroads: Can It Be Both Prosecutor and Judge?* 28(12) Legal Background 1-4 (2013).

¹⁰⁵ Most importantly the mandate of hearing officer who polices the observance of companies' right of defense during the proceedings has been expanded.

¹⁰⁶ See for example Renato Nazzini, *supra* note 61, at 999-1005.

¹⁰⁷ *Menarini v Italy*, *supra* note 63, at paragraph 59.

¹⁰⁸ See Tadeusz Skoczny, *Modele instytucjonalne ochrony konkurencji na świecie – wnioski dla Polski [The Institutional Models of the Protection of Competition in the World – Conclusions for Poland]*, 2 Ruch Prawniczy, Ekonomiczny i Socjologiczny, 75, 94-95 (2011).

¹⁰⁹ Initial decision is made by the Administrative Law Judge (the ALJ) that is independent both from FTC counsels filing the complaint and the FTC's Commissioners. The latter have a right to overturn in appeal the decision of the ALJ. In such situation the U.S. court of appeals may analyze the appealed FTC's decision more closely, *California Dental Association v. FTC*, 128 F.3d 720, 725 (9th Cir.1997).

¹¹⁰ For such *de lege ferenda* postulates with regards to institutional arrangement of Polish competition authority see: Maciej Bernatt, Tadeusz Skoczny, *Publicznoprawne wdrażanie reguł konkurencji w Polsce. Czas na zmiany? [Public Enforcement of Competition Rules in Poland. Time for Changes?]* in EUROPEIZACJA PUBLICZNEGO PRAWA GOSPODARCZEGO [EUROPEIZATION OF PUBLIC ECONOMIC LAW], HANNA GRONKIEWICZ-WALTZ, KRZYSZTOF JAROSZYŃSKI (EDS.) 4-5 (2011).

¹¹¹ Generally see the ECtHR judgments in cases: *Albert and Le Compte v Belgium* of 10 February 1983, no. 7299/75, 7496/76, paragraph 29; *Gautrin and others v France* of 20 May 1998, no. 21257/93, paragraph 57; *Frankowicz v Poland* of 16 December 2008, no. 53025/99, paragraph 60. Specifically for judicial

means that a court should be entitled, and actually examine all the relevant facts as well as have the power to quash the administrative decision in all its aspects (facts and law)¹¹². The Polish model of judicial control exercised by the administrative courts limited to legality of the administrative decision is considered by the ECtHR to be in accordance with the requirements of Article 6 of the ECHR¹¹³. However, such judicial control has to be exercised in practice, it cannot be only theoretical or illusory¹¹⁴. In case Kp 4/09 the CC rightly pointed out that judicial control limited to legality of the administrative decision imposing the fine for road law violation is insufficient when this law does not provide any premises characterizing the administrative liability that could be controlled by the administrative court¹¹⁵. A judicial review may also become illusory when administrative law in question points that administrative law prescribes an automatic administrative liability¹¹⁶. In such case a sole fact of violation of administrative law forces the court to uphold the decision even if exonerative circumstances (such as vis maior or third person fault) could actually be identified by a court.

On the other hand balanced, flexible approach to judicial review under which efficiency of the proceedings is also taken into consideration should not be rejected. The ECHR requirement of full jurisdiction does not seem to exclude a U.S.-style deferential standard of review of this part of the administrative decision that requires administrative agencies' expertise and special knowledge in the given area of administrative law¹¹⁷. In U.S. when reviewing administrative agency's construction of

control over administrative agencies see judgments: *Bendenoun v France*, supra note 60, at paragraph 46; *Umlauf v Austria* of 23 October 1995, no. 15527/89, paragraphs 37-39; *Schmautzer v Austria* of 23 October 1995, no. 15523/89, paragraph 34; *Janosevic v Sweden* of 21 May 2003, no. 34619/97, paragraph 81. See also Koen Lenaerts, Jan Vanhamme, *Procedural Rights of Private Parties in the Community Administrative Process*, 34 CMLR 531, 561-562 (1997).

¹¹² The ECtHR judgments in cases: *Bendenoun v France*, supra note 60, paragraph 46; *Janosevic v Sweden*, supra note 111, paragraph 81. The principle of full jurisdiction is applicable only in case of decisions taken by administrative authorities which do not satisfy the requirements of Article 6(1) of the ECHR.

¹¹³ The ECtHR judgment of 4 October 2001 in case *Potocka v. Poland*, no. 33776/96, paragraphs 55-59; see also the ECtHR judgment of 21 July 2011 in case *Sigma Radio Television Ltd v. Cyprus*, no. 32181/04, paragraphs 153-154. The court should have the possibility to determine the central issue in a case, the ECtHR judgment of 14 November 2006 in case *Tsfayo v. UK*, no. 60860/00, paragraph 48.

¹¹⁴ See ECtHR judgment of 13 May 1980 in case *Artico v. Italy*, no. 6694/74, paragraph 33.

¹¹⁵ See the CC judgment in case Kp 4/09, supra note 35.

¹¹⁶ See point 5.1. of the paper.

¹¹⁷ The ECtHR judgment of 22 November 1995 in case *Bryan v. UK*, no. 19178/91, paragraphs 44-48.

statute which it administers the courts defer to agency interpretation of this statute unless the interpretation is unreasonable¹¹⁸. When the interpretation is reasonable the courts cannot substitute it with its own, different one. Expert-character of administrative agencies required by specialized and complex character of cases decided by these agencies is an argument for accepting such deferential standard of review¹¹⁹. It may improve the efficiency of the proceedings as it delegates the power to decide the issue that requires special knowledge to those who this knowledge have. More limited, deferential scope of judicial review of decisions can be more readily approved when prosecutorial and adjudicative functions are divided during administrative phase of the proceedings¹²⁰.

The approval of deferential standard additionally supports the argument that the courts should have a right to decide what the appropriate level of the amount of sanction is. Neither the administrative agencies nor the legislator should be given a full deference in this respect. Most favorably the courts should review the question of sanction (necessity of its imposition and its amount) on de novo basis. EU law provides a good example of that¹²¹. Differently the CC's reasoning in judgments in cases P 64/07 and P 19/06¹²² excludes in fact the judicial insight as to the amount of sanction. In these judgments the CC accepted that the amount of administrative fine may be fully determined by the calculation provided in the construction law. In case P 64/07 the CC rejected possibility of individualization of the amount of administrative sanction on the basis of time (the duration of the use of the construction without permission), the size of

¹¹⁸ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984).

¹¹⁹ On the basis of the ECtHR ruling in case *Menarini v. Italy*, *supra* note 63, it is argued that deferential standard of review meets the requirements of full jurisdiction also in case of cases of criminal character in a sense of Article 6 of the ECHR, see Renato Nazzini, *supra* note 61, at 985-986. For different discussion see Damien M.B. Gerard, *Breaking the EU Antitrust Enforcement Deadlock: Re-empowering the Courts?* 36 ELR 457, 478-479 (2011).

¹²⁰ *Bryan v. UK*, *supra* note 117, paragraph 47. According to Renato Nazzini "(T)he admissibility of a two-tier enforcement system whereby the administrative decision-maker is subject to deferential judicial review depends on the degree to which the first instance decision-maker already complies with the requirements of independence and impartiality"; Renato Nazzini, *supra* note 61, at 1005.

¹²¹ Article 31 of the Council Regulation (EC) No 1/2003 of 16 December 2002 on implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Official Journal L 1, 04.01.2003, pp.1-25) is an example of such rule. It provides that "(t)he Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed".

¹²² See also point 5.1. of the paper

the construction or financial situation of the entity that is punished¹²³. Similarly in case P 19/06 the CC accepted fixed size of the sanction independent from individual circumstances of given infringement¹²⁴.

The more complex the category of administrative law area is the closer should be judicial control with respect to possible procedural infringements committed by administrative agencies in the course of administrative proceedings. This especially true in these areas where the courts defer to administrative agencies determinations based on their expert, economic knowledge. In the context of Polish system of administrative sanctions such judicial control should be exercised not only by administrative courts but also by the Court of Competition and Consumer Protection (a court that has jurisdiction over appeals against decisions imposing sanctions of the competition, energy, telecommunications, postal and railway transport agencies) even if it acts as a first instance court deciding the merits of a case¹²⁵. The complex character of competition and market regulatory cases (its complicated evidentiary nature) requires judicial control over the course of administrative proceedings before the competition and regulatory agencies¹²⁶. Such observation finds its support in the ECHR standards. The ECtHR expects the judiciary to not be limited to assess whether the impugned decision is compatible with substantive law¹²⁷. Courts shall also to control and be empowered to set aside an administrative decision in its entirety or in part, if it is established that procedural requirements of fairness were not met in the proceedings which led to its adoption¹²⁸.

¹²³ Such approach was criticized by the dissenting CC's judge Marek Mazurkiewicz who noted that the same fine may be imposed on the owner of small shop with limited financial resources and the owner of big shopping center.

¹²⁴ See also the CC judgment in case SK 52/04, *supra* note 33.

¹²⁵ The Court of Competition and Consumer Protection is a first-instance, civil court (not administrative one). It is entitled to change in its judgment the decision of the administrative agency. Differently Polish administrative courts after establishing the illegality of the decision are entitled only to annul an administrative decision and remand a case.

¹²⁶ The practice of the Court of Competition and Consumer Protection has been not satisfying. The Court has not been exercising sufficient control over possible breach of procedural rules especially when it comes to the proceedings before the Polish competition authority, see Maciej Bernatt, *supra* note 63, at 266-267. The judgment of Supreme Court of 3 October 2013, III SK 37/12, may be expected to bring improvements in this respect. EU courts are concentrated on possible procedural infringements during the proceedings before the EU Commission; see for instance case T-44/90 La Cinq SA, [1992] ECR II-1, paragraph 86.

¹²⁷ *Potocka v. Poland*, *supra* note 113, paragraphs 55 and 58.

¹²⁸ *Id.*

6. Conclusion

The proceedings leading to the imposition of administrative sanctions should be efficient. However, for the sake of efficiency the need for the observance of procedural fairness in these proceedings should not be sacrificed. Also argument for efficiency should not lead to the construction of liability rules in a way that excludes any possibility of exoneration.

This paper may be seen as a call to the Polish lawmaker and the Polish Constitutional Court for a more flexible approach in the area of procedure and liability rules governing the imposition of administrative sanctions in Poland. The scope of procedural guarantees provided to the parties, institutional arrangement of the system and the rigorism of rules governing administrative liability should not be determined in abstracto for the whole area of administrative law¹²⁹. Rather Polish law-maker when passing or amending the administrative laws and the Constitutional Court when deciding on the constitutionality of the ones in force should condition the determination on the complexity of the category of administrative law area and the severity of sanctions that may be imposed by the administrative agencies. There are constitutional grounds as well international and comparative arguments for the introduction of such balanced, flexible approach. In areas of administrative law that involve non-complicated, usually numerous and repetitive cases and where the sanctions are not very harsh the scope of parties' procedural rights may be more limited and the rules governing the imputation of liability less favorable to the parties. By contrast, where the cases are complex (for instance very complicated from the economic point of view) and the sanctions very severe the procedural guarantees should be broader and the parties should be given an opportunity to invoke the exonerative circumstances that might show they did not violate the administrative law. Tailor-made rules are needed.

¹²⁹ The distinction between criminal and administrative regimes elaborated by the Polish Constitutional Court does not solve a problem of how to adapt the level of procedural guarantees and rules of imputation of liability to different in terms of complexity and severity of sanctions areas of administrative law.