Studia Iuridica 100
ISSN 0137-4346; e-ISSN 2544-3135

https://doi.org/10.31338/2544-3135.si.2024-100.3

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GUILT AS A PREMISE OF ADMINISTRATIVE LIABILITY OF A PENAL CHARACTER[1]

Abstract

Liability for offences subject to administrative monetary sanctions formally belongs to administrative law, where the prevailing position is that guilt does not constitute a prerequisite for this liability. However, the punitive nature of some sanctions at the same time places this kind of liability under broadly understood criminal law (penal law). Their penal nature raises doubt as to the legitimacy of the aforementioned position concerning guilt.

The aim of this article is to answer the question whether guilt should constitute a premise for administrative liability of a penal nature. First, analysis of the standards in the matter developed in the jurisprudence of the Polish Constitutional Tribunal, the European Court of Human Rights, and the Court of Justice of the European Union will be presented. Next, selected provisions of administrative law in force will be examined to answer the question whether they are compatible with the aforementioned standards.

[1] This article was prepared within the project financed by National Science Centre, Poland, grant no. DEC-2018/30/E/HS5/00738.

KEYWORDS

principle of guilt, *nullum crimen sine culpa*, administrative-criminal liability, presumption of innocence

SŁOWA KLUCZOWE

zasada winy, *nullum crimen sine culpa*, odpowiedzialność administracyjno-karna, domniemanie niewinności

I. INTRODUCTION

Analysis of the standards related to administrative liability of a penal character (hereinafter called also administrative-criminal liability)[2] requires examination of the assumptions included in the name of this liability. The liability for administrative offences, especially those which entail administrative monetary sanctions, is often of a penal nature. Formally it is classified as administrative liability, but because of other criteria accompanying its assessment it is considered to be criminal in the broad sense of the word (penal liability)[3]. Although the need to go beyond the formal classification of this kind of liability in order to properly assess it is not disputed in the jurisprudence of the European Court of Human Rights (ECtHR)[4], and dominates in the jurisprudence of the Court of Justice of the European Union (ECJ)[5], it it still problematic in the jurisprudence of the Polish Constitutional Tribunal (CT)[6].

[2] The term was proposed in the Polish literature by D. Szumiło-Kulczycka, *Prawo administracyjno-karne*, Kraków 2004.

[3] See judgment of the ECtHR of 8 June 1976, *Engel and others v. Netherlands*, Application no. 5100/71, paras 80–82. For more see A. Błachnio-Parzych, *Zbieg odpowiedzialności karnej i administracyjno-karnej jako zbieg reżimów odpowiedzialności represyjnej*, Warsaw 2016, pp. 66–76.

[4] As examples of the jurisprudence of the ECtHR, see: 23 July 2002, *Janosevic v. Sweden*, Application no. 34619/97, paras 67–68; 23 November 2006, *Jussila v. Finland*, Application no. 73053/01, para. 38; 4 March 2014, *Grande Stevens and others v. Italy*, Application no. 18640/10, 18647/10, 18663/10, 18668/10, 18698/10, para. 98.

[5] See judgments of the ECJ of: 5 June 2012, *Bonda*, C-489/10, ECLI:EU:C:2012:319, para. 37; 26 February 2013, *Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:280, para. 35; 20 March 2018, *Luca Menci*, C524/15, ECLI:EU:C:2018:197, para. 26.

[6] See as examples judgments of the CT of: 29 April 1998, K 17/97, OTK 1998/3/30; 7 July 2009, K 13/08, OTK-A 2009/7/105.

The lack of a clear position in this matter and noticeable disregard of the jurisprudence of the ECtHR[7] has resulted in an insufficient degree of recognition of the need to treat such cases differently from other administrative cases. However, the postulate formulated in the Polish literature[8] to introduce general provisions concerning this liability contributed to the introduction in 2017 of Chapter VIa, "Administrative monetary sanctions"[9] to the Code of Administrative Proceedings (CAP)[10]. The drafters of the amendments explained that administrative monetary sanctions tend to be as severe as penalties imposed for crimes. The lack of general rules on the imposition and the assessment of the sanctions results in a significant difference under Polish law between the situation of the entities in criminal proceedings and in administrative proceedings[11].

The particular subject of interest in this article is guilt as a premise of administrative-criminal liability. Although there are several concepts of guilt in the theory of criminal law, the common ground seems to be the position that criminal liability can only be attributed to a person whose behaviour was within the sphere of the person's free choice[12]. Guilt legitimizes punishment and influences

[7] See for example M. Błachucki, (in:) M. Błachucki (ed.), *Administracyjne kary pieniężne w demokratycznym państwie prawa,* Warsaw 2015, pp. 5–6. The author does not take into account requirements regarding this kind of liability resulting from the case law of the ECtHR. He mistakenly claims that the position indicating the need to take into account the criminal nature of liability for certain offences under the administrative law is based on the assumption that a "sanction" does not belong to the construction of an administrative norm. At the same time, the criticized position does not negate the presence of sanctions in administrative norms. According to it, if the sanction is penal in nature, the guarantees resulting from its character must be maintained to a certain extent. Furthermore, Błachucki raises an argument about the need to protect "tradition" in administrative law, which does not take into consideration the increase of punitive measures in administrative sanctions since the 1990s. Much more important than "tradition" is the need to change this aspect of administrative law in a direction consistent with the ECHR, thus making it an instrument which is not only effective, but also respects human rights.

[8] W. Radecki, *Kary pieniężne w polskim systemie prawnym czy nowy rodzaj odpowiedzialności karnej?*, 'Przegląd Prawa Karnego' 1996, Nos 14-15, p. 8; M. Król-Bogomilska, *Administracyjne kary pieniężne – kierunki rozwoju*, (in:) B. Namysłowska-Gabrysiak, K. Syroka-Marczewska, A. Walczak-Żochowska (eds), *Prawo wobec problemów społecznych. Księga Jubileuszowa Profesor Eleonory Zielińskiej*, Warsaw 2016, pp. 195–198.

[9] Dz. U. (Journal of Laws) 2017, item 935.

[10] Consolidated text, Dz. U. (Journal of Laws) 2022, item 2000, as amended.

[11] Explanatory memorandum to the governmental draft act on amendments of acts – Code of administrative proceedings and other acts, VIII term of the Sejm, parliamentary print no. 1183.

[12] W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna*, Kraków 2010, p. 314. For more about the premise of attributing guilt, see J. Lachowski, (in:) R. Dębski (ed.), *Nauka o przestępstwie. Zasady odpowiedzialności. System Prawa Karnego.* Vol. 3, Warsaw 2017, pp. 693–699. The scope of this article does not allow an analysis of the concept of guilt concerning corporate criminal liability. However, the issue is very important with respect to the grounds for administrative-criminal liability, because many entities subjected to the kind of liability are often corporations. For more on this issue, see: M. Król-Bogomilska, *Zwalczanie karteli w prawie antymonopolowym i karnym*, Warsaw 2013, pp. 191–194.

its severity[13]. It also makes the preventive function effective. This latter observation is especially important as regards administrative-criminal liability, because one of the arguments against making guilt a premise of this kind of liability is its preventive function[14]. Meanwhile, if the punishment is to affect future behaviour of the same or similar other entities, it should depend on whether the perpetrator of the behaviour had the opportunity to make a free decision as to the alleged unlawful conduct. Otherwise, its influence on others would not matter, because the liability for future infringements of that law would not depend on the free choice of the perpetrators of the infringements.

Considering the above, it is reasonable to ask the question whether guilt should constitute a premise of administrative-criminal liability. To answer this question, the standards developed in the matter in the jurisprudence of the Polish Constitutional Tribunal, the European Court of Human Rights, and the Court of Justice of the European Union will be presented. Next, the administrative law in force will be analysed to examine whether guilt constitutes a premise for this kind of liability, and to what extent. This discussion will make it possible to formulate conclusions as to whether the current state of affairs is compatible with the standards developed by the aforementioned courts.

II. GUILT AS A PREMISE OF ADMINISTRATIVE-CRIMINAL LIABILITY IN THE JURISPRUDENCE OF THE POLISH CONSTITUTIONAL TRIBUNAL, THE EUROPEAN COURT OF HUMAN RIGHTS, AND THE COURT OF JUSTICE OF THE EUROPEAN UNION

According to the standards of criminal liability, guilt constitutes a basic premise (*nullum crimen sine culpa*). While this requirement is not expressed directly in the Polish Constitution, it is however implicit in its Articles 2, 30, 40 and 42(1) and (3). Pursuant to Article 42(1) of the Constitution, only a person who has committed an "act" shall be held criminally responsible. A behaviour constitutes an act when it depends on the will of its perpetrator[15]. On the grounds of Article 42(3) of the Constitution, in which the presumption of innocence was formulated, the strict correlation between the presumption of innocence and guilt is under-

[13] J. Lachowski, 2017, *op.cit.*, pp. 699–702.

[14] See judgment of the CT of 7 July 2009, K 13/08, OTK-A 2009/7/105.

[15] P. Cychosz, *Konstytucyjny standard prawa karnego materialnego w orzecznictwie Trybunału Konstytucyjnego,* Kraków 2017, p. 353; P. Kardas, *Prawo karne w świetle standardów konstytucyjnych*, 'Państwo i Prawo' 2022, No. 10, p. 93. See also judgments of the CT of: 3 November 2004, K 18/03, OTK-A 2004, no. 10, item 103; 8 January 2008, P 35/06, OTK-A 2008, no. 1, item 1.

scored. The presumption of innocence applies to all proceedings in which guilt is a premise of liability[16]. Inasmuch as administrative-criminal liability refers not only to natural persons, it is important to note that this provision also relates to the liability of corporations and other kinds of collective entities[17]. The reason why Article 2 of the Constitution is pointed out as the source of the principle of guilt followed from the principle of social justice. The imposition of punishment without regard to guilt would be unfair[18]. Furthermore, the imposition of punishment without proving guilt would mean that in inflicting a punishment it does not matter whether the act constituted an act of self-determination[19]. Such punishment would infringe on the principle of human dignity provided for in Article 30 of the Polish Constitution. In addition, Article 40 of the Constitution prohibits torture and cruel, inhuman, or degrading treatment or punishment. The infliction of punishment without taking into account the possibility or impossibility of choice in the behaviour subject to punishment would constitute such treatment[20].

To summarise, the lack of a direct expression of the principle of guilt is not an obstacle to the recognition of guilt as a premise of criminal liability. The problem discussed in this article is whether, and to what extent, it is also a premise for the kinds of liability of a penal character other than liability for crimes. The meaning of the phrase "criminal liability" as used in the Polish Constitution is not interpreted in a uniform way by the CT. Although the position that it should be understood in a strict way – i.e. related to crimes – has been expressed[21], the opposite position – according to which the CT opted for its autonomous understanding – has also been frequently presented[22]. Thus the guarantees provided for a finding that criminal liability understood in an autonomous way encompasses not only liability for crimes, but also for other kinds of penal liability.

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[16] M. Florczak-Wątor, (in:) P. Tuleja (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw 2019, pp. 151, 154.

[17] Judgment of the CT of 3 November 2004, K 18/03, OTK-A 2004, no 10, item 103. As regards the meaning of the term "collective entity", see Article 2 of the Act of 28 October 2002 on Criminal Liability of Collective Entities for Punishable Offences, Dz. U. (Journal of Laws) 2020 item 358, as amended.

[18] J. Lachowski, 2017, *op.cit.*, p. 700.

[19] A. Wąsek, *Kodeks karny. Komentarz.* Vol. I, Gdańsk 2000, p. 37; M. Peno, *Problem sposobu pojmowania i roli winy w prawie karnym,* 'Czasopismo Prawa Karnego i Nauk Penalnych' 2006, No. 3, p. 112. *Ibidem*.

[20] A. Wąsek, 2000, *op.cit.*, p. 37; P. Cychosz, 2017, *op.cit.*, p. 356.

[21] Judgments of the CT of: 15 January 2007, P 19/06, OTK-A 2007/1/2; 21 October 2015, P 32/12, OTK-A 2015/9/148 (see also the dissenting opinions to the judgment of judges W. Hermeliński and T. Liszcz).

[22] See judgments of: 8 July 2003, P 10/02, OTK-A 2003/6/62; 3 November 2004, K 18/03, OTK-A 2004, no. 10, item 103; 26 November 2003, SK 22/02, OTK-A 2003/9/97; 3 June 2014, K 19/11, OTK-A 2014/6/60; of 21 April 2015, P 40/13, OTK-A 2015/4/48; 2 April 2015, P 31/12, OTK-A 2015/4/44.

However, insofar as regards guilt as a premise for administrative liability of a penal character, two dominant positions exclude the application of Article 42 of the Constitution. According to the first position, the preventive function of administrative sanctions speaks for their automatic application. In order to impose an administrative sanction the authority has only to prove an infringement of the law, and it does not matter whether the infringement was culpable[23]. This line of judgments often presents the argument that Article 42 of the Constitution should not be applied to this kind of liability, because the essence of administrative sanctions is not to punish, but to prevent legal goods from future infringements[24]. This argument is however based on an incorrect understanding of the role of criminal sanctions. They do not have only a retributive function, but they also serve to prevent others and the perpetrator of the offence from repeating the same offence. These two functions are equivalent[25]. This also regards administrative sanctions of a penal character. Although their stated purpose is prevention, this purpose is realized through the application of a sanction. In this regard there are no differences in the matter between purely criminal and administrative sanctions of a penal nature.

As regards the second line of the CT's jurisprudence, the kind of liability cannot be either absolute or purely objective[26]. According to one of the first judgments of the CT concerning kinds of liability (of 1 March 1994, U 7/93), there must be a subjective element of fault with regard to an administrative punishment. It found that "[a]n entity that fails to comply with an administrative obligation must therefore be able to defend itself and demonstrate that the failure to comply with the obligation is the result of circumstances for which it is not responsible." The lack of such a possibility is incompatible with the principle of a democratic state ruled by law[27]. Although this concept rejects the application of Article 42 of the Constitution and – in consequence – the application of the presumption of innocence, it does not isolate this kind of liability from guilt. Guilt matters, but the burden to prove circumstances indicating a lack of guilt rests with the perpetrator of the infringement of law. The grounds for this position lie in Articles 2 and 31(3) of the Constitution.

Turning now to the European Convention on Human Rights (ECHR), there is also no specific provision concerning the *nullum crimen sine culpa* principle.

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[23] See judgments of: 24 January 2006, SK 52/04, OTK-A 2006/1/6; 31 January 2008, SK 75/06, OTK-A 2008/2/30; 5 May 2009, P 64/07, OTK-A 2009/5/64.

[24] See judgments of the CT of: 7 July 2009, K 13/08, OTK-A 2009/7/105; 15 January 2007, P 19/06, OTK-A 2007/1/2; 31 January 2008, SK 75/06, OTK-A 2008/2/30; 5 May 2009, P 64/07, OTK-A 2009/5/64.

[25] See Article 53(1) of the Polish Criminal Code (consolidated text, Dz. U. (Journal of Laws) 2022, item 1138).

[26] See judgments of the CT of: 4 July 202, P 12/01, OTK-A 2002/4/50; 1 July 2014, SK 6/12, OTK-A 2014/7/68; 24 January 2006, SK 52/04, OTK-A 2006/1/6.

[27] OTK 1994/1/5.

However, similarly to the Polish Constitution, the ECHR also provides for the presumption of innocence in Article 6(2) and for the principle of legality in Article 7. They are considered to be the source of the principle of guilt. Referring to these two provisions, the ECHR has underlined that no one can be criminally liable for an act of another person[28]. It is unacceptable to be punished for a deed performed by another person without proving the guilt of the punished one.

As regards the presumption of innocence, generally the reversal of the burden of proof to the detriment of the accused constitutes its infringement[29]. The ECtHR has underlined the importance of the presumption of innocence, which constitutes a part of the general notion of a fair hearing[30]. The aim of the presumption of innocence is to ensure that no person may be found guilty of a criminal offense until proven guilty in court[31]. The burden of proof rests with the accuser and any doubt should be interpreted in favour of the accused[32].

However, the ECtHR declares in the same judgments that the right to be presumed innocent is not absolute[33]. There are presumptions of fact and presumptions of law in every legal system. They are not prohibited by the ECHR if they remain within "certain limits". The factors which are important for drawing the limits are the importance of "what is at stake" and maintaining the right of the defence[34]. Insofar as regards the criterion of the importance of "what is at stake", the gravity of the offense and the severity of punishment are taken into consideration[35]. The next condition for ensuring compliance with the prescriptions of Article 6(2) ECHR is to assure the accused person the opportunity to defend him/herself; to disprove the truth of the evidence; or to prove that it was not possible to prevent the facts because of his or her mental state or some other reason. The

[28] This problem was recognized especially in two cases against Switzerland, in which heirs were fined for offences committed by the testator. See the judgments of the ECtHR of 29 August 1997, cases: *A.P., M.P. and T.P. v. Switzerland*, Application no. 19958/92; *E.L., R.L. and J.O.-L. v. Switzerland*, Application no. 20919/92.

[29] Judgment of the ECtHR of 8 February 1996, *John Murray v. the United Kingdom*, Application no. 18731/91.

[30] Judgment of the ECtHR of 5 July 2001, *Phillips v. the United Kingdom*, Application no. 41087/98.

[31] Judgment of the ECtHR of 28 October 2004, *Y.B. and others v. Turkey*, Application no. 48173/99 and 48319/99, para. 43.

[32] Judgments of the ECtHR of: 25 March 1983, *Minelli v. Switzerland*, Application no. 8660/79; 6 December 1988; *Barber and others v, Spain*, Application no. 10590/83.

[33] Judgments of the ECtHR of: 17 December 1996, *Saunders v. the United Kingdom*, Application no. 19187/91, para. 68; 5 July 2001, *Phillips v. the United Kingdom*, Application no. 41087/98, para. 40.

[34] Judgments of the ECtHR of: 7 October 1988, *Salabiaku v. France*, Application no. 10519/83 paras 28–30; 17 December 1996, *Saunders v. the United Kingdom*, Application no. 19187/91, para. 68-69; 5 July 2001, *Phillips v. The United Kingdom*, Application no. 41087/98, paras 40–41.

[35] Judgment of the ECtHR of 25 September 1992, *Pham Hoang v. France*, Application no. 13191/87, para. 21.

burden of proof is reversed, to the detriment of the person whom the objective evidence concerns. However, there is no infringement of the presumption of innocence when such a person has the opportunity to disprove the assumptions based on these facts[36].

The lack of the principle of guilt being formulated as a substantive principle in the ECHR influences the way in which the protection of this principle is presented in the jurisprudence of the ECtHR. It is strictly connected with the right to defence of the person whose guilt is presumed based on objective evidence[37]. Another procedural requirement underlined by scholars in the matter is the impartiality of the court[38].

Insofar as regards the EU law, there is no substantive principle of guilt either. However, the principle is derived from the presumption of innocence, which is formulated in Article 48 of the Charter of Fundamental Rights of the European Union (CHFR). The significance of the principle was recognized even before the adoption of the Charter, as it was part of the general principles of the European Union. Furthermore, the importance of the principle was underlined in EU law along with the adoption of the Directive (EU) 2016/343 of the European Parliament and the Council of 9 March 2016 on strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings[39].

As regards the jurisprudence of the ECJ, the obligation to respect the presumption of innocence is especially underlined in competition cases[40]. In its judgment of 8 July 1999 in the case of Hüls AG v. Commission of the European Communities, C-199/92 P, the ECJ stated that because of the nature of the infringements of

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[36] However, it should be underlined that the above-mentioned position of the ECtHR was taken in judgments which were not unanimous. Judges who expressed dissented opinions supported a definition of the presumption of innocence based on a stricter basis. They criticized relaxation of the protection of this principle. See: Concurring opinion of Judge Thomassen to the judgment of the ECtHR of 23 July 2022, *Janosevic v. Sweden*, Application no. 34619/97.

[37] P. H. van Kempen, J. Bemelmans, *EU Protection of the Substantive Criminal Law Principles of Guilt and* ne bis in idem *under the Charter of Fundamental Rights: Underdevelopment and Overdevelopment in an Incomplete Criminal Justice Framework*, 'New Journal of European Criminal Law' 2018, Vol. 9, p. 255.

[38] M. Viering, (in:) P. Van Dijk, F. Van Hoof, A. Van Rijn, L. Zwaak (eds), *Theory and Practice of the European Convention on Human Rights,* Antwerpen-Oxford 2006, p. 625.

[39] OJ L 65, 11.3.2016, p. 1–11. According to Article 6(2) of the Directive: "Member States shall ensure that the burden of proof for establishing the guilt of suspects and accused persons is on the prosecution (…)."

[40] Judgments of the ECJ of: 8 July 1999, *Commission v. Anic Partecipazioni*, C-49/92 P, ECLI:EU:C:1999:356, paras. 145, 204; 11 December 2007, *Autorità Garante della Concorrenza e del Mercato v. Ente tabacchi italiani – ETI SpA and others and Philip Morris Products SA and others v. Autorità Garante della Concorrenza e del Mercato and others*, C-280/06, ECLI: EU:C:2007:775, para. 39; 10 September 2009; *Akzo Nobel NV and Others v Commission of the European Communities*, C-97/08 P, ECLI: EU: C: 2009:536, para. 56.

Article 81 EC and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies to the procedures relating to the infringements[41].

Similar to the jurisprudence of the ECtHR, the ECJ does allow for the relaxation of the principle in some instances. In its judgment of 10 July 1990, C-326/88[42], the ECJ accepted the application of criminal strict liability when the examined liability is used to protect an important public interest. The premises of this liability as based on the concept of strict criminal liability were assessed as proportionate to the objective pursued[43]. The ECJ noted that in many cases the lack of guilt as a premise for finding criminal liability is examined from the perspective of the principle of proportionality, not the *nulla poena sine culpa* principle. Such a position is accompanied by the lack of a clear assessment of the penal character of the liability[44].

Even in competition cases the ECJ took position that an error with regard to the lawfulness of conduct does not matter if the perpetrator of the conduct could not have been unaware of the anti-competitive nature of that conduct[45]. In its judgment of 23 December 2009 in the case of Spector Photo Group NV, Chris Van Raemdonck v. Commissie voor het Bank-, Finance- en Assurantiewezen (CBFA), C-45/08[46], the ECJ interpreted Article 2(1) of Directive 2003/6/EC of the European Parliament and the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) as legitimizing the presumption that the transaction of a person who is in possession of inside information constitutes the use of the information. No proof is required that the person took advantage of the inside information. The only required elements are the possession of the information and a transaction which was performed at the same time. However, the ECJ underlined in its judgment that the right to defence should be provided to that person, in particular the right to rebut that presumption.

To summarise the above review of the jurisprudence of the selected courts, the position of the CT is not uniform and it is difficult to formulate a clear standard in the matter based on its jurisprudence. Insofar as regards the jurisprudence of the European tribunals, the ECtHR and the ECJ generally underline the importance of the principle of proving guilt. However, their position taken in relation to the presumption of innocence in specific judgments may lead to the conclusion

[41] ECLI:EU:C:1999:358, paras 149–150.

[42] *Anklagemyndigheden v. Hansen & Soen I/S*, ECLI:EU:C:1990:291, para. 19.

[43] See also judgment of the ECJ of 27 February 1997, *Ebony Maritime SA and Loten Navigation Co. Ltd v. Prefetto della Provincia di Brindisi and others*, C-177/95, ECLI: EU:C:1997:89.

[44] Judgment of the ECJ of 11 July 2002, *Käserei Champignon Hofmeister GmbH & Co. KG v. Hauptzollamt Hamburg-Jonas*, C-210/00, ECLI: EU:C:2002:440, para. 49.

[45] Judgment of the ECJ of 18 June 2013, *Bundeswettbewerbsbehörde and Bundeskartellanwalt v. Schenker & Co. AG and Others*, C-681/22, ECLI:EU:C:2013:404, para. 39. See also the opinion of Advocate General Kokott delivered on 28 February 2013, C-681/11, ECLI:EU:C:2013:126.

[46] ECLI:EU:C:2009:806.

that the principle is not always heavily protected[47]. The European tribunals allow for the establishment of the relevant facts based on presumptions regarding the conditions surrounding the decisions taken by the alleged perpetrator of the act. Thus, it is admissible to base this liability on the presumption of guilt, so long as the accused can rebut the presumption. Although the positions of the European tribunals and the second of the two above-presented lines of the CT's case-law start from different positions insofar as regards the requirement to apply procedural guarantees to administrative penal liability, they lead to similar conclusions. An administrative authority is not required to prove guilt, but an entity that infringed administrative law should be able to prove its absence. The absence of guilt releases the perpetrator from penal liability.

III. GUILT AS A PREMISE OF ADMINISTRATIVE-CRIMINAL LIABILITY UNDER ADMINISTRATIVE LAW

The question whether guilt constitutes a premise of administrative-criminal liability under applicable administrative law is not easy to answer. First of all, the position of scholars is not uniform. According to the dominant stance, guilt does not constitute or should not constitute a *sine qua non* premise of that kind of liability[48]. According to the minority position, which is gaining more and more supporters, guilt constitutes, or should constitute – depending on how they interpret the law in force – a premise for finding administrative liability of a penal nature[49]. Some scholars seem to support the concept, in which the perpetrator of

[47] P. H. van Kempen, J. Bemelmans, 2018, *op.cit.*, pp. 263–264.

[48] See, among others: Z. Janku, *Kara – administracja publiczna – prawo administracyjne,* (in:) Ł. Pohl (ed.), *Aktualne problemy prawa karnego. Księga pamiątkowa z okazji Jubileuszu 70 urodzin Profesora Andrzeja Szwarca,* Poznań 2009, p. 193; E. Kruk, *Sankcja administracyjna*, Lublin 2013, pp. 116–118; M. Rogalski, *Aksjologia administracyjnych kar pieniężnych*, (in:) J. Zimmermann (ed.), *Aksjologia prawa administracyjnego*, Vol. I, Warsaw 2017, p. 1198; A. Wróbel, (in:) M. Jaśkowska, M. Wilbrandt-Gotowicz, A. Wróbel (eds), *Kodeks postępowania administracyjnego. Komentarz,* Warsaw 2020, p. 1017; R. Stankiewicz, (in:) R. Hauser, M. Wierzbowski (eds), *Kodeks postępowania karnego. Komentarz*, Warsaw 2021, pp. 1423–1424.

[49] W. Radecki, *Kary pieniężne w ochronie środowiska*, Bydgoszcz 1996, pp. 85, 94; Z. Kmieciak, *Ogólne zasady prawa i postępowania administracyjnego*, Warsaw 2000, p. 130; M. Król-Bogomilska, *Kary pieniężne w prawie antymonopolowym: w ustawie o ochronie konkurencji i konsumentów, w europejskim prawie wspólnotowym,* Warsaw 2001, pp. 94–99; M. Wincenciak, *Sankcje w prawie administracyjnym i procedura ich wymierzenia*, Warsaw 2008, p. 154; M. Szydło, *Charakter i struktura prawna administracyjnych kar pieniężnych*, 'Studia Prawnicze' 2003, Vol. 4, pp. 140–141; B. Wierzbowski, *Problem kar administracyjnych w demokratycznym państwie prawnym*, (in:) P. Kardas, T. Sroka, W. Wróbel (eds), *Państwo prawa i prawo karne. Księga jubileuszowa Profesora Andrzej Zolla,* Vol. I, Warsaw 2012, pp. 965–966, 975; K. Czichy, *O niestosowaniu gwarancji karnych do administracyjnych kar pieniężnych,* 'Prokuratura i Prawo' 2017,

the administrative offence can prove the absence of guilt, which will lead to the exclusion of liability. Nevertheless, they classify this concept as belonging to the first group[50].

Furthermore, when examining the aforementioned positions vis-à-vis the law in force, it is necessary to specify what they refer to, as there is no uniform regulation concerning this liability. In 2017 the Polish legislator introduced general rules regarding administrative liability of a penal character in the new aforementioned Chapter VIa of CAP – "Administrative monetary sanctions"[51]. However, according to Article 189a(2) CAP, if there are special rules regarding the specific kind of liability, the application of Chapter VIa CAP is excluded.

For the purposes of this study the most important provision of Chapter VIa is Article 189e CAP. According to this provision, if the violation of law was caused by force majeure, the accused party is not subject to punishment. In the justification of this amendment, its drafters explained that "a subjective element of guilt" should constitute the premise of administrative liability. They added that an entity facing administrative monetary sanctions should have the possibility to defend itself by demonstrating that the violation of the law was the result of circumstances beyond its control[52]. By juxtaposing Article 189e CAP and Article 189b CAP – which contains a definition of an administrative monetary sanction – one may conclude that the legislator introduced the presumption that the infringement of law was the result of the behaviour which was under the entity's control. In other words, in order to impose the monetary sanction only the fact of an infringement of law has to be proved. Given that force majeure is able to exclude such liability, it can be assumed that the premise of guilt underlies this kind of liability, however, the guilt is presumed.

Although the drafters declared the need to introduce the possibility of a defence if the violation of law was the result of circumstances beyond one's control, they restricted it to the circumstances covered by the term "force majeure". According to commentators who look for the sources of the term in private law, it is always an external event, outside the control of the perpetrator of the infringement. However, this "external" nature has two aspects: objective and subjective.

Vol. 12, p. 102; M. Szpyrka, *Europejskie standardy stosowania kar pieniężnych na przykładzie polskiego prawa telekomunikacyjnego,* Warsaw 2020, pp. 30–33; A. Wróblewski, *Wina w odpowiedzialności administracyjnej w aspekcie prawa do sądu w rozumieniu art. 6 EKPC na przykładzie administracyjnych kar pieniężnych,* 'Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego' 2022, Vol. XX, p. 128.

[50] M. Kaczocha, *Kary pieniężne w ustawie o międzynarodowym przemieszczaniu odpadów (wybrane zagadnienia)*, (in:) M. Błachucki (ed.), 2015, *op.cit.*, pp. 200–204; J. Żurek, *Wina jako przesłanka wymierzania administracyjnych kar pieniężnych,* 'Roczniki Administracji i Prawa' 2020, No. XX(3), p. 190; L. Staniszewska, *Administracyjne kary pieniężne*, Poznań 2022, pp. 210–213, 219.

[51] Dz. U. (Journal of Laws) 2017, item 935.

[52] *Ibidem*.

The first relates to the extraordinary, unique character of an "external" event; while the second concerns the assessment of the infringer's due diligence[53]. Some commentators stipulate floods, fires, and epidemics as classic external events[54]. Others, however, do not restrict such events solely to consequences of the forces of nature, and also refer to legislative and executive acts, as well as serious disturbances in social life[55]. This latter position was accepted in the jurisprudence of the Polish administrative courts[56]. The courts underline, however, that the circumstances should be impossible to avoid[57]. Because of the limited possibilities to exclude this liability on the grounds of force majeure, administrative courts take the position that such liability can be excluded by outside events if they are not of a subjective character[58]. Indeed, force majeure does not cover other circumstances in which a specific behaviour did not remain within the sphere of the alleged perpetrator's free choice. According to Krawczyk, some of the circumstances, such as error in law, error in fact, or even – insofar as regards liability of natural persons – insanity, can be taken into consideration as premises justifying the mitigation of a penalty on the grounds of Article 189e(1) CAP, covered by the term "circumstances" surrounding the infringement of law[59].

As regards the specific rules which exclude the application of Chapter VIa CAP, many interesting observations have been formulated based on the liability for the infringement of Article 106 of the Act of 16 February 2007 – Competition and Consumer Protection Act[60]. According to this provision, a monetary sanction is imposed if a specific act was committed "even unintentionally". The wording of the provision speaks for the position according to which guilt is a premise for this kind of liability[61]. Similar conclusions were drawn with respect to Article

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[53] A. Wróbel, 2020, *op.cit.*, p. 1023.

[54] B. Adamiak, (in:) B. Adamiak, J. Borkowski (eds), *Kodeks postępowania karnego. Komentarz*, Warsaw 2022, p. 1144.

[55] A. Wróbel, 2020, *op.cit.*, p. 1023.

[56] See judgment of the Supreme Administrative Court of 19 November 2021, II GSK 1221/21, Lex no. 3331755.

[57] Judgment of the Voivodship Administrative Court in Warsaw of 20 July 2018, VI SA/Wa 721/18, Lex no. 2585407.

[58] Judgments of the Voivodship Administrative Court in Warsaw of: 4 February 2019, VIII SA/Wa 736/18, Lex no. 2632107; and 10 March 2020, VI SA/Wa 2331/19, Lex no. 3015242.

[59] A. Krawczyk, (in:) W. Chróścielewski, Z. Kmieciak (eds), *Kodeks postępowania administracyjnego. Komentarz,* Warsaw 2019, pp. 990–997.

[60] Consolidated text, Dz. U. (Journal of Laws) 2021, item 275.

[61] See: M. Król-Bogomilska, *Zwalczanie karteli w prawie antymonopolowym i karnym*, Warsaw 2013, pp. 181–194; M. Król-Bogomilska, (in:) T. Skoczny (ed.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warsaw 2014, p. 1334; M. Urbańska-Arendt, *Wpływ EKPC na uwzględnianie "winy" jako przesłanki dopuszczalności nakładania kar pieniężnych w orzecznictwie dotyczącym deliktów prawa antymonopolowego i energetycznego,* 'Internetowy Kwartalnik Antymonopolowy i Regulacyjny' 2017, Vol. 6(6), pp. 46–48; M. Namysłowska, Ł. Grzejdziak, *Tam, gdzie kara depcze winie po piętach. O winie jako przesłance nałożenia kary pieniężnej z tytułu złamania zakazu praktyk naruszających zbiorowe interesy konsumentów*, (in:) M. Błasz-

92c(1) of the Act of 6 September 2001 on Road Transport[62]. According to this provision, if the entity had no influence on the occurrence of the infringement, and the infringement occurred as a result of events and circumstances that the entity could not foresee, the entity should not be held responsible[63]. The burden of proof in this regard rests, however, with the accused entity[64].

There are also special rules according to which the degree of guilt should be taken into consideration in sentencing. They are considered to introduce, indirectly, guilt as a premise of liability. Examples include Article 103 and 104(2) of the Act of 25 August 2006 on food and nutrition safety[65]; and Article 56(1) and (6) of the Act of 10 April 1997 on energy law[66].

IV. CONCLUSIONS

Summarizing, there are no doubts that according to the jurisprudence of the ECtHR and the ECJ guilt should constitute a premise of every kind of penal liability. As regards the jurisprudence of the CT, the first presented line of reasoning – according to which guilt does not matter for finding administrative-criminal liability – disregards the nature of the liability and the punitiveness of some administrative sanctions. The second line of reasoning presented in the CT's case-law leads, despite starting from a different position than the positions of the ECtHR and the ECJ, to similar conclusions on the grounds of Article 2 and 30(3) of the Polish Constitution. According to this line of reasoning an administrative authority is obliged to prove the infringement of law. While it does not have to prove guilt, the absence of guilt can be asserted as defence by the accused entity. Therefore, guilt is a presumed premise of liability and the presumption can be rebutted.

It should be noted, however, that not all rules of the administrative law in force are in line with these standards. This refers especially to the rules provided for in Chapter VIa of CAP. Although the drafters of the amendments to CAP declared that guilt should constitute a premise of administrative liability, Article 189e CAP does not cover all the circumstances according to which a specific

czyk, A. Zientara (eds), *Interdyscyplinarność – w nauce najciekawsze rzeczy dzieją się na styku różnych dziedzin. Księga Jubileuszowa Profesor Małgorzaty Król-Bogomilskiej*, Warsaw 2021, pp. 390–409.

[62] Consolidated text, Dz. U. (Journal of Laws 2022 item 2201.

[63] L. Staniszewska, 2022, *op.cit.*, p. 218.

[64] Judgment of the Voivodship Administrative Court in Kraków of 7 November 2022, III SA/Kr 770/22, Lex no. 3445993.

[65] Consolidated text, Dz. U. (Journal of Laws) 2022, item 2132.

[66] Consolidated text, Dz. U. (Journal of Laws) 2022, item 1385, as amended.

behaviour did not remain within the sphere of the entity's free choice. The provision allows for excluding penal liability only when the violation of law was caused by force majeure.

It should be underlined that direct application of the Polish Constitution can assure the compliance of CAP with this Act. Even before the introduction of Chapter VIa to CAP, the administrative courts had accepted several times the exclusion of liability when the accused entity proved that a specific behaviour did not remain in the sphere of the entity's free choice[67]. However, to avoid discrepancies on this subject, the scope of the circumstances given in Article 189e CAP should be extended.

The next important issue is the admissibility of the reversal of the burden of proof with regard to circumstances evidencing absence of guilt. The ECtHR and the ECJ allow for the relaxation of the presumption of innocence when it remains within "certain limits". Apart from substantive requirements allowing to assess whether the opposite presumption meets these criteria, procedural requirements are equally important – adequate safeguards for the rights of defence and the impartiality of courts. Taking into consideration the level of those safeguards in Polish administrative proceedings, and in particular the lack of full judicial review over administrative decisions in a majority of cases of administrative-criminal liability, the compliance of the reversal of the burden of proof with the existing standards raises doubts. Therefore, alongside substantive law reforms in this matter, solutions improving the level of procedural standards should be adopted as well.

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