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**THE CONVERGENCE OF THE BASIS
OF RESPONSIBILITY FOR A CRIME (AN OFFENSE)
AND FOR AN ADMINISTRATIVE DELICT AND
THE *NE BIS IN IDEM* PRINCIPLE IN THE POLISH LAW**

The growing number of administrative delicts and criminal (offense) rules means that the possibility of convergence of both criminal and administrative responsibility becomes more frequent.

This issue applies to both natural persons and legal persons as well as to organizational units without legal personality. In the case of collective entities, the Polish law system provides the possibility of imposing a financial penalty on such entities (on the basis of the Act of 28 October 2002 on Liability of Collective Entities for Criminal Acts¹) for the criminal conduct of a related natural person and also an administrative fine for the committed delict.

1. THE *NE BIS IN IDEM* PRINCIPLE

The *ne bis in idem*² principle is expressed in the acts of international human rights law. Article 14, paragraph No. 7 of International Covenant on Civil and Political Rights (ICCPR) of 19 December 1966 states that “no one shall be prosecuted or punished for a crime for which he has already been validly convicted or acquitted in accordance with the law and criminal procedure of the country concerned”. Also, in Article 4, paragraph No. 7 of Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms of 22 November 1984 it was pointed out that “no one may be tried or punished in proceedings before the same State for an offense for which he or she was previously convicted by a final judgment or acquitted in accordance with the law and rules of criminal proceedings of that State.” The *ne bis in idem* principle is also included in

¹ Dz.U. [Journal of Laws] of 2018, pos. 703.

² I.e., the prohibition of repeated punishment of the same person for committing the same act.

Article 50 of the Charter of Fundamental Rights of the European Union³ and in Article 54 of the Convention Implementing the Schengen Agreement.⁴

However, this principle was not explicitly included in the Constitution of the Republic of Poland of April 2, 1997. The problem of duplication of responsibility was repeatedly the subject of examination by the Constitutional Tribunal, which derives the *ne bis in idem* principle from the rule of law expressed in Article 2 of the Constitution and the principle of fair trial pursuant to Article 45 of the Constitution.

2. THE JUDICIAL PRACTICE OF THE POLISH CONSTITUTIONAL TRIBUNAL

In many rulings, the Constitutional Tribunal (CT) emphasized that the *ne bis in idem* principle applies only to criminal provisions, but of a criminal nature in the constitutional meaning, i.e. provisions of a repressive nature, i.e. the purpose of which is to subject a citizen to some form of punishment⁵ without restricting this understanding only to formal qualification of the behavior as a crime or an offense by the legislator.

However, if two repressive provisions do not coincide, in such a case the CT points out that the admissibility of using two sanctions should be examined not in the context of the *ne bis in idem* principle but on the basis of the principle of proportionality.⁶

In recent years, there was a number of very interesting rulings made by the CT concerning the issue of duplication of administrative sanctions and sanctions for crimes (tax crimes, offenses).

In the verdict of 12 April 2011 (P 90/08) the CT did not recognize the possibility of imposing a 75% tax on undisclosed income as a repressive (punitive) penalty indicating that the taxation of undisclosed revenues or revenues unex-

³ No one shall be liable to be tried or punished again in criminal proceedings for an offense for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

⁴ Convention of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders. Article 54 states: „A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.”

⁵ See: CT rulings of March 1, 1994 (U 7/93), of April 12, 2011 (P 90/08), of July 8, 2003 (P 10/02, OTK-A 2003, No. 6, pos. 62), of November 3, 2004 (K 18/03, OTK-A 2004, No. 10, pos. 103), of November 18, 2010 (P 29/09, OTK-A 2010, No. 9, pos. 104).

⁶ For example, ruling of September 4, 2007, P 43/06, OTK-A 2007, No. 8, pos. 95.

plained by revealed sources is an institution meant to assess the unpaid income tax in the absence of such an assessment by the taxpayer himself. According to the Tribunal, such solution has mainly a restitution function, which is aimed at supplementing or compensating for possible losses of the state resulting from unreliable taxpayers not fulfilling their obligations. The CT stressed that the legislator adopted such tax model because the amount of losses incurred by the state resulting from taxpayers failing to meet their tax obligations is impossible to determine. In the opinion of the Tribunal, the tax liability increased to 75% for undisclosed sources of income also plays a preventive role, since the possibility of using it should induce all obliged taxpayers to voluntarily fulfill the tax obligation. Due to the negation of the criminal nature of the provision introducing the 75% tax rate, the CT concluded that the admissibility of running two proceedings, namely the administrative one for the imposition of the tax and the penal tax proceeding, cannot be analyzed in the context of the *ne bis in idem* principle. Such analysis should be based on the principle of proportionality. According to the CT, this principle was not violated.

The CT in the verdict of 12 October 2014 (P 50/13) refused to characterize the provision of Article 57, paragraph 1 of the Energy Law Act⁷ as a criminal sanction, which introduces a high fee imposed in case of illegal electricity consumption. The Tribunal decided that this fee is, in fact, primarily of compensatory character. The amount of such fee results from the tariff because, as a rule of thumb, it is not possible to precisely calculate the actual amount of energy consumed in the event of illegal connection to the power grid. Therefore, this fee is intended to guarantee the energy company full restitution of damage, both for the electricity used and for the unpaid interest resulting from the delay.

It is also possible to impose an offense penalty for illegal energy consumption under Article 278 paragraph 5 of the Criminal Code. The Tribunal stated that since the fee charged pursuant to Article 57 of the Energy Law Act has, first of all, a compensatory function, the *ne bis in idem* principle was not violated. The CT emphasized, however, that the application of different measures to the same person for the same act must not go beyond the acceptable level of punishment set by the proportionality principle. Thus, a criminal court deciding on the scope of the penalty for the crime should take into account the fact that the given person was previously charged the fee based on the Energy Law Act.

In the opinion of the CT, also Article 89 of the Gambling Act⁸ is not a criminal sanction.⁹ During the examination of constitutionality of this provision, the rule provided for a fine of PLN 12,000 for each slot machine used to organize gambling games outside a casino. The CT decided that this sanction has all the features characteristic of administrative sanctions: it is imposed for a violation

⁷ Ustawa prawo energetyczne, Act of April 10, 1997, Journal of Laws of 2018, pos. 755.

⁸ Ustawa o grach hazardowych, Act of November 19, 2009, Journal of Laws of 2018, pos. 165.

⁹ Ruling of October 21, 2015, P 32/12.

of the statutory prohibition, the condition of liability is not fault itself, punishment is obligatory and punishment is imposed in a fixed amount. The Tribunal stated that the purpose of this penalty is not to repay for the illegal activity, but to compensate for unpaid tax on games and other debts that are paid by legally operating entities. This sanction is, therefore, a reaction to profiting from illegal gambling activities without paying taxes and other fees. Recognizing the financial penalty under Article 89 of the Gambling Act as non-criminal in nature, the CT could only consider the issue of conducting two proceedings – an administrative one to impose the fee and a penal tax punishment under Article 107 of the Tax Penal Code – not in the context of the *ne bis in idem* principle but in the context of the principle of proportionality. The Tribunal decided that the principle of proportionality was not broken because in the penal tax proceedings, the court can review the fine and take into account the fact of previously imposing the administrative penalty. Therefore, the criminal court is the guardian of compliance with the principle of proportionality.

According to the CT also the sanction indicated in Article 102, paragraph 1, point 4 and paragraph 1c of the Act on Drivers of Vehicles,¹⁰ which make it possible to issue an administrative decision on confiscating the driving license for exceeding the speed limit in a built-up area by more than 50 km/h, is not a criminal sanction.¹¹ In the opinion of the CT, it mainly performs a preventive function, since its immediacy and obligatory application is to act as a deterrent to drivers, thus discouraging them from excessive speeding. Also, the severity of this sanction, in the opinion of the CT, does not mean that it is considered a criminal sanction. This is a less severe sanction than sanctions for offenses, because it has a clearly shorter period of application (3 or 6 months) than the penalty prohibiting driving resulting from an offense (from 6 months to 3 years).

On the other hand, the Tribunal decided that we are dealing with an administrative sanction of a repressive nature in the case of an additional charge imposed pursuant to Article 24 paragraph 1 of the Act on the Social Insurance System¹² for not paying social security contributions.¹³ The CT stressed that this fee is not a compensation, because accrued interest on unpaid contributions serves this purpose already. This fee may or may not be imposed by ZUS (Social Security Administration, pol. *Zakład Ubezpieczeń Społecznych*), which has the freedom of decision to impose this fee and set its amount (the act only specifies the maximum amount of 100% of unpaid contributions). CT also took into account that in the case law of the Supreme Court and common courts it is assumed that the individual circumstances of each case, including the fault of the payer, are decisive

¹⁰ Ustawa o kierujących pojazdami, Act of January 5, 2011, Journal of Laws of 2017, pos. 978.

¹¹ Ruling of October 11, 2016, K 24/15.

¹² Ustawa o systemie ubezpieczeń społecznych, Act of October 13, 1998, Journal of Laws of 2017, pos. 1778.

¹³ Ruling of November 18, 2010, P 29/09.

for the application of the penalty. All these premises determined that the Constitutional Tribunal recognized the additional fee as a repressive sanction.

The same behavior for which an additional fee may be charged pursuant to Article 24 paragraph 1 of the Act on the Social Insurance System, may also be considered an offense under Article 218 paragraph 1 of the Criminal Code and also under Article 98 paragraph 1 and 2 of the Act on the Social Insurance System.

Therefore, in accordance with the above and with the opinion of the CT we are looking at two repressive proceedings, and thus at a violation of the *ne bis in idem* principle. In the conclusion of the justification of the ruling, the Tribunal stated that if the provisions were to be assessed separately, they would be consistent with the Constitution. Combined, however, they create a legal mechanism that can cause unconstitutional effects. In view of the above, CT considers all these provisions in violation with Article 2 of the Constitution of the Republic of Poland, Article 4 paragraph 1 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 14 paragraph 7 of the International Covenant on Civil and Political Rights.

Also in the ruling of 20 June 2017, P 124/15, the CT considered an administrative sanction to be of a criminal nature. The case concerned Article 92a paragraph 1 of the Road Transport Act,¹⁴ which enables imposing a financial penalty for violation of obligations or conditions of road transport set out in Annex No. 3 to this Act. Among them point 3.9 was highlighted, which states “placing in the consignment note and other documents data and information inconsistent with the facts”, and such behavior may also fulfill the characteristics of Article 271 paragraph 1 of the Criminal Code.

The Tribunal pointed out that the punitive nature of this fee is shown by, firstly, its name “financial penalty” already indicating that the sanction is a form of punishment. Secondly, these sanctions are not intended to enforce a change in behavior on the person, but are a repayment for breach of duties. They are not subject to remission (refund) in the event of stopping the violation by the person involved and thus the restoration of the lawful state. Thirdly, in the opinion of the Tribunal, the mechanism of imposing these penalties shows a lot of similarities to the regulations contained in the Criminal Code, as the legislator provided for exoneration conditions, limitation periods and specific blurring of the imposition of the fine. In addition, the CT pointed out that the legislator already introduced a regulation aimed at preventing double punishment (included in Article 92a paragraph 5 of this Act) but this provision only covers the coincidence of a financial penalty with an offense, and does not cover the situation of convergence with the responsibility for crime.¹⁵

¹⁴ Ustawa o transporcie drogowym, Act of September 6, 2001, Journal of Laws of 2017, pos. 2200.

¹⁵ Article 92a, paragraph 5 states: “if an act which is a violation of the provisions referred to in paragraph 1, simultaneously exhausts the characteristics of an offense, only the provisions on administrative responsibility apply in relation to the entity being a natural person.”

A new view emerged in that ruling stating that the recognition of financial penalties provided for in Article 92a paragraph 1 of the Road Transport Act as punishments in the constitutional sense, could not yet constitute a sufficient basis for the Tribunal's ruling on the inconsistency of the examined regulation with the constitutional prohibition of double (multiple) punishment of the same person for the same act. The Tribunal held that it was also necessary to determine whether cumulative legal remedies would serve the same purposes, i.e. the protection of identical legal goods. Thus, the ruling introduced the premise of the identity of the legally protected good as a condition of the inadmissibility of cumulation of proceedings in the light of the *ne bis in idem* principle. In previous Tribunal's rulings, such notion did not appear.

The Tribunal decided that the sanction in the form of a financial penalty imposed on the basis of the Road Transport Act in connection with point No. 3.9 of Annex No. 3 to this Act is intended to protect the truthfulness of information, i.e. has the same purpose as that of Article 271 of the Criminal Code.

In view of the above, the CT concluded that there was a violation of the constitutional prohibition of double (multiple) punishment (*ne bis in idem* principle), and thus Article 2 of the Constitution. Double (multiple) punishment of the same person for the same act is at the same time a violation of the principle of proportionality of the state's response to the violation of the law by the individual (for example in rulings reference No. K 24/15, part III, point 6.1 and reference No. K 45/14, part III, point 4.1). It is an expression of excessive repressiveness, incompatible with the requirements of a democratic state ruled by law (Article 2 of the Constitution).

In the case law of the CT, unlike the case law of the European Court of Human Rights, uniform criteria for a categorizing a case as a criminal case were not developed,¹⁶ while the Constitutional Tribunal uses the term 'repressive responsibility'. The use of such term has been criticized by the judge of the CT, prof. A. Rzepliński. In a separate opinion to the ruling of October 21, 2014 (P 50/13), he stated that according to the meaning of the word "repression" indicated in the dictionary, it cannot be used as a term equivalent to a sanction. A. Rzepliński rightly pointed out that repression is a cruel, humiliating and inhuman punishment, so there is no place for it in a democratic state of law.

¹⁶ Regarding the criteria for the classification by the Constitutional Tribunal of sanctions of repressive type, see for example A. Błachnio-Parzych, *Sankcja administracyjna a sankcja karna w orzecznictwie Trybunału Konstytucyjnego oraz Europejskiego Trybunału Praw Człowieka*, (in:) M. Stahl, R. Lewicka, M. Lewicki (eds.), *Sanckje administracyjne*, Warszawa 2011; A. Błachnio-Parzych, *Zbieg odpowiedzialności karnej i administracyjno-karnej jako zbieg reżimów odpowiedzialności represyjnej*, Warszawa 2016, pp. 51–66; M. Sławiński, *Pojęcie tzw. przepisów o charakterze represyjnym – uwagi na tle dotychczasowego orzecznictwa Trybunału Konstytucyjnego*, „Przegląd Sejmowy” 2013, issue 5.

In the judicial practice of the CT, the most frequent indication is that we are dealing with repressive responsibility (understood as punitive in nature) when the purpose of a provision is to subject a citizen to some form of punishment.¹⁷ Thus, the provision is repressive if it is intended to make the citizen pay for the act committed. Recognizing the liability as repressive excludes the compensatory objective of the imposed fee.¹⁸ According to the CT, an administrative sanction (and not a repressive one) is one that has primarily a preventive function, although at the same time, the Tribunal notes that an administrative, and even a civil sanction,¹⁹ may have repressive character,²⁰ but it is not the foreground of the sanction. The purpose of an administrative sanction is, therefore, not the repayment itself but forcing the adoption of a specific behavior.²¹ The administrative nature of the sanction is also supported by the goal of restoring the lawful state.²² The features supporting the recognition of sanctions as administrative rather than repressive indicated in the case law of the CT also include: marking a penalty at a fixed rate (no possibility of adjusting it depending on the case); obligatory imposition; finding guilt is not a condition for punishment.²³ According to the CT, the severity of the sanction may also define the sanction as repressive and not administrative.²⁴

3. ARTICLE 4 OF THE PROTOCOL NO. 7 TO EUROPEAN CONVENTION ON HUMAN RIGHTS (ECTHR) AND EUROPEAN COURT OF HUMAN RIGHTS (ECHR) CASE LAW

Article 4 of Protocol No. 7 to the ECtHR also indicates that the principle of *ne bis in idem* concerns criminal cases. On the basis of the ECtHR, the term “criminal case” also has broader understanding, not only as behavior directly recognized by the legislator. In the judgment of 8 June 1976 in the case of Engel and Others v. The Netherlands,²⁵ the ECHR indicated three criteria that allow a given case to be considered as a criminal one, namely:

¹⁷ See case-law cited in footnote No. 5.

¹⁸ Compare the ruling P 50/13, P 32/12, discussed above.

¹⁹ See considerations contained in the above-mentioned ruling of October 12, 2014, P 50/13.

²⁰ See for example, ruling of April 18, 2000, K 23/99 regarding the nature of imposed payments by the decision of the Insurance Guarantee Fund (*Ubezpieczeniowy Fundusz Gwarancyjny*).

²¹ See TC ruling of June 20, 2017, P 124/15.

²² See ruling of March 26, 2002, SK 2/01 regarding sanctions in the form of demolition under construction law.

²³ Compare, for example, ruling of October 21, 2015 (P 32/12).

²⁴ Compare ruling of October 14, 2009, Kp 4/09, regarding the imposition of penalty points on drivers and the ruling of October 11, 2016, K 24/15 discussed above.

²⁵ Complaint No. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72. Considerations regarding the criteria are in point 82.

1) the formal nature of the act – if it is a crime in domestic legislation, then the case is criminal,

2) nature of the violation (the content of the charges against the person is examined),

3) the severity of the punishment threatening this behavior.

If it is enough to meet one of these criteria, we are dealing with a criminal case.

The second and third criteria should be considered separately, but a cumulative analysis of both of these criteria is possible, if a separate analysis of each of them does not allow to reach a clear conclusion as to the existence of a criminal charge. When assessing the severity of punishment as the third criterion, the maximum allowed penalty for this act is taken into account, not the penalty ultimately imposed on the given person for the act.²⁶

The ECHR derives three prohibitions from the *ne bis in idem* principle contained in Article 4 of Protocol No. 7 to the European Convention on Human Rights – no one shall be:

1) liable to be tried,

2) tried,

3) punished,

for an act for which he or she was previously convicted by a final judgment or acquitted.²⁷

In the judicial practice of the ECHR the term “*idem*” (that is when we deal with proceedings concerning the same act) has been differently understood for a long time. In the judgment of 10 February 2009 in the case of Sergey Zolotukhin v. Russia,²⁸ the ECHR analyzed its previous verdicts and recognized that Article 4 of Protocol No. 7 must be understood as one prohibiting the conduct for the second criminal act, if it arises from identical facts or from facts which are substantially the same.²⁹

The ECHR has repeatedly emphasized that it is inconsistent with the principle of *ne bis in idem* when two identical and independent proceedings concerning the same act are conducted against the same person.³⁰ The ECHR case law, however, allows for two proceedings if the ruling in one of these cases is based on a decision issued in the second proceeding, for example in the case of taking away a driving license after imposing a penalty for driving under the influence

²⁶ ECHR ruling in the Case of Engel, point 82, ECHR ruling of March 4, 2014 in the Case of Grande Stevens v. Italy, application No. 18640/10, point 98, ruling of February 10, 2009, case of Sergey Zolotukhin v. Russia, 14939/03, paragraph 56.

²⁷ Ruling of February 20, 2004 Nikitin v. Russia, 50178/99 point 37, ruling of February 10, 2009 Sergey Zolotukhin v. Russia, 14939/03, paragraph 110, ruling of May 20, 2014 Nykanen v. Finland, 11828/11, point 47.

²⁸ 14939/03.

²⁹ Point 82 of the ruling.

³⁰ ECHR rulings of May 20, 2014 Nykanen v. Finland 11828/11, January 27, 2015 Rinas v. Finland 17039/13, February 17, 2015 Boman v. Finland 41604/11.

of alcohol.³¹ In such a situation, in the subsequent proceedings, the circumstances of the act committed are not examined again.

In the case *A and B v. Norway*,³² the ECHR stated that there is no breach of the *ne bis in idem* principle if two proceedings conducted against the same person are closely related in substance and time, are integrated and form a coherent whole, i.e.:

- 1) the proceedings pursued complementary objectives and thus dealt with different aspects of the misconduct,
- 2) the initiation of two proceedings was foreseeable,
- 3) repeats were avoided in the collection and evaluation of evidence (factual findings from one proceeding were adopted in the second proceeding),
- 4) the penalty imposed in one proceeding was included in the second.

The three criteria indicated by the ECHR in the *Engel* case were applied by the Court of Justice of the European Union. The CJEU used these criteria for the assessment of the nature of the sanctions in the judgment of 26 February 2013, case C-617/10 of *Åklagaren v. Hans Åkerberg Fransson*, in the judgment of 5 June 2012, case C-489/10 concerning *Łukasz Bonda* and in the judgments of 20 March 2018 case C-537/16, of *Garlsson Real Estate SA*, in liquidation, *Stefano Ricucci*, *Magiste International SA* against the *Commissione Nazionale per le Società e la Borsa (Consob)* and case C-524/15 against *Luce Mencie*.

The Polish Constitutional Tribunal also referred to these three criteria in the judgment of October 11, 2016, case No. K 24/15.

4. REGULATIONS LIMITING DOUBLE PENALTIES IN THE EVENT OF A CONFLICT OF CRIMINAL AND ADMINISTRATIVE-CRIMINAL LIABILITY IN THE POLISH LEGAL SYSTEM

On the basis of a narrowly understood criminal law covering liability for crimes and offenses, there are adequate provisions to ensure respecting of the *ne bis in idem* principle. The final conclusion of criminal proceedings to the same act of the same person or the conduction of a proceeding initiated earlier to such an act constitutes a negative procedural condition under Article 17 paragraph 1

³¹ *R.T. v. Switzerland* 31982/96, May 30, 2000 and *Nilsson v. Sweden*, 73661/01, December 13, 2005.

³² Ruling of November 15, 2016, 24130/11. The case concerned criminal liability of a person for tax irregularities and administrative measures to offset the tax amounting to 30% of tax due. The presented considerations on the admissibility of conducting two proceedings can be found in paragraph 132 of the reasoning of the verdict.

point 7 of the Code of Criminal Procedure and Article 5 paragraph 1 point 8 of the Offenses Procedure Code.

Appropriate regulations are also found in substantive criminal law. Article 11 paragraph 1 of the Criminal Code and Article 6 paragraph 1 of the Tax Penal Code indicate that the same act can only constitute one crime. In case when an act is a crime and also exhausts the signs of an offense, Article 10 of the Offenses Code orders to adjudicate both for the crime and for the offense, but if the subject had already been convicted for the crime and for the offense with a penalty or a punishment of the same type, a more severe penalty or punishment is imposed.³³ An analogous solution was also adopted in Article 8 of the Criminal Code in regard to the overlapping of provisions contained in the Tax Penal Code with the provisions of the Criminal Code or the Offenses Code.

So far, however, there was no system-wide solution to the convergence of criminal (offense) liability with administrative sanctions of criminal nature. The legislator has only concluded relevant regulations in several acts, for example in the Act on Road Transport. Article 92a paragraph 5 of this act indicates that if the action being a violation of the provisions referred to in paragraph 1 of this article simultaneously exhausts the characteristics of an offense, only the provisions on administrative responsibility apply to the entity being a natural person. However, the Constitutional Tribunal rightly stated in its ruling of 20 June 2017 (case P 124/15) that this regulation is not sufficient, because it omits the situation when such action fulfills the features of a crime.

Another example of the regulation of the confluence of two liability regimes is Article 38a of the Act on the Prevention of Pollution from Ships,³⁴ which indicates that a natural person is not subject to a financial penalty provided for in Article 36 paragraph 1 or Article 37 point 4 if the persons' behavior simultaneously carries the marks of an offense specified in Article 35a of this act, and the offense has been confirmed by a valid conviction.

It is also possible to indicate, as an example, the Act of August 18, 2011 on Maritime Safety,³⁵ of which Article 129 indicates that a natural person is not subject to the liability provided for in Article 127 paragraph 1 point 7 if the behavior simultaneously carries the marks of an offense specified in art. 178a paragraph 1 of the Criminal Code, and this offense was confirmed by a valid conviction. Article 127 paragraph 1 item 7 of this Act introduces a financial administrative penalty in the amount of twenty-fold the average monthly salary for the preceding year, for operating a ship or inland waterway vessel, sea or inland yacht, or performing duties in the scope of ship safety, ship protection or preventing pollution

³³ Article 10 of the Offenses Code was recognized by the CT in the ruling of December 1, 2016 (K 45/14) as compliant with Articles 2 and 45 of the Constitution, Article 4 paragraph 1 of Protocol No. 7 to the ECtHR and Article 14 paragraph 7 of the ICCPR.

³⁴ Ustawa o zapobieganiu zanieczyszczenia morza przez statki.

³⁵ Ustawa o bezpieczeństwie morskim, Journal of Laws of 2018, position 181.

of the marine environment while intoxicated or under the influence of a narcotic. Also Article 178a paragraph 1 of the Criminal Code provides for criminal liability for driving a motor vehicle in a state of intoxication or under the influence of a narcotic.

However, the indicated regulations have significant drawbacks. The Act on the Prevention of Pollution from Ships and the Maritime Safety Act all prevent double punishment only when the criminal proceedings are concluded before the penalty from administrative proceedings is imposed. If the order is reversed, i.e. the administrative proceedings conclude before the criminal proceedings, then double punishment is possible.³⁶ In addition, administrative liability of a repressive nature is not blocked by a judgment previously issued by a criminal court that is not a conviction, i.e. the discontinuation of proceedings, conditional discontinuation of proceedings or acquittal.

Following the decision of the CT of 18 November 2010 (P 29/09), relevant regulations were also introduced to the Act on the Social Insurance System. Article 24, paragraph 1b provides that in relation to the contribution payer who is a natural person convicted by a valid sentence for non-payment of contributions or paying them at an insufficient rate, an additional charge for the same act shall not be imposed. However, if proceedings are initiated in the case of a crime or an offense regarding the failure to pay dues or paying them in an insufficient amount, proceedings for imposing a supplementary fee against the payer who is a natural person are not initiated for the same act, and the proceedings are suspended until the end of the proceedings for a crime or an offense (Article 24, paragraph 1c). In accordance with paragraph 1d, in the case of a final conviction of a payer who is a natural person for an offense involving failure to pay dues or paying them in undervalued amounts, the proceedings for additional payment for the same deed are canceled ex officio by court. Additionally, any issued decision to impose an additional fee for the same deed also becomes invalid ex officio and the collected fee is returned immediately with interest in the amount and under the terms stated in the civil law, counted from the day of collecting the additional fee. These regulations concern only the case of a conviction, they do not suspend punishment in administrative proceedings in case of conditional discontinuance of proceedings, which is a decision stating guilt and may be combined with imposing, for example, the obligation to pay a specific sum of money on the perpetrator (Article 67 paragraph 3 of the Criminal Code).³⁷

There were also other cases where the legislator tried to avoid the possibility of double punishment of a natural person. One example is the introduction of the liability of a managing person for violating the prohibitions in Article 6

³⁶ A. Błachnio-Parzych, *Zbieg odpowiedzialności...*, pp. 225–230, 243–250.

³⁷ M. Król-Bogomilska, *Z problematyki zbiegu odpowiedzialności karnej i administracyjnej – w świetle orzecznictwa Trybunału Konstytucyjnego*, „Studia Iuridica. Wina i kara. Księga pamięci Profesor Genewfy Rejman” 2012, issue 55, pp. 74–75.

paragraph 1 of this Act (unlawful agreements limiting competition)³⁸ into the Act on Competition and Consumer Protection.³⁹ Only points 1 to 6 of this provision are indicated as the basis of such liability, omitting point 7 concerning the bid-rigging. This solution was applied because bid-rigging behavior is also a crime under Article 305 of the Criminal Code. This was to ensure the lack of double punishment of the managing person for participation in bid-rigging – once on the basis of Act on Competition and Consumer Protection and the second time for the crime addressed in the Criminal Code.⁴⁰

In Polish law we can also find an Act in which the legislator directly authorized the use of two sanctions: administrative (including punitive) and criminal. This takes place in the Act on the Liability of Collective Entities for Criminal Acts, in which Article 6 states that “the liability or lack of liability of a collective entity under the terms specified in this Act shall not exclude civil liability for damage caused, administrative liability or individual legal liability of the perpetrator of the prohibited act.” The responsibility of collective entities under this act is repressive in nature, which was decided by the CT in the ruling of 3 November 2004 (case No. K 18/03). Therefore, there will be a doubling of two liabilities of repressive nature.

An important change in the scope of a statutory solution to the convergence of criminal and administrative (and repressive in nature) liabilities was introduced by the amendment to the Code of Administrative Procedure,⁴¹ which added Section IVa to it. In this section Article 189f paragraph 1 point 2 stipulates that the public administration body, by way of a decision, waives the imposition of an administrative fine and issues only an admonishment if a legally binding decision for the same behavior has been previously made by another authorized administrative body to impose an administrative fee on the party or the party received a valid punishment for a misconduct or a fiscal offense or a final conviction for a crime or for a fiscal crime and the previous penalty meets the purposes

³⁸ The amendment of the Act on Competition and Consumer Protection (UOKiK) made by the Act of June 10, 2014 Amending the Act on Competition and Consumer Protection and the Civil Code Act (Journal of Laws of 2014, pos. 945).

³⁹ Ustawa o ochronie konkurencji i konsumentów, Act of February 16, 2007, Journal of Laws of 2018, pos. 798, further known as “Act on Competition and Consumer Protection” (UOKiK).

⁴⁰ However, this is not a solution that fully prevents double punishment of a natural person. Some bid-rigging agreements may be classified as agreements prohibited under other categories than those from point 7 of prohibited agreements types under Article 6 paragraph 1 of UOKiK and also indicated as the basis of liability of managing persons. This issue was discussed in detail in my study entitled: *A. Zientara, Odpowiedzialność karna i administracyjna za udział w zмовie przetargowej – możliwość podwójnego ukarania*, (in:) M. Błachucki (ed.), *Administracyjne kary pieniężne w demokratycznym państwie prawa*, Warszawa 2015. See also: G. Materna, A. Zawłocka-Turno, *Materialne i procesowe zmiany w zakresie praktyk ograniczających konkurencję i naruszających zbiorowe interesy konsumentów*, „IKAR” 2015, issue 2(4), pp. 19–20.

⁴¹ Act of April 7, 2017 Amending the Act – The Code of Administrative Procedure and Other Chosen Acts (Journal of Laws of 2017, pos. 935).

for which an administrative fine would be decided. Withdrawal from the imposition of a fine is, therefore, dependent on the assessment of the purposes of this fine. Therefore, it seems that if we are faced with an administrative punishment of a repressive nature, there should be a waiver of its imposition. However, as with the already discussed solutions to the convergence issue described in the Act on Preventing Pollution from Ships, also the Code of Administrative Procedure does not provide the protection of the entity against double punishment in the event of first imposing a financial penalty and then a criminal penalty in criminal proceedings. The Code of Administrative Procedure does not offer a solution similar to that contained in the Act on the Social Insurance System under which, in the event of a subsequent conviction, the fine is refunded. Also on the grounds of the Code of Administrative Procedure only a valid conviction for a crime can prevent the imposition of a fine, but not a conditional sentence that discontinues the proceedings, which should also be assessed as a punitive sanction because of the possibility of declaring the measures indicated in Article 67 paragraph 3 of the Criminal Code. Meanwhile, the ECHR document pointed out that the protection provided for in Article 4 of Protocol No. 7 also applies to situations where the first criminal trial does not result in conviction.⁴² Such protection is currently not provided by the current provisions of the Code of Administrative Procedure.

In the event of the administrative penalty coming first and then the need to issue a ruling in criminal proceedings coming second, as emphasized by the CT, the courts' obligation to take into consideration the amount of the administrative penalty for the same act should be coming from the constitutional principle of proportionality.⁴³ This principle, however, was not explicitly included in the Criminal Code. The CT noticed this and said that the court is not bound only by the rules and directives of the scope of the punishment explicitly specified in the criminal law, but should also apply the principles and directives of the scope of the punishment that are not included *expressis verbis* in the Criminal Code but have their constitutional basis. One of such principles, resulting from the Constitution of the Republic of Poland, is the principle of court's reasonable consideration, during the process of choosing the means of reaction for a crime, of the fact that the perpetrator had already suffered from another type of sanction with a repressive nature for the same act.

⁴² For example ruling of February 10, 2009, case of Sergey Zolotukhin v. Russia, 14939/03, point 110.

⁴³ Compare ruling of October 21, 2015, P 32/12 and ruling of October 12, 2014, P 50/13.

5. CONCLUSIONS

In the light of the *ne bis in idem* principle, it is unacceptable to impose two penalties, understood as punitive measures of repressive nature, on the same person for the same act. It is, therefore, forbidden to impose a punishment for a crime or an offense along with a repressive administrative penalty. The imposition of a penalty for a crime/offense together with a non-repressive administrative penalty may be considered in the context of the principle of proportionality, but not in the context of the *ne bis in idem* principle.

Currently available solutions to the confluence of the basis of criminal and administrative liability of a repressive nature should be considered as not fully satisfying. The most serious reservations are raised by Article 6 of the Act on Liability of Collective Entities, which directly indicates that the application of the sanctions provided for in this Act is independent of administrative responsibility. Additionally the amendment that introduced Article 189f to the Code of Administrative Procedure does not block the possibility of conducting two independent proceedings against the same person, and the only basis for cancellation of an administrative penalty is either a final conviction for a crime or a final punishment for an offense. If the order of decisions is reversed – that is when an administrative decision is issued first and followed by a crime or offense conviction, the person will be punished twice. In such situation, as it was emphasized in Constitutional Tribunal's rulings, a criminal court should take into consideration the administrative penalty imposed and adequately adjust the severity of the criminal penalty when deciding on the verdict.

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**THE CONVERGENCE OF THE BASIS OF RESPONSIBILITY
FOR A CRIME (AN OFFENSE) AND FOR AN ADMINISTRATIVE
DELICT AND THE *NE BIS IN IDEM* PRINCIPLE
IN THE POLISH LAW**

Summary

This study presents the case law of the Polish Constitutional Tribunal referring to the *ne bis in idem* principle and the case law of the European Court of Human Rights issued on the basis of Article 4 of Protocol No. 7 to the European Convention on Human Rights. The work also includes the discussion of solutions adopted in Polish law in the case when a person meets both the signs of a crime/offense and the premises of administrative responsibility of a punitive (repressive) nature in a single unlawful act. For many years, a system-wide solution to this type of convergence was missing in Polish law. The situation changed last year with the introduction of Article 189f to the Code of Administrative Procedure. However, as indicated in the study, this provision does not fully implement the *ne bis in idem* standard developed by the European Court of Human Rights.

KEYWORDS

ne bis in idem, case law, Constitutional Tribunal, European Court of Human Rights

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ne bis in idem, orzecznictwo, Trybunał Konstytucyjny, Europejski Trybunał Praw Człowieka