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STRICT LIABILITY REGIME IN POLAND

1. INTRODUCTION

The subject of this article will be the so-called (in literal translation) objective liability, which concept is in Poland applied to administrative offences (pol. *delikty administracyjne*) and various administrative monetary penalties (pol. *administracyjne kary pieniężne*). The form the liability takes in this regime is relatively similar to the concept of strict liability in common law states. Therefore, this term will be used in the main part of the article. The core of strict liability in Poland will be examined on the basis of the judgments of the Constitutional Tribunal and administrative courts; the new provisions added to the Code of Administrative Procedure¹ by the amendment of 7 April 2017² will also be taken into consideration. Moreover, I consider it necessary to compare the domestic regulations and the respective judgments with the system of the European Convention on Human Rights. It seems that the most significant role in discovering the precise shape of strict liability will be played by exculpatory circumstances.

It is stressed in the theory of administrative law that the liability for violating administrative law is of strict character, which means that the entity is held liable for such violation independently of *mens rea*. Accordingly, the offender's mental attitude to the violation is not relevant. The intent does not have to be confirmed in the course of the proceedings. The entity is held liable when the violation is ascertained and (even though this element is not widely accepted by jurists in Poland) can be ascribed to the perpetrator.³

¹ Journal of Laws of 2017, No. 1257.

² Journal of Laws of 2017, No. 935.

³ R. Zawłocki, *Pojęcie i istota deliktu administracyjnego*, „Monitor Prawniczy” 2018, issue 1, p. 13 and sub.

2. CASE-LAW OF THE CONSTITUTIONAL TRIBUNAL

First of all – if we want to begin a more serious reflection – the case-law of the Constitutional Tribunal must be taken into account because of its influence on administrative courts. The ‘general part’ of the administrative offences law was introduced into the Polish legal system only three years ago and, in addition, is not comprehensive. Moreover, no in-depth analysis of this regime of liability has been carried out by Polish jurists.⁴ Therefore – for the purposes of non-Polish readers – the most important cases in translations into English will be quoted below.

In one of the latest judgments, the Constitutional Tribunal followed the prevailing view of jurists (who specialise in administrative law) and decided that ‘The Constitutional Tribunal adopts in its judgments the distinction between criminal liability based on the principle of culpability⁵ and administrative liability based on the objective violation of law. According to the well-established case-law of the Tribunal, administrative liability is of strict character; it is not based on the concept of *mens rea*. An administrative sanction is an effect of the state of unlawfulness and a criminal sanction is a consequence of committing a crime. In the case of administrative liability, the examination of the perpetrator’s attitude to the act is not relevant. [...] Strict liability excludes the possibility of differentiating between the sanctions according to the degree of culpability and makes it possible not to differentiate between on account of other circumstances’.⁶

In other judgments, the Constitutional Tribunal decided that ‘[administrative] penalty is not a consequence of committing a crime, but a consequence in the event of the state of unlawfulness, which excludes the perpetrator’s attitude to the act from the strict liability regime’.⁷

The Constitutional Tribunal also decided that: ‘In the case-law concerning administrative violations, the concept of objective culpability is applied, i.e. culpability based on the superiority of the objective fact of the violation of a sanc-

⁴ R. Zawłocki, *Pojęcie i istota deliktu...*, p. 13; W. Radecki, *Odpowiedzialność za przestępstwa, wykroczenia i delikty administracyjne w prawie polskim, czeskim i słowackim*, „Prokuratura i Prawo” 2017, issue 10; W. Radecki, *Dezintegracja polskiego prawa penalnego*, „Prokuratura i Prawo” 2014, issue 9.

⁵ It should be borne in mind that the term *wina* (*zawinienie*) can be translated as *guilt*, *culpability* or *mens rea*, depending on the context, and that none of those translations is perfect because of the subtleties of doctrine of the Polish criminal law.

⁶ Judgment of the Constitutional Tribunal of 21.10.2015, No. P 32/12, OTK ZU 9A/2015, item 148.

⁷ Judgment of the Constitutional Tribunal of 31.03.2008, No. SK 75/06, OTK ZU 2A/2008, item 130; exactly the same in judgment of the Constitutional Tribunal of 15.01.2007, No. P 19/06, OTK ZU 1A/2007, item 2.

tioned norm,⁸ which *per se* justifies charging the entity of having failed to act with due care required in the relationships of a given kind'.^{9,10}

The reflections on the nature of administrative liability made by the Polish constitutional court are not without purpose. The Constitutional Tribunal finds the strict character of liability one of the few criteria which justify the sanction in the form of an administrative monetary penalty, the other criteria being: the placement in the text of the statute (e.g. in the section called 'monetary penalty' rather than 'criminal provisions', which is characteristic of crimes), and the stipulation concerning whether the punishment should be obligatorily meted out by an administrative body, which, for its part, has no discretion to determine the amount of the penalty.¹¹ In other judgments, the criterion of the character or purpose of the sanction (preventive, protective or compensatory, but not punitive or retributive) is decisive¹² (but the Constitutional Tribunal also said that the fact that administrative sanctions are meted out automatically *ex lege* have, first of all, a preventive effect;¹³ this 'presumption' is settled in the case-law of the Constitutional Tribunal). When those conditions are fulfilled, the Constitutional Tribunal finds that an administrative monetary penalty 'has no features or functions of punitive punishments, which means that a monetary penalty [...] is not a punishment as this term is understood in criminal law; it is not a form of criminal responsibility in the meaning of article 42 of the Constitution'.¹⁴ Therefore, the guarantees provided by article 42 of the Constitution (*nullum crimen sine lege, nullum crimen sine culpa, nulla poena sine lege*, the right to defend oneself, the presumption of innocence) are not – in light of this judgment – applied to administrative offences. For our purposes, especially the lack of the *nullum crimen sine culpa*

⁸ The common-law reader might be unfamiliar with the concept of sanctioned (*sankcjonowana*) and sanctioning (*sankcjonująca*) norms. This concept is predominantly popular in countries under the influence of the German jurisprudence. To simplify the notion, a sanctioned norm creates an order or a prohibition and a sanctioning norm provides a sanction in the event of failure to follow a prohibition or an order.

⁹ Judgment of the Constitutional Tribunal of 24.01.2006, No. SK 52/04, OTK ZU 1A/2006, item 6.

¹⁰ In this part of the judgment, the Constitutional Tribunal in fact rewrote part of Article 355(2) of the Polish Civil Code (this provision stipulates the general obligation of the debtor). It is clear that the Constitutional Tribunal in many cases draws inspiration comes from civil law, not from criminal law.

¹¹ Judgment of the Constitutional Tribunal of 21.10.2015, No. P 32/12, OTK ZU 9A/2015, item 148.

¹² Judgment of the Constitutional Tribunal of 5.05.2009, No. P 64/07, OTK ZU 5A/2009, item 64.

¹³ Judgment of the Constitutional Tribunal of 21.10.2015, No P 32/12, OTK ZU 9A/2015, item 148.

¹⁴ Judgment of the Constitutional Tribunal of 21.10.2015, No. P 32/12, OTK ZU 9A/2015, item 148; similarly, judgment of the Constitutional Tribunal of 24.01.2006, No. SK 52/04, OTK ZU 1A/2006, item 6.

principle where administrative offences are concerned is essential. It seems that the Constitutional Tribunal creates circular reasoning here – the fact that liability is strict is one of the decisive criteria for stipulating that the *nullum crimen sine culpa* principle will not be applied to administrative monetary penalties.

When article 42 is not applied, it means that when the parliament creates a provision establishing an administrative offence, it is not limited by the ‘criminal’ guarantees of the Constitution, but only by the basic features and principles of the Polish legal system, such as the principles of the democratic state ruled by law, proportionality, equality and human rights (and, in the case of administrative monetary penalties, particularly the protection of property).¹⁵ On the other hand, it must be observed that, in a different judgment, the Constitutional Tribunal adjudicated that the guarantees provided by article 42 of the Constitution shall apply *mutatis mutandis*¹⁶ to the regimes of punitive liability other than criminal.

Back to the core of our reflections, there is a question to be asked, namely whether the Constitutional Tribunal developed a less restrictive approach, as well. It must be noted that the principle *nullum crimen sine culpa* was formulated in a judgment of the Constitutional Tribunal.¹⁷ The essence of the norm is that the entity cannot be held liable when it had no possibility – in any way – to prevent itself from committing the offence. The principle was inferred from article 42 of the Constitution (and, apparently, article 2) and established on the basis of another regime of liability¹⁸ (which is closer to criminal law in the strict sense); it was noted that the principle is applicable to punitive regimes of liability. Administrative monetary penalties – as mentioned above – are considered not to be punitive.

However, in one of its early judgments (of the 1990s, even before the Constitution of 1997 was passed), the Constitutional Tribunal stated that: ‘There must be an element of culpability so as to mete out [an administrative penalty]. Thus, the entity which fails to fulfill an administrative obligation must have the possibility to defend itself and to prove that the failure was a consequence of a circumstance for which the entity was not responsible’.¹⁹ It seems that this element of the decision was inferred from the rule of law (Article 1 of Constitution of 1952 as amended by the Act of 29th of December 1989,²⁰ which is the exact equivalent of Article 2 of the Constitution of 1997). For many subsequent years,

¹⁵ Judgment of the Constitutional Tribunal of 15.01.2007, No. P 19/06, OTK ZU 1A/2007, item 2.

¹⁶ Judgment of the Constitutional Tribunal of 4.07.2002, No. P 12/01, OTK ZU 4A/2002, item 50.

¹⁷ Judgment of the Constitutional Tribunal of 3.11.2004, No. K 18/03, OTK ZU 10A/2004, item 103.

¹⁸ To some extent similar to the one known in common law states’ concept of corporate (vicarious) liability.

¹⁹ Judgment of the Constitutional Tribunal of 1.03.1994, No. U 7/93, OTK ZU 1994, item 5.

²⁰ Journal of Laws of 1989, No. 75, item 444.

the problem of strict liability was not a subject of in-depth analysis in the Constitutional Tribunal's case-law. However, after a long period of silence, the Tribunal adjudicated that the administrative liability was not of absolute character and that the offender could be absolved from liability by claiming that he or she had done everything what could have been reasonably required from him/her in order not to allow the violation to arise.²¹ This statement brought the strict liability of administrative character closer to the regime of civil law, in which the debtor is liable for the lack of due care (Article 472 of the Polish Civil Code), but, additionally, established the presumption of culpability (e.g. in Article 431 of the Polish Civil Code). This principle, established by the respective judgment, will from now on be referred to as the 'standard of diligence'.

In one of its latest judgments, the Constitutional Tribunal referred to the driver's licence suspension insofar as it concerns a lack of exculpatory situations connected with the state of necessity. The Constitutional Tribunal found that 'in administrative law – similarly to criminal law or petty offences law – the matter of collision of values and interests which justifies the entity failing to comply with legal orders or prohibitions should be examined'.²² In another part of the judgment, the Tribunal explained that the principle of fair administrative procedure inferred from Article 2 of the Constitution means that a lack of the possibility of exculpation when the violation rises from necessity is considered contradictory to the principle of the rule of law.²³

To summarise this part, it should be pointed out that the case-law of the Constitutional Tribunal appears to be inconsistent and that the synthesis of different approaches seems to be impossible. It is difficult to predict any tendencies in case-law still to come. However, it seems that the scope of guarantees is likely to be extended and that the view that justification or excuse clauses must be provided (rightly) prevails.

3. CASE-LAW OF ADMINISTRATIVE COURTS

Case-law of the Constitutional Tribunal influences administrative courts, which adjudicate upon cases in which the matter of strict liability is involved. Sometimes also the Constitutional Tribunal draws inspiration from the decisions of the administrative courts.

²¹ Judgment of the Constitutional Tribunal of 7.07.2009, No. K 13/08, OTK ZU 7A/2009, item 105.

²² Judgment of the Constitutional Tribunal of 11.10.2016, No. K 24/15, OTK ZU A/2016, item 77.

²³ *Ibidem*.

In the recent case-law, administrative courts have seemed to apply the more liberal decisions of the constitutional court. In one of its judgments, the Voivodship Administrative Court in Warsaw argued that ‘strict administrative liability is not absolute, which means that the offender can be absolved from liability when he or she proves that he or she has done everything that could have been reasonably required from him or her in order not to allow the violation to arise. Rejecting this view would be contradictory to basic constitutional principles inferred from the clause of the rule of law (Article 2 of the Constitution), notably the principle of the protection of legitimate expectations and the principle of legal certainty. [...] Regulating the legal situation of the entity automatically, rigorously and independently of the circumstances which led to the failure to fulfil the legal obligation cannot be reconciled with the principle of the rule of law. The entity which is punished by an administrative monetary penalty must have the right to defend itself in administrative law procedures as well as, which is exceptionally vital, the right to be absolved from administrative liability at least if it proves that it was sufficiently diligent when performing its duties and objectively had no possibility to act in any other way’.²⁴

In another judgment, concerning competition law, it was decided that the entity may be absolved from liability if it proves that objective circumstances preclude the possibility to hold it liable because of it took precautionary and preventive actions.²⁵

However, it should be noted that there is another view on the matter, expressed by the following words of the Voivodship Administrative Court in Warsaw: ‘The matter of culpability in the actions of the party to these proceedings is not relevant when establishing facts and issuing an administrative decision. The appeal body was thus justified to decide that the applicant could not be absolved from liability by proving that he or she had had no influence on whether this violation had arisen and had not agreed to it arising’.²⁶ Yet another judgment emphasized the restrictive interpretation of the provisions of an act and claimed that if the act (the norms of material law) did not provide for the state of necessity, the administrative body was obliged not to accept the necessity.²⁷

²⁴ Judgment of the Voivodship Administrative Court in Warsaw of 20.06.2013, No. IV SA/Wa 600/13.

²⁵ Judgment of the Court of Appeals in Warsaw of 25.10.2012, No. VI ACa 750/12.

²⁶ Judgment of the Voivodship Administrative Court in Warsaw of 20.05.2011, No. VI SA/Wa 371/11.

²⁷ Judgment of the Voivodship Administrative Court in Łódź of 10.12.2010, No. II SA/Łd 1069/10.

4. THE IMPACT OF THE STATUTORY PROVISION ON THE SHAPE OF STRICT LIABILITY

In 2017, new provisions concerning administrative monetary penalties were introduced to the Polish legal system in the new part IVa of the Code of Administrative Procedure. It is noteworthy that almost all judgments quoted above were issued before those provisions entered into force. For these reasons, this amendment to the Code of Administrative Procedure might be considered a codification of case-law and a reaction to the demands expressed by jurists, but – as it is possible to prove – it is not complete. The insufficiency of these provisions is i.a. caused by the fact that material matters have been regulated in a procedural act, which, as some believe, resulted from the lack of a better idea, as no general act on administrative material law exists in Poland.²⁸ Furthermore, the deficiencies include the lack of application to tax matters (Article 3(1)(2) of the Code of Administrative Procedure) and the fact that they have no effect if the same matters are regulated in other provisions (Article 189a(2) of the Code of Administrative Procedure). It should be noted, however, that the provisions of part IVa apply to all ‘additional fees’ or similar instruments (a sanction for administrative violation is often called otherwise than ‘administrative monetary penalty’) – it is achieved by creating an autonomous definition of the administrative monetary penalty (article 189b of the Code of Administrative Procedure), something that merits appreciation. Let us proceed to the exact shape of strict liability established by part IVa of the Code of Administrative Procedure.

Pursuant to article 189e of the Code of Administrative Procedure, the party to administrative proceedings shall not be punished when the violation arose as a consequence of *force majeure*. It is noteworthy that *force majeure* is understood by the commentators of this provision in the same manner as by the doctrine of civil law: as an event of external character that is impossible to anticipate and prevent (in light of actions and experience of the properly functioning entity²⁹). Some consider this provision superfluous, as there can be no administrative violation without perpetration, and thus, *force majeure* leads to a violation of law, but there is no perpetration³⁰ – there is no guilty person. This view, however, seems not to be obvious to jurists and to the Constitutional Tribunal itself. Nonetheless, this provision cannot be the legal basis for exculpation in every case when the entity claims it did everything reasonably required from it in order not to allow the violation to arise. There might be instances in which there was no *force majeure*, but

²⁸ W. Radecki, *Odpowiedzialność za przestępstwa...*, p. 41; R. Zawłocki, *Pojęcie i istota deliktu...*, p. 13 and sub.

²⁹ S. Gajewski, *Kodeks postępowania administracyjnego. Nowe instytucje. Komentarz do rozdziałów 5a, 8a, 14 oraz działów IV i VIIIa KPA*, Warszawa 2017, p. 107–108.

³⁰ R. Zawłocki, *Pojęcie i istota deliktu...*, p. 13 and sub.

the entity was sufficiently diligent – in such a case, there will be no exculpation under article 189e. For example, it is imaginable that an event could have been prevented by the obliged entity, but the entity chose a different method of prevention, which turned out to be ineffective, but was indeed reasonable and justified.

Article 189d stipulates that when meting out an administrative monetary penalty, the administrative body must take into consideration, *inter alia*, the degree to which the punished party contributed to the violation of law (article 189d(4)) and the actions voluntarily undertaken by the party in order to avoid the consequences of the violation (article 189d(5)). It seems that article 189d cannot be a legal basis for renouncing the imposition of a penalty (or absolving from liability). Firstly, that is because the very wording of article 189d ('when meting out an administrative monetary penalty') suggests so, and secondly, because the conditions of renouncing the imposition of an administrative penalty are regulated by article 189f. To conclude, even if the party did not participate in a violation of law by any means and did everything in order to avoid the consequences of the violation, it will only justify meting out a punishment on the lowest statutory level, presuming that the other circumstances which the administrative body must take into consideration (there are altogether seven points in the article) will be favourable for the party concerned. Notwithstanding the impression that this provision is the closest to the standard of diligence established by the Constitutional Tribunal, it should be treated as a defective implementation of this principle to statutory law. One may assume it is even doubly deleterious. That is because the administrative bodies and the courts can deny to apply the standard of diligence established by the Constitutional Tribunal, claiming that it can be considered as an interpretation *contra legem*, because article 189d and other articles clearly stipulate how and when an administrative monetary penalty may or may not be meted out. When there was no regulation of this matter at all, a liberal interpretation was easier, especially when upheld by the authority of the Constitutional Tribunal.

The possibility of exculpation as established in the case-law of the Constitutional Tribunal may be found in article 189b of the Code of Administrative Procedure, which stipulates that an administrative monetary penalty is meted out as a consequence of a violation of law which consisted in failing to fulfil an obligation or infringing a prohibition imposed on a natural person, a legal person or an organisation that has no legal personality. This provision seems to affirm the prevailing opinion of jurists. However, in light of the case-law of the Constitutional Tribunal, such wording of the provision might be (and, as a matter of fact, should be) interpreted in a way that enables the entity to absolve itself from liability when it did not fail to fulfil an administrative obligation or infringe a prohibition. This view is in conformity with the postulate of R. Zawłocki³¹ that only an action (or omission) might be the basis of liability, but it must not be

³¹ *Ibidem*.

understood as rigorously as in criminal law (which means that a legal person can commit an action or omission, as well). Indeed, two conditions should be distinguished in this provision: the perpetration (action or omission), i.e. a failure to fulfil an obligation or an infringement of a prohibition imposed on a natural person, a legal person or an organisational unit having no legal personality (1) and a violation of law (2). The wording of article 189e suggests that condition (2) can exist (as a fact, e.g. the sea is polluted) without the occurrence of condition (1), but then an administrative penalty shall not be meted out (thinking in a different way would mean that the liability is absolute, not strict). However, it appears that this finding goes far beyond the case of *force majeure*. It would not seem like a *contra legem* interpretation (although a very creative one) if one stated that doing everything that could be reasonably required from the entity in order not to allow the violation to arise can be considered to exclude the fulfilment of condition (1). It is not an omission and therefore there is no perpetrator to be held liable. It should be noted that under article 77 of the Code of Administrative Procedure, the burden of proof concerning perpetration is on the administrative body; nevertheless, it should be distinguished from the obligation to furnish the evidence, which lies with the party³² which will have to bear the consequences³³ of the lack of the evidence for its diligence. In this way, one may find harmony between the case-law of the Constitutional Tribunal and the new provisions, which, as it may seem, regulate rather different matters.

As stated above, the Constitutional Tribunal also explained that in a democratic state ruled by law, the entities shall have the possibility to argue that the violation of administrative law was a consequence of necessity and that this condition shall be an exculpatory one. It seems that none of the aforementioned provisions may serve as the basis of exculpation on the grounds of necessity. One may assume that *force majeure* does not entail the same measures as the state of necessity, which excludes the application of article 189e. As far as article 189b is concerned, one may try to apply the same creative mode of interpretation. I think it is justified in this case, at least when it comes to the collision of a more important interest with a less important one. It is accepted in doctrine of criminal law that such a collision (article 26(1) of the Polish Criminal Code³³) is a justification, not an excuse,³⁴ i.e. it excludes the unlawfulness of the act. If we remember that unlawfulness is a contradiction to a legal norm which establishes an order or a prohibition³⁵ and that condition (1) indirectly stipulates unlawfulness as a necessary element of every administrative offence, it seems to be proven that – thanks to the creative interpretation – the state of necessity – if in any provision at all – can be found in

³² R. Kędziora, *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 2017, p. 477.

³³ Journal of Laws of 2017, No. 2204.

³⁴ Again, there is no direct equivalent of *kontratyp* and *wylączenie winy* in the English legal system, but it is reasonable to use the words *justification* and *excuse*, respectively.

³⁵ W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna*, Kraków 2013, p. 158.

article 189b. However, it would be desirable that the statute explicitly expressed the possibility to justify the state of unlawfulness. Although the judgment of the Constitutional Tribunal concerned a particular provision,³⁶ i.e. establishing a sanction for speeding (the suspension of driver's licence), the standard of necessity established by the Constitutional Tribunal seems to apply to all systems of administrative law, notably to the administrative monetary penalty. Consequently, issuing an act³⁷ stipulating that speeding drivers in the state of necessity will not be deprived of the driver's licence is an inappropriate, fragmentary implementation of the judgment of the Constitutional Tribunal. The institution of exculpation by necessity should be regulated on the general level, applying to all cases of the administrative monetary penalty (and other punitive sanctions). Another problem is the collision between an interest which is not manifestly less important with another one (as in article 26(2) of the Polish Criminal Code), which is considered an excuse. The Constitutional Tribunal decided in the aforementioned case that the state of necessity in administrative law should not to be understood widely, which seems to mean that only the state of necessity which involves the collision of a more important interest with a less important one ought to be considered an exculpatory circumstance.

5. STRICT LIABILITY IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

One should also consider the standards of the European Convention on Human Rights. The deliberations on strict liability are made not only so as to examine its very nature, but, above all, in order to examine conformity of the Polish legal system with human rights. The case-law of the European Court of Human Rights might be helpful in creating a model of strict liability whose limits will conform with the standards of the Convention.

First of all, one should recall several basic facts. The Convention ensures with regard to 'criminal charges' or 'criminal matters' by virtue of articles 6 and 7 of the Convention as well as articles 2, 3 and 4 of Protocol No. 7. The definition of a 'criminal charge' is autonomous on the grounds of the Convention. There are three criteria, called the 'Engel criteria', which are examined in order to verify whether a charge is criminal. Firstly, the belongingness to criminal law in a member-state legal order is examined. Secondly, the criminal character of the offence is considered (the deterrent and the punitive purpose of sanction is relevant in

³⁶ Article 102(1)(4) of the Act on Drivers of 5.01.2011 (Journal of Laws of 2017, No. 978).

³⁷ Article 2 of the Act amending the Road Traffic Code and the Act on Drivers of 12.04.2018 (Journal of Laws of 2018, No. 1099).

this criterion³⁸). Thirdly, the severity of the penalty is examined.³⁹ In principle, the protection is granted when only one of these criteria is met.⁴⁰ It is accepted in the case-law that when the third criterion is considered, it is not relevant what punishment is actually meted out, but what penalty could be meted out according to law (the maximal statutory limit).⁴¹ It seems that the guarantees of the Convention will apply in the majority of cases concerning administrative monetary penalties existing in the Polish legal system. These penalties are severe sanctions and, even if not, their purpose seems to be punitive and deterrent as it is understood in the case-law of the ECtHR. In search of the standard of the Convention, one should look at the case-law and the matter of application of article 6(2) of the Convention, which stipulates the presumption of innocence.

It is stressed in the case-law of the European Court of Human Rights that the Convention does not prohibit the presumptions of law, but as far as criminal matters are concerned, a member state is obliged to act within reasonable limits.⁴² The penalisation of a simple or an objective fact regardless of intent or negligence is considered a presumption of a fact and liability,⁴³ which is permitted as long as it is rebuttable. In this landmark judgment, the ECtHR found that this presumption was not irrebuttable, because exculpation was possible by *force majeure* or an error.⁴⁴ In another case, the ECtHR ruled that even if the burden of proof was on the party to administrative proceedings concerning tax surcharges, the presumption was difficult to rebut and the decision was enforced before the final judgment of the court, there was no violation of article 6(2), because the presumption was within reasonable limits in comparison to the legitimate aim.⁴⁵

It seems that article 6(2) is applicable only to proving guilt, not to adjudicating upon other matters which are to be examined, e.g. meting out a punishment.⁴⁶ For the ECtHR, ‘innocence’ seems to entail the lack of perpetration. Therefore, it is

³⁸ Judgment of the European Court of Human Rights of 24.02.1994, *Bendenoun v. France*, No. 12547/86, section 47.

³⁹ Judgment of the European Court of Human Rights of 8.06.1976, *Engel and Others v. Netherlands*, No. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, section 82.

⁴⁰ Judgment of the European Court of Human Rights of 23.07.2002, *Janosevic v. Sweden*, No. 34619/97, section 67.

⁴¹ Judgment of the European Court of Human Rights of 27.08.1991, *Demicoli v. Malta*, No. 13057/87, section 34.

⁴² Judgment of the European Court of Human Rights of 07.10.1988, *Salabiaku v. France*, No. 10519/83, section 28.

⁴³ *Ibidem*, section 26.

⁴⁴ *Ibidem*, section 29; Judgment of the European Court of Human Rights of 28.06.2018, *G.I.E.M. S.R.L. and Others v. Italy*, No. 1828/06, 34163/07, 19029/11, section 243.

⁴⁵ Judgment of the European Court of Human Rights of 23.07.2002, *Janosevic v. Sweden*, No. 34619/97, sections 103–108; Judgment of the European Court of Human Rights of 23.07.2002, *Vastberga Taxi Aktiebolag and Vulic v. Sweden*, No. 36985/97, sections 113–116.

⁴⁶ Judgment of the European Court of Human Rights of 8.06.1976, *Engel and Others v. Netherlands*, No. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, section 90.

not prohibited to create the presumption of intent or negligence (i.e. strict liability regime) in an internal legal system, even though it is prohibited to create the presumption of guilt. It would be contradictory to article 7 of the Convention to mete out a punishment to a person who is not a perpetrator.⁴⁷

To conclude, in proceedings, an administrative body or court is obliged to find the perpetrator; in the second stage, when the offender is known, the administrative body or court can apply the presumption of culpability (established by law), but the party to the proceedings has to have an opportunity to rebut this presumption (a possibility of defence). Only when the party fails to do so may it be held liable.

It seems that those minimal requirements established by the case-law of the European Court of Human Rights are fulfilled in Polish law relating to administrative monetary penalties. As mentioned above, there is no presumption of perpetration, because the burden of proof is on the administrative body pursuant to article 77 of the Code of Administrative Proceedings. As in the case of *Salabiaku*, exculpation is possible by *force majeure*; therefore, the presumption is rebuttable. However, one should not forget that the ‘reasonable limits’ are also connected with the principle of proportionality. It requires an in-depth analysis of the individual provisions establishing administrative monetary penalties (notably the most severe ones) – an analysis of whether it is justified to apply the strict liability regime in a particular case. On the other hand, one should also remember about the *Jussila* standard – the guarantees provided by the Convention do not have to be applied with full stringency⁴⁸ to cases that do not belong to the hard core of criminal law.

6. CONCLUSIONS

To sum up, the definition of administrative offence can be constructed as follows: it is an unlawful (condition (1) mentioned above) action or omission (as proven by R. Zawłocki, also condition (1) above) under administrative penalty resulting in an objective violation of law (condition (2) mentioned above). In cases of administrative violations, there are three (more or less recognised) exculpatory circumstances: *force majeure*, standard of diligence and necessity.

However, it should be noted that the process of evolution of the model of strict liability in Poland is yet to be finished. We find ourselves in the transitional

⁴⁷ Judgment of the European Court of Human Rights of 29.10.2013, *Varvara v. Italy*, No. 17475/09, section 71.

⁴⁸ Judgment of the European Court of Human Rights of 23.11.2006, *Jussila v. Finland*, No. 73053/01, section 43.

period and the principles of the strict liability regime are still not certain and well-grounded. It appears that it will change its shape, either by the provisions of the statute or by the case-law of the constitutional court or the European Court of Human Rights. The tendency is towards a regime with more possibilities of exculpation, but it is unclear which justifications or excuses fully recognised in the Polish criminal law (e.g. *error iuris*, *error facti*, experiment, self-defence) will be applicable to administrative violations. It is up to jurists to reflect on postulates *de lege ferenda*. It is necessary to take the standard and methods accepted in the doctrine of criminal law into consideration, because administrative monetary penalties belong, in fact, to criminal law in its broad sense.

Strict liability (understood as a presumption of culpability) seems to be imperative in some cases,⁴⁹ when proving intent or recklessness would be too troublesome given the importance of the proceedings, i.e. in cases in which the punishment is low and the proceedings are simplified in order to provide efficiency. Nonetheless, the Polish legal system seems to create a paradox, because liability for petty offences (e.g. traffic offences like speeding) is not based on strict liability (in principle,⁵⁰ the maximum punishment is 5000 PLN or one month of restriction on freedom or thirty days of imprisonment⁵¹) and, on the other hand, very severe punishments might be meted out in the strict liability regime for some administrative violations, e.g. there exists a monetary penalty up to the equivalent of one million Special Drawing Rights,⁵² which is approximately five million PLN. As shown by this example, one should always bear in mind that these presumptions ought to be proportionate and within reasonable limits (and that the consistency of law should be provided). A strict liability regime is very convenient for public authorities (proceedings are faster and cheaper), but it does not mean that there will be no guarantees characteristic for criminal law in strict sense in very serious cases (e.g. the aforementioned examples). Unfortunately, it seems that there is no intention to regulate these matters in such a way and there is no method to have it done so; the European Court of Human Rights and the Constitutional Tribunal established their standards on the minimal level and for these reasons my postulate is based not on actions that the legislature is obliged to take (by virtue of the Constitution or the Convention), but rather on actions that it should take (because it is *bonum et aequum*).

⁴⁹ D. Szumiło-Kulczycka, *Prawo administracyjno-karne*, Kraków 2004, p. 71.

⁵⁰ Article 1(1) and articles 18–27 of Code of Petty Offences (Journal of Laws of 2018, No. 618).

⁵¹ J. Jakubowska-Hara, (in): P. Daniluk (ed.), *Kodeks wykroczeń. Komentarz*, Warszawa 2016, p. 131 mentions that according to the official statistics, imprisonment without suspension is imposed only in 0.5% of convictions. We must remember that those statistics cover only judgments and not every punishment imposed on the entity, because a punishment for a petty offence in Poland may be as well (and most frequently is) imposed by other law enforcement services, notably by the police.

⁵² Article 36 of the Act of 18.08.2011 on Maritime Safety (Journal of Laws of 2018, No. 181).

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STRICT LIABILITY REGIME IN POLAND**Summary**

The article focuses on administrative violations, which are considered to be based on strict (or objective) liability model. Due to the lack of in-depth scholarly analysis of administrative liability, its principles had to be developed in the case-law of the Constitutional Tribunal, which influences the decisions of administrative courts. The recently introduced provisions of the Code of Administrative Procedure concerning administrative monetary penalties are also analysed. The conformity of this model with the guarantees provided by the European Convention on Human Rights is examined, as well. The analysis leads to the conclusion that three exculpatory circumstances are recognized in this regime: force majeure, necessity and ensuring the standard of diligence established by the Constitutional Tribunal.

KEYWORDS

objective liability, administrative liability, administrative monetary penalty, administrative offence

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odpowiedzialność obiektywna, odpowiedzialność administracyjna, administracyjne kary pieniężne, delikty administracyjne