REVIEW OF EUROPEAN ADMINISTRATIVE LAW; VOL. 9, NR. 1, 5-32, PARIS LEGAL PUBLISHERS © 2016

Administrative Sanctions: Between Efficiency and Procedural Fairness

Dr. Maciej Bernatt*

Assistant Professor in the Department of European Economic Law (Jean Monnet Chair), Faculty of Management, University of Warsaw; Scientific Secretary of the Centre for Antitrust and Regulatory Studies at the University of Warsaw

Abstract

The article aims at presenting - from Poland's perspective - the challenges in building an adequate system of administrative sanctions. It is claimed that the efficiency of the functioning of this system should be balanced with the appropriate level of observance of procedural fairness as well as with appropriate rules governing the attribution of administrative liability. This article analyzes three areas where a balanced approach is needed: the first concerns the bases for administrative liability, the second the scope of procedural rights, and the third the institutional arrangement of the system. This article names two factors that should be taken into consideration when deciding how to reconcile efficiency with procedural fairness. Taken into account should be, first, the complexity of the given area of administrative law and, second, the severity of the sanctions.

1. Introduction

Administrative sanctions are of interest for public law scholars all over the world. They are a principal instrument for guaranteeing effectiveness of administrative laws in different areas. Their severity is growing. At the same time, the rules governing the imposition of administrative sanctions are rarely regulated completely in one legal act. Poland's and the EU's legal systems are examples here. Thus, these rules need to be interpreted from different sources. This brings doubts about substantive and procedural standards applicable in the proceedings leading to the imposition of administrative sanctions. In the

* DOI 10.7590/187479816X14628633832166
The earlier draft of this article was discussed at the European University Institute as a part of the common project of the EUI, the New York University and the Jagiellonian University on *Changing Landscape of Polish Public Law*. Points 4.3 and 5.3. of the article draws on the author's findings of the study funded by the National Science Centre, Poland (project 2014/15/D/HS5/01562). All omissions remain mine. Comments are welcome at mbernatt@wz.uw.edu.pl.

EU and ECHR context, the question about the need for application of quasi-criminal procedural guarantees is raised particularly often.[1]

This article aims at presenting the challenges in building an adequate system of administrative sanctions from Poland's perspective. ECHR and EU standards serve as a primary point of reference and potential inspiration for the improvement of the *status quo* identified in the case-law of Poland's Constitutional Court. In line with Council of Europe standards, it is claimed that the efficiency of the administrative sanctions system should be reconciled with the appropriate level of observance of procedural fairness as well as with appropriate rules governing the attribution of administrative liability.[2] Only then may such a system be considered to play its role - serving to impose administrative sanctions when it is justified (accuracy) and so contributing to the accomplishment of the goals of administrative laws.[3]

The article provides the analysis of three areas where a balanced approach in the imposition of administrative sanctions is needed. The first concerns the bases for administrative liability that must be present in order for administrative sanctions to be imposed. The second is the scope of procedural rights of parties charged with a violation of administrative law. The third area is the institutional arrangement of the system: the division of prosecutorial and adjudicative functions when it comes to the internal structure of the administrative agency, and the scope of judicial review of the decisions which impose administrative sanctions.

This article proposes two factors that should be taken into consideration when deciding how to reconcile efficiency with procedural fairness and the adequate construction of the bases for administrative liability. It is claimed that, first, the complexity of the given area of administrative law area and, second, the severity of the sanctions should be considered when constructing the system under which administrative sanctions are imposed. The more complex the case is, and the more severe the sanctions are, the greater the scope of the parties'

---

1 See for example Adrienne de Moor-van Vugt, 'Administrative Sanctions in EU Law' (2012/1) *REALaw*.

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

3 In *Spector Photo Group* the CJEU linked the presence of adequate procedural safeguards and adequate liability rules with the attainment of goal pursued. In particular, it observed – in the context of the Directive's 2003/6 prohibition of insider trading – that any possession of inside information by primary insider who enters into a market transaction automatically could fall within this prohibition. According to the CJEU such interpretation "would entail the risk of extending the scope of that prohibition beyond what is appropriate and necessary to attain the goals pursued by that directive. Such an interpretation could, in practice, lead to the prohibition of certain market transactions which do not necessarily infringe the interests protected by that directive.", see case C-45/08, *Spector Photo Group* [2009], ECR I-12073, para. 45-46.

procedural rights, the less automatic the rules governing the attribution of liability, and the greater the division of prosecutorial and adjudicative functions should be. Complexity and severity of sanctions should also influence the shape of judicial review.

The structure of this article is as follows. Part 2 provides an overview of procedural fairness and efficiency. This analysis is followed in part 3 by the study of procedural fairness and efficiency in the case-law of the Poland's Constitutional Court (the CC).[4] It is argued that these two values are complementary and not alternative. Part 4 suggests the need for a balanced and flexible approach in the constitutional determination of the scope of the parties' procedural rights, and the rules regulating the attribution of liability. Arguments stemming from ECtHR and CJEU case-law, as well as U.S. experiences are presented to support such an approach. Part 5 covers the three areas where a balanced approach is recommended. ECHR and EU standards are relevant here again. The analysis covers rules governing attribution of administrative liability in Poland, procedural rights of parties to administrative proceedings, and the institutional arrangement of the system in which sanctions are imposed. Competition law – an especially complex area of administrative law that is characterized by the presence of severe financial sanctions – is used often in this part of the article as a point of reference.

2. Efficiency and Procedural Fairness – an Overview

Tadeusz Kotarbiński, a Polish praxiologist, developed the concept of efficient action.[5] According to Kotarbiński, an action is efficient when it is based on a measure that is adequate to the goal pursued and when the goal is achieved with the use of minimal resources (time, material, energy, and money) needed.[6] In this article, efficiency is understood in the way proposed by Kotarbiński. It is asked how the system under which administrative sanctions are imposed balances time (length of the proceedings), money (the costs of a long, extensive evidentiary hearing) and other resources against the requirements

4 All the CC judgments mentioned in the article are available at http://ipo.trybunal.gov.pl/.

5 T. Kotarbiński, *Traktat o dobrej robocie* [*Treaty of work well done*] (Wrocław: Zakład Narodowy im. Ossolińskich 1975). See in English: T. Kotarbiński, *Praxiology. An Introduction to the Science Of Efficient Action* (Warszawa-Oxford: PWN-Pergamon Press 1965). See also T. Kotarbiński, *Hasło dobrej roboty* [*Good work*] (Warszawa: Wiedza Powszechna 1975); T. Kotarbiński, 'Comments on the Concept of Efficiency' in: W. Gasparski, T. Pszczołowski (eds.), *Praxiological Studies. Polish Contributions to the Science of Efficient Action* (Warszawa: PWN, D. Reidel Publishing Company 1983), p. 67; T. Pszczołowski, *Zasady sprawnego działania* [*Rules of efficient action*] (Warszawa: Wiedza Powszechna 1982).

6 T. Kotarbiński, *Hasło dobrej roboty* [*The slogan of a good work*] (Warszawa: Wiedza powszechna 1975), p. 13.

of procedural fairness. It is presumed – in line with the CJEU and CC opinion[7] – that administrative sanctions are, in Kotarbiński's words, measures that are adequate to the goal pursued – the objectives of administrative law in question.[8] At the same time, procedural fairness is seen as a value that should be reconciled with the pursuance of the accomplishment of this goal with the use of minimal resources needed.[9] The process of the imposition of administrative sanctions should not be solely concerned with efficiency. Procedures should be both fair and efficient.[10]

In this article, procedural fairness is understood in accordance with the concept of the process values elaborated by Robert Summers. He claims that every legal process can be seen not only from the perspective of its result, but also from the point of view of the process in itself.[11] Thus, process values are said by him "to refer to standards of value by which we may judge a legal process to be good as a process, apart from any 'good result efficacy' it may have".[12] Such an approach is in line with socio-psychological studies which show that participants of the legal process assess it not only by its final result, but also from the perspective of the respect for the process values.[13] However, respecting

---

7 In the judgment of 25 March 2010, P 9/08, the CC pointed out at the importance of "effective measures" that would induce the addressee of legal norms to observe them. Administrative sanctions are considered in the by the CC as such effective measures, judgment SK 21/03 (14 June 2004). See also the judgment U 7/93 (1 March 1994). The CJEU believes that administrative sanctions should be effective, proportionate and dissuasive, see case C-617/10 *Åkerberg Fransson* (judgement of 26 February 2013), not yet reported, para. 36. AG Cruz Villalon observes that effectiveness is the main reason for the popularity of administrative sanctions across EU Member States, see the opinion in: *Åkerberg Fransson* of 12 June 2012, para. 74. In *Taricco* the CJEU found – in the context of criminal proceedings concerning offences in relation to VAT – that the EU Member States are obliged to put in place a system of effective and dissuasive sanctions to prevent serious tax fraud affecting the financial interests of the EU, see case C-105/14, *Taricco* (judgement of 8 September 2015), not yet reported, para. 58.

8 These objectives are different depending on the type of administrative law in question. Construction and road law may be concerned about safety, competition law about protection of consumer welfare, environmental law about the preservation of nature etc.

9 In the EU literature it is rightly pointed out that the presence of procedural guarantees may translate into greater effectiveness of the system by building its greater legitimacy. It is argued that parties to the proceedings who are content with the level of procedural rights accorded might be less inclined to appeal the decision or raise against it due-process charges. See A. Scordamaglia-Tousis, *EU Cartel Enforcement: Reconciling Effective Public Enforcement with Fundamental Rights* (Wolters Kluwer Law & Business 2013), pp. 14-15.

10 Henry J. Friendly when discussing different areas of U.S. law aptly observed that "the problem is always the same–to devise procedures that are both fair and feasible", H.J. Friendly, 'Some Kind of Hearing' (1975/Vol. 123) *University of Pennsylvania Law Review* 1267-1317, at 1315.

11 R.S. Summers, 'Evaluating and Improving Legal Process–A Plea for 'Process Values'(1974/Vol. 60/No. 1) *Cornell Law Review* 1-52, at 1.

12 *Id.*, at 3.

13 In this respect see E. Allan Lind, T.R. Tylor, *The Social Psychology of Procedural Justice* (New York: Springer 1988), p. 217. Thus procedural fairness enhances the legitimacy of the proceedings in question. Both parties and the general public are more likely to accept the outcome of such proceedings when procedural fairness is guaranteed.

the process values may positively influence the achievement of the presumed result.[14] In the context of administrative proceedings, the parties' right to be heard plays an important role in presenting to the adjudicator the counter-arguments and counter-evidence that may be indispensable for making an accurate decision (whether administrative law was violated and whether there are grounds for the imposition of sanction). Procedural fairness is thus understood as a group of values that shall be protected by procedural guarantees such as the right to be heard, right of defense, right to a hearing before an impartial and independent adjudicator or right to judicial review.[15] In parallel, it is borne in mind that the greater the presence of legal guarantees of procedural fairness, the greater the risk that the process will become less efficient – longer and more costly, a fact that may adversely affect private parties.[16] Moreover, additional layers of procedural guarantees do not ensure that the right result will be reached. Despite their existence, an adjudicator may still take a wrong decision for a variety of reasons. Hence, procedural fairness has to be reconciled with efficiency.[17]

U.S. law provides interesting examples of a flexible approach in the need for balance between efficiency and procedural fairness. The scope of procedural guarantees available under the Fifth Amendment Due Process Clause may vary depending on the case. The U.S. Supreme Court addressed the question whether due process requires an evidentiary hearing prior to the deprivation

---

14 Wojciech Sadurski is of the opinion that the implementation of the fair procedure cannot be seen as the indispensable and sufficient condition to obtain the right result of the process (a just one); according to him it can however help in reaching such result – see Wojciech Sadurski, *Teoria sprawiedliwości. Podstawowe zagadnienia [A theory of justice. Principal problems*] (Warszawa: Wydawnictwo PWN 1988), p. 81. The different approach was taken by John Rawls who in his model of 'pure procedural justice' describes situations in which there is no criterion for what constitutes a just outcome other than the procedure itself – see J. Rawls, *Teoria Sprawiedliwości* [*A Theory of Justice*] (Warszawa: Wydawnictwo PWN 1994, originally published in 1971), p. 122.

15 See M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji* [*Procedural fairness in the proceedings before the competition authority*] (Warszawa: Wydawnictwo Naukowe WZ UW 2011), pp. 91-98.

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

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

of welfare benefits even if such a hearing is provided thereafter. Originally in *Goldberg v. Kelly*, the Court held that a hearing closely resembling a judicial trial is necessary before depriving somebody of these benefits.[18] A different approach was taken in *Mathews v. Eldridge*.[19] In this seminal case, the Supreme Court recalled that "(d)ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances"[20] and that "due process is flexible and calls for such procedural protections as the particular situation demands".[21] According to the Supreme Court, the identification of the specific dictates of due process

"requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail".[22]

In other words, the *Mathews* test requires balance between efficiency and procedural fairness. It asks about the likelihood of reaching a presumed result – non-erroneous decision (in our case, the accurate imposition of sanction) under the procedure used and about the cost entailed with the use of such procedure. It also asks how additional or substitute procedural safeguards improve the decision process (in reaching a non-erroneous decision[23]) and what costs will this involve. The question about the private interest that will be affected by the official action may be associated in this article's proposal with the severity of the sanction – the more severe it is, the greater the intrusion in the private interest sphere. The complexity of the area of the administrative law is instead a factor that should be taken into consideration when deciding about the need for introducing a given level of procedural guarantees (additional or substitute).

18 *Goldberg v. Kelly*, 397 U.S. 254, 266-271 (1970).
19 *Mathews v. Eldridge*, 424 U.S. 319 (1976).
20 *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961).
21 *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).
22 *Mathews v. Eldridge*, at 335.
23 Such approach is in line with that the presence of procedural guarantees (especially such as right to be heard) may be helpful in achieving the presumed result.

3. Efficiency and Procedural Fairness as Constitutionally Complementary Values

The preamble to the Constitution of the Republic of Poland of 1997[24] points out that it is necessary to ensure that the work of public institutions is both efficient and fair. However, as the preamble is not a binding legal source of constitutional principles, the analysis of efficiency and procedural fairness requires the study of the first chapter of the Polish Constitution (titled: "The Republic") where general principles governing the Republic of Poland are listed. In this chapter, neither efficiency nor procedural fairness are mentioned directly. However, they may be interpreted from the principle of democratic-state-of-law prescribed in Article 2 of Poland's Constitution.[25] The vast case-law of the Polish Constitutional Court identifies procedural fairness as a part of the democratic-state-of-law clause. The CC underlines that the principle of the democratic-state-of-law demands that all proceedings - which are conducted by state institutions to decide individual cases (so not only judicial proceedings) - should meet the requirements of procedural fairness.[26] This approach corresponds with the notion of formal state of law whereby the state is responsible for the creation of organizational and procedural institutions that limit potential abuses of power by the state against individuals.[27] The CC has identified the values of procedural fairness that shall be guaranteed by any procedure.[28] The first value is the right to be heard. It shall be guaranteed at least by the right to have access to the case file, and the right to comment on the evidence contained in it, as well as the right to file a motion for evidence.[29] The second value is the precise and understandable motivation of the decision.[30] Third, the CC is of the opinion that in the case of administrative bodies, the review of their decisions by a court must be guaranteed; the court should review the legality of adminis-

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

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

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

27 M. Wyrzykowski, 'Zasada demokratycznego państwa prawnego – kilka uwag' [*The Principle of the Democratic-State-of-Law*] in: *Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego* [*A book of 20-year anniversary of constitutional court's case-law*] (Warszawa: Biuro Trybunału Konstytucyjnego 2006), p. 237.

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

29 The CC judgments SK 5/02 (11 June 2002), SK 29/04 (6 December 2004) and in case K 53/05.

30 The CC judgment in case K 53/05; the judgments SK 30/05 (16 January 2006) and SK 68/06 (13 May 2007). Justification is considered as the way for counteracting discretion and arbitrariness of the state organs.

trative proceedings.[31] Fourth, the duration of the proceedings should be reasonable.[32]

Unlike procedural fairness, the notion of efficiency has not attracted so much of the CC's attention. Still, the CC considers the efficiency of the functioning of the public institution as a constitutional value that influences the assessment of the constitutionality of the statutory provisions.[33] In addition, the fast pace of proceedings is surely not constitutionally irrelevant – in the democratic state of law, public institutions should act not only fairly but also efficiently, so as to guarantee law compliance. The fact that a reasonable duration of the proceedings is considered by the CC as an element of procedural fairness[34] confirms that efficiency should not be seen as a conflicting, alternative value. Rather, Poland's Constitution requires a balance between the scope of the procedural rights of the parties and the duration of the proceedings.[35] Such an observation finds its confirmation under Article 45(1) of the Constitution which guarantees the right to a fair and public hearing, without undue delay, before a competent, impartial and independent court. The CC pointed out that additional procedural limitations imposed on the party represented by a counsel, meant to expedite the proceedings, cannot reach too far so as to disproportionally limit the parties' right to protect their interests by means of judicial proceedings.[36] Hence, a compromise between aiming to accelerate the proceedings and the possibility for the parties' to have use of their procedural rights is constitutionally required.[37] The ECtHR considers the issue in a similar manner whereby the efficient conduct of an investigation, albeit a legitimate goal, cannot be pursued at the expense of substantial restrictions of the rights of the defense.[38] In addition, limitations as to the scope of judicial review seem to be justified under Article 6 ECHR by the need for guaranteeing effectiveness of administrative law.[39] The CJEU approach also suggests that this weighing exercise is

---

31 The CC judgment K 13/08 (7 July 2009) and in cases P 46/07 and P 57/07.

32 The CC judgment SK 89/06 (26 February 2008) and in case P 57/07.

33 The CC judgement K 14/03 (7 January 2004). See also the CC judgements 7 P 20/04 (November 2005) and K 54/05 (12 March 2007).

34 The CC judgments in cases SK 89/06 and P 57/07.

35 P. Hofmański, 'Prawo do sądu w ujęciu Konstytucji i ustaw oraz standardów prawa międzynarodowego' [*Right to Court in the Light of the Constitution, Statutes and Standards of International Law*] in: L. Wiśniewski (ed.), *Wolności i prawa jednostki oraz ich gwarancje w praktyce* [*Individual freedoms and rights and their guarantees in practice*] (Warszawa: Wydawnictwo Sejmowe 2006), p. 276.

36 The CC judgment Kp 3/08 (18 February 2009 r.).

37 The CC judgment SK 29/04 (6 December 2004).

38 For such conclusion in the criminal case concerning lengthy pre-trial detention see the ECtHR judgment of 18 September 2012 in case *Dochnal v. Poland*, no. 31622/07, para. 87.

39 The ECtHR judgment of 7 June 2012 in *Segame v France*, no. 4837/06, para. 56-59. The ECtHR in reply to the applicant company complaint that the French administrative courts did not have the power to vary the tax fine justified the limitations of judicial review by "the special need for fiscal measures to be sufficiently effective to preserve the interests of the State" (para. 59). It further observed that "such cases differ from the hard core of criminal law for the purposes of the Convention" (id.). See also *infra* part 5.3.

necessary when efficiency of enforcement of administrative law and individuals' procedural rights are at stake.[40]

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

4. In Search for a Balanced Approach in the Area of Administrative Sanctions

4.1. The Abstract Approach of Poland's Constitutional Court

Poland's Constitution of 1997 does not directly regulate administrative sanctions, nor does it provide rules governing the attribution of administrative liability. Administrative sanctions are also not complexly regulated by legislation hierarchically lower than the Constitution. Different legal acts give diverse Polish public authorities a power to impose administrative sanctions of pecuniary nature.[41] This includes *inter alia* the areas of construction, environmental, competition, road, financial, tax, customs, pharmaceutical, energy, telecommunication and railway transport law. These laws provide always only legal basis for the imposition of sanction. By contrast, they do not regulate, or regulate only randomly, the rules under which administrative liability is determined. The lack of a general, coherent legislative standard regulating administrative sanctions, and the procedure under which they are imposed, increases the role of Poland's Constitutional Court in defining the constitutional standards that govern procedural and liability rules under which administrative sanctions are imposed.

The CC has repeatedly ruled on the constitutionality of administrative laws prescribing the grounds for the imposition of administrative sanctions.[42] The

---

40 See C-360/09 *Pfleiderer* [2011] ECR I-5161, para. 25-32, for finding that there is a need for balance between competition authorities' effective leniency policies and access of third parties seeking private damages to leniency documents.

41 The laws in question use different terms to name these sanctions. However, they usually involve a pecuniary element where the fine amount is described on either a percentage or quota basis. The area of construction law provides also an example of coercive sanctions that may involve among others restoration of the building to its previous state (see Art. 66-67 of the Construction Act of 7 July 1994, *Journal of Laws*, No. 89, sec. 414). The CC refers both to fines and restitutory sanctions as administrative sanctions.

42 As to the constitutional basis of administrative sanctions the CC sees the power to impose sanctions by administrative bodies as a consequence of the obligation to obey the law (Art. 83 of the Constitution). The CC underlines that administrative law would remain ineffective without the possibility to impose sanctions on those who violate it. The CC judgments K 23/99 (18 April 2000), P 2/98 (12 January 1999), SK 3/08 (22 September 2009), SK 52/04 (24 January 2006 r.) and P 19/06 (15 January 2007).

CC was faced with constitutional questions concerning the rules of liability and the scope of procedural rights of parties to administrative proceedings. The CC attempted to establish abstract criteria that distinguish administrative liability and administrative sanctions from criminal liability and criminal penalties. In such a way it tried to clarify when the more automatic rules of attribution of liability, and the more limited scope of procedural rights, characteristic of the Polish administrative regime, are constitutionally acceptable. The CC uses three criteria to distinguish criminal liability (and criminal penalties) from administrative liability (and administrative sanctions).[43] These criteria do not follow those applied by the ECtHR and the CJEU.[44]

The first is the type of the entities that may be sanctioned. The CC believes the scope of entities that may be sanctioned by means of administrative sanctions to be broader than in the case of criminal sanctions as it covers also legal persons.[45] Such an approach can be criticized because under Polish law criminal liability is not limited to natural persons only but covers legal ones as well.[46] What is more, natural persons may also be punished by means of administrative sanctions.

The second criterion relates to the function of the sanction. The CC underlines that criminal sanctions mainly play a repressive role. By contrast, prevention is seen by the CC as the main goal of administrative sanctions - the sanction is not meant as a retribution for the committed act but as a measure that enables the realization of the function of administrative bodies as enforcers.[47] In literature this criterion is criticized as insufficiently precise.[48] It is underlined that the preventive function of administrative sanctions is practically always accompanied by the repressive one.[49] Moreover, Polish criminal law literature under-

43 M. Wyrzykowski, M. Ziółkowski, 'Sankcje administracyjne w orzecznictwie Trybunału Konstytucyjnego' [*Administrative Sanctions in the Case-law of the Constitutional Court*] in: R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), *Konstytucyjne podstawy funkcjonowania administracji publicznej. System prawa administracyjnego* [*Constitutional foundations of the functioning of public administration. The system of administrative law*] (Warszawa: C.H. Beck 2012), p. 374.

44 See *infra* point 4.3.

45 See the CC judgment K 17/97 (29 April 1998) and in case SK 52/04.

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

47 The CC judgment in case P 19/06. See also the CC judgement in case P 32/12 (30 July 2012).

48 A. Błachnio-Parzych, 'Sankcja administracyjna a sankcja karna w orzecznictwie Trybunału Konstytucyjnego oraz Europejskiego Trybunału Praw Człowieka' [*Administrative Sanction and Criminal Sanction in the Case-law of the Constitutional Court and the European Court of Human Rights*] in: M. Stahl, R. Lewicka, M. Lewicki (eds.), *Sankcje administracyjne* [*Administrative sanctions*], (Warszawa : Wolters Kluwer 2011), pp. 661-662 and M. Wyrzykowski, M. Ziółkowski, *supra* note 43, at 374.

49 R. Lewicka, M. Lewicki, J. Wyporska-Frankiewicz, 'Kilka uwag na temat przedawnienia sankcji administracyjnych' [*A Couple of Comments about the Statute of Limitations of Administrative Sanctions*], in: M. Stahl, R. Lewicka, M. Lewicki (eds.), *supra* note 48, at 548. See also M. Stahl, 'Sankcje administracyjne – problemy węzłowe' [*Administrative sanctions–main problems*], in: M. Stahl, R. Lewicka, M. Lewicki (eds.), *supra* note 48, at 28. See also Supreme Court judgment III SK 24/11 (14 February 2012).

lines the preventive function of criminal sanctions also, and not only its retributive one.[50] In addition, some of the administrative sanctions are clearly meant to punish the infringer on an *ex post* basis rather than force a private entity to meet its obligation determined in a regulatory, *pro futuro* decision of an administrative body. Such situation arises in competition law where fines are imposed by the competition authority when the practice in restriction of competition is found.

The third criterion relates to the character of liability. The CC considers administrative liability to be objective. Under this concept, the attribution of liability is solely based on the establishment of infringement.[51] Contrary to criminal liability, fault of the perpetrator is irrelevant for the attribution of liability. In some of the judgments, the CC understands this objective liability as an automatic one[52] and, in fact, nearly an absolute one.[53] The sole fact of the occurrence of a violation of the law prejudges the establishment of one's liability. No exonerating factors may be taken into consideration.[54] A third party contribution to the infringement, extraordinary circumstances or *vis major* do not play any role here.[55] By contrast, the CC states in other judgments that the entity that violated public law may be released of its liability if it proves that it had done all which could be reasonably expected in order not to violate the law.[56]

It is disputable whether the abstract criteria elaborated by the CC effectively help to distinguish the administrative regime from the criminal one.[57] In any case, the CC's distinction does not solve the problem of how to adapt the level of procedural guarantees, and the rules of attribution of liability in different areas of administrative law that differ in terms of complexity and severity of sanctions. Importantly, the classifications by the CC of given areas of law as administrative precludes application of guarantees of right of defense and presumption of innocence prescribed in Article 42 of Poland's Constitution in the administrative proceedings leading to the imposition of administrative sanctions.

---

50 W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna* [*Polish criminal law. General part*] (Kraków: Znak 2010), pp. 415-417.

51 The CC judgment in cases P 9/08 and P 19/06 as well as the judgment SK 2/01 (26 March 2002).

52 See for instance the CC judgment P 64/07 (5 May 2009).

53 See M. Wyrzykowski, M. Ziółkowski, *supra* note 43, at 373. Such approach of the CC goes counter the CJEU appoach, see *infra* point 4.3.

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

55 Different approach is suggested by M. Wincenciak, *Sankcje w prawie administracyjnym i procedura ich wymierzania* [*The sanctions in administrative law and the procedure of their imposition*] (Warszawa: Wolters Kluwer 2008), p. 152.

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

57 See Mirosław Wyrzykowski, Michał Ziółkowski, *supra* note 43, at 370-374. See also the CC judgment Kp 4/09 (14 October 2009).

Different to the approach taken by the ECtHR and the CJEU[58], the CC understands the notion of "criminal" used in Article 42 of the Constitution very narrowly.[59] As a consequence, only the proceedings classified on statutory level as criminal or disciplinary are considered by the CC to be criminal in the meaning of Article 42 of the Constitution.[60] For this reason Article 42 of the Constitution is found by the CC to be inapplicable in cases of administrative proceedings in which financial sanctions are imposed.[61] In particular, presumption of innocence does not have to be respected.[62]

4.2. Suggested Balanced Approach

This article is meant to suggest a different approach. Rather than attempting to distinguish *in abstracto* the criminal regime from administrative one (and so decide generally about the scope of procedural guarantees and rigor of liability rules) a more flexible and more balanced approach should be taken. For the area of administrative law in question, the legislator and the CC should determine what the appropriate scope of parties' procedural rights are, so as to properly balance procedural fairness and efficiency. Similarly, the rules on the attribution of liability should be constructed in a way that the level of their rigor is weighed against the requirement of efficiency. This determination should depend on the complexity of the area of administrative law in question as well as the severity of sanctions imposed for the violation in question.[63] The greater the complexity and the more severe the sanctions, the greater the scope of parties' procedural rights, the less automatic the attribution of liability and the greater the division of prosecutorial and adjudicative functions

---

58 See *infra* point 4.3.

59 The CC judgment in case SK 3/08. See also the decision in case P 52/07 (9 December 2008) and judgment in case P 19/06. The CC approach is followed by the courts dealing with the appeals against administrative decisions in which sanctions are imposed; see the judgment the Regional Court in Warsaw (the Court of Competition and Consumer Protection) XVII AmA 8/10 (3 October 2011) and XVII AmA 197/10 (11 June 2012).

60 The CC judgment in cases: P 19/06; K 13/08 and SK 3/08. See also the judgments in cases: P 12/01; SK 52/04 and the decision in case P 52/07; for the proceedings concerning minor offences (classified as criminal on the statutory level) see the judgment P 10/02 (8 July 2003). Article 42 of the Constitution is applicable in case of disciplinary proceedings see the CC judgments K 41/97 (8 December 1998) and K 4/08 (1 December 2009). See also the judgment K 18/03 (3 November 2004), where Art. 42 of the Constitution was found applicable in case constitutional control of the criminal in its nature Act on the liability of collective entities for offences.

61 See the CC judgments in cases: SK 3/08 and P 19/06 (for sanctions in construction law); SK 52/04 (for sanctions in custom law); K 13/08 (for sanctions in fisheries law) and SK 75/06 (for sanctions in road transportation law). See also the CC decision in case P 52/07.

62 See the CC judgments in cases: SK 52/04; P 19/06; SK 3/08. See also the CC reasoning in judgments SK 15/02 (17 December 2003 r.) and K 6/09 (24 February 2010).

63 Adrienne de Moor-van Vugt, *supra* note 1, at 5 argues that "[t]he more intrusive the sanction becomes, the higher the safeguards need to be".

should be. The complexity and severity of sanctions should also influence the shape of judicial review.[64]

This proposal should not be seen as a call for the abandonment of the division between the criminal and administrative regime. There are categories of cases that are clearly criminal and to which well-established principles governing liability, level of procedural guarantees and institutional requirements are applicable. Rather, the proposal made here may be used in the broad area of administrative law where the category of cases regulated by administrative laws differ significantly between each other in terms of their complexity and the severity of sanctions. For instance, it would be unreasonable to require the same level of procedural guarantees for complicated cases concerning the abuse of a market dominant position (where the pecuniary sanction may be very high) and simple, insignificant traffic law violations. Arguments of supranational character may be raised in favor of the proposed, more balanced approach.

4.3. The ECtHR and the CJEU Case-law

In the case-law of the ECtHR one can identify a flexible approach to the way of determining standards governing the required scope of procedural guarantees. According to well established standards, the notion of criminal charge used in Article 6(1) of the European Convention on Human Rights (ECHR)[65] is understood broadly, resulting in the application of Article 6 criminal procedural standards to proceedings that are not classified as criminal in domestic law. Given proceedings are classified as criminal under Article 6 of the ECHR when they meet the *Engel* criteria.[66] The criteria are as follows: classification under domestic law, the nature of the offence and the degree of severity of the penalty.[67] Even if the case is considered to be criminal under Article 6 ECHR, the ECtHR is still ready to differentiate the standard when the case falls outside the scope of the "hard core of criminal law" (imposition of

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

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

66 The *Engel* criteria were established in the ECtHR judgment of 8 June 1976 in: *Engel and others v the Netherlands*, no. 5100/71, para. 82; see also the ECtHR judgment of 21 February 1984 in: *Öztürk v Germany*, no. 8544/79, para. 50.

67 In the judgment of 24 February 1994 in case *Bendenoun v. France*, no. 12547/86, the ECtHR took into consideration firstly the fact that the offence in question was charged under the provisions applicable to all citizens, secondly that penalty in question (tax surcharge) was intended not as pecuniary compensation for damage but essentially as a punishment to deter reoffending, thirdly, that they were imposed under a general rule, whose purpose is both deterrent and punitive and lastly that penalty was substantially high (para. 47).

administrative sanctions will normally be outside this scope). In *Jussila v. Finland*, the ECtHR noted that "tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency".[68] For this reason, lack of access by the party to an oral hearing aimed at cross-examining the tax inspector and obtaining a supporting testimony was found in *Jussila* to be in accordance with the ECHR. In *Menarini v. Italy*, the ECtHR accepted instead the imposition of the sanction by an administrative body rather than a court despite the fact that it classified the Italian regime of competition law as criminal in the sense of Article 6 of the ECHR.[69] Similar conclusion was reached in *Grande Stevens v. Italy*.[70] The ECtHR decisions in these two cases as well as in *Valico Srl v. Italy*[71] and *Segame v. France*[72] show also that the Article 6 ECHR full jurisdiction requirement[73] does not have to mean that the national courts reviewing administrative decisions imposing sanctions have to be empowered to full, *de novo* decision-making.[74] What is required is a review (judicial check) regarding the accuracy of administration findings concerning both facts and law.[75] In addition, the appropriateness of fines imposed by the administrative authority need to also be reviewed by courts and the courts have to be entitled to both annul and to lower the fine.[76]

The CJEU applies the ECtHR's *Engel* criteria when deciding about the criminal character of an offence. The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person

---

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

69 The ECtHR judgment of 27 September 2011 in case *Menarini v. Italy*, no. 43509/08, para. 59. For the discussion in the field of competition law see W.P.J. Wils, 'The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights' (2010/Vol. 33/No. 1) *World Competition* 5-29, at 15-19; M. Bernatt, 'Convergence of Procedural Standards in the European Competition Proceedings' (2012/Vol. 8/No. 3) *Competition Law Review* 255-283, at 273-274.

70 The ECtHR judgment of 4 March 2014 in case *Grande Stevens and Others v Italy*, no. 18640/10, at para. 138-139. In this case violation of Art. 6 ECHR was found because of lack of access to oral hearing during the judicial phase of the proceedings. The system of imposition of sanctions by administrative authority in the first instance was considered to be acceptable as long as full judicial review is provided.

71 The ECtHR decision of 21 March 2006 in: *Valico Srl v. Italy*, no. 70074/01.

72 See *supra* note 39.

73 See *infra* part 5.3.

74 See M. Bernatt, *Deferential Standard of Judicial Review in the light of Article 6 of the ECHR*, in: P. Nihoul, T. Skoczny (eds.), *Procedural Fairness in Competition Proceedings* (Cheltenham: Edgar Elgar 2015), pp. 309, 317-327. The dissenting judge in *Menarini* and *Grande Stevens* – Pinto De Alrbuquerque – understands full jurisdiction in a such broad way. However, his view is not shared by the ECtHR majority.

75 *Segame v. France*, para. 56-59; *Menarini, v. Italy*, para. 65-67; *Grande Stevens v. Italy*, para. 138-139; *Valico v. Italy* at 21-22. See also *infra* part 5.3.

76 *Id.*

concerned is liable to incur.[77] Thus, the CJEU takes a case by case approach and does not propose abstract criteria to distinguish administrative liability from criminal. Deciding often upon claims of potential violation of *ne bis in idem* principle, the CJEU tends to conclude that the offence is administrative rather than criminal. For example in *Bonda* the CJEU observed that the rules of the Common Agricultural Policy – being classified by law as administrative rather than criminal – were only applicable to those entities that "[had] freely chose to take advantage of agricultural aid".[78] In addition, the CJEU found that the exclusion from aid eligibility was not sufficiently severe to be considered criminal in nature.[79] Still, the CJEU way of reasoning in *Bonda* shows that the CJEU is ready to reach a different conclusion if the nature of the offence and the severity of sanctions were different. It is observed that the CJEU in this respect "sit[s] squarely within established Convention standard".[80] Thus, its approach does not preclude a finding that the offence classified by law as administrative is in fact criminal in nature. In *Spector Photo Group* the CJEU found that administrative sanctions for the violation of the prohibition of insider trading introduced to national law as an implementation of Article 14(1) of the Directive 2003/6[81] should be qualified – in the light of the nature of the infringements at issue and the degree of severity of the sanctions that may be imposed – as criminal sanctions for the purposes of the application of the ECHR.[82] Also, in the area of EU competition law the EU Courts indirectly acknowledge that the cases decided under Article 101-102 TFEU involve a criminal charge in a sense of the *Engel* criteria[83] even if the Regulation 1/2003 clearly stipulates

77 *Åkerberg Fransson*, at para. 39 relying on case C-489/10 *Bonda* [2012] ECR I-0000, para. 37.

78 *Bonda*, at para. 30.

79 *Id.*, at para. 43.

80 See A. Andreangeli, '*Ne bis in idem* and administrative sanctions: *Bonda*' (2013/Vol. 50). *Common Market Law Review* 1827, 1834. By contrast, the divergences can be observed when it comes to the understanding of *ne bis in idem* principle (in particular when it comes to the *idem* notion–identity of offence). The CJEU approach in competition law (see C-17/10 *Toshiba Corporation* [2012] *OJ* C 98/3) does not seem to correspond with the ECtHR standard established in the judgement of 10 February 2009 in case *Zolotukhin v. Russia*, no. 14939/03 as it takes into account the requirement of the identity of the legal interest protected (and not only identity of the facts) as a precondition for finding a violation of *ne bis in idem* principle. See more R. Nazzini, 'Fundamental rights beyond legal positivism: rethinking the ne bis in idem principle in EU competition law' (2014/Vol. 2/2) *Journal of Antitrust Enforcement* 270, 286.

81 The Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), *OJ* 2003 L 96, p. 16.

82 *Spector Photo Group*, at para. 42.

83 AG Sharpston reached such conclusion in *KME*, see the opinion of 10 February 2011 in case C-272/09 P, *KME Germany AG*, para. 64 (her opinion was limited to the heaviest infringement of EU competition law). The CJEU in its judgement did not directly take a position in this respect. However, its analysis under Art. 47 of the EU Charter of Fundamental Rights as to the sufficiency of judicial review amounts to indirect application of Art. 6 ECHR standards governing the judicial review in cases classified as criminal in the light of *Engel* criteria. See C-272/09 P, *KME Germany AG*, para. 103 and 106-107. See also case C-386/10 P *Chalkor*, para. 67. In addition, the CJEU does not refrain from invoking directly the ECtHR case-law to substantiate

that the fines imposed by the European Commission are not of criminal nature.[84] The CJEU is also of the opinion that because of "the nature of the infringements in question and the nature and degree of severity of the ensuing penalties" the principle of the presumption of innocence – as guaranteed by Article 6(2) of the ECHR – applies to the procedures relating to infringements of the competition rules that may result in the imposition of fines.[85]

The ECtHR's and the CJEU's approach gives ample opportunity for balancing efficiency and procedural fairness when deciding about the appropriate level of procedural guarantees in proceedings leading to the imposition of administrative sanctions.[86] For example in *Spector Photo Group* the CJEU conclusion that nominally administrative sanctions are criminal for the purposes of application of the ECHR did not preclude the CJEU from finding that under the principle of presumption of innocence it is permitted to presume that that "the intention of the author of insider dealing can be inferred implicitly from the constituent material elements of that infringement, provided that that presumption is open to rebuttal and the rights of the defense are guaranteed."[87] Similarly, the use of presumptions of facts is common in EU law cartel cases. The CJEU points out for example that it is sufficient for the Commission to show that the undertaking participated in meetings in which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel.[88] The use of presumptions of fact - important from the efficiency perspective - is permissible as long as procedural guarantees are present.

---

a defense as to the compatibility of the EU courts' review with Art. 6 of the ECHR, see case C-501/11 P *Schindler* (18 July 2013), not yet reported, para. 33-36.

84 See Art. 23(5) of the Council Regulation (EC) No. 1/2003 of 16 December 2002 on implementation of the rules on competition laid down in Art. 81 and 82 of the Treaty, *OJ* L 1, 04.01.2003, pp. 1-25.

85 See case C-235/92 P *Montecatini v Commission* [1999] ECR I-4539, para. 175-176 and case C-199/92 P *Hüls v Commission* [1999] ECR I-4287, para. 149-150. See also case T-279/02 *Degussa v Commission* [2006] ECR II-0000, para. 115.

86 See more *infra* point 5.2.

87 *Spector Photo Group*, at para. 44.

88 Joined Cases C 204/00 P, a.o., *Aalborg Portland A/S v Commission* [2004] ECR I-123, para. 81. See more A. Scordamaglia, 'Cartel Proof, Imputation and Sanctioning in European Competition Law: Reconciling effective enforcement and adequate protection of procedural guarantees', (2010/Vol. 7/1)*Competition Law Review* 5, 21-28.

5. Three Areas Requiring a Balanced Approach

5.1. Attribution of Liability

The first area where there is a need for a balanced approach in the system under which administrative sanctions are imposed concerns the bases for administrative liability. The more complex the area of administrative law, and the more severe the sanctions, the less automatic (more favorable for the parties) rules governing the administrative liability should be.

The Constitutional Court of Poland generally associates the administrative law regime with objective liability, where the attribution of liability is based solely on the establishment of the action that is classified by public law as the infringement. Such clear-cut approach makes it difficult to adapt the level of the rigor of the liability system *vis-a-vis* efficiency of the proceedings to the area of the administrative law in question.

In case Kp 4/09 concerning the new administrative system of road law violations, the CC expressed the opinion that the lawmaker by establishing administrative liability in a given area aims to improve the efficiency of the process of the imposition of sanctions.[89] This is achieved by the lack of the obligation to prove one's guilt.[90] Thus the introduction of objective liability is seen as a measure guaranteeing the effectiveness of administrative law.[91] The efficiency of the system, based on no requirement to prove somebody's guilt, leads to greater effectiveness of road law (enhances its compliance). Such approach is correct in case of petty road law violations (such as speeding) that are numerous and repetitive – the cases in question are usually not complicated (complex) and the fines are not very high.

However, there are other areas of administrative law where the approach of road law is not necessarily appropriate. This is true in particular because in some of its judgments the CC understands objective liability as in fact an absolute one – no exonerative factors (such as the contribution of a third party to the infringement, extraordinary circumstances or *vis major*) can be taken into consideration by the administrative agency whatsoever. In case P 64/07, the CC dealt with the question of whether it is sufficient in construction law for the finding of a violation and imposition of a sanction to establish that somebody started using a building without informing the construction authority about the termination of the work or without obtaining an administrative permission to use the building. The CC rejected the permissibility of the individualization of the fine. Though the sanctions might have been very harsh in the individual

89 The CC judgment in case Kp 4/09. See similarly M. Wincenciak, *supra* note 55, at 36.
90 The CC judgment in case Kp 4/09.
91 The CC understood in such way *ratio legis* of an amendment to road law that change the character of liability for speeding from criminal to administrative one (*id.*).

case, the CC accepted automatic administrative liability where the beginning of the use of the property was a prejudging premise. Efficiency of the process seems to be the underlying, decisive factor here. Such approach is in line with the earlier CC's judgment in case P 19/06 where the CC decided upon liability under the same provision of Poland's construction law.[92]

The approach taken in these two cases has been followed in some of the CC's judgments. For instance, the CC found in case P 9/08 that liability based on the sole fact that a driver of a car is not able to present the receipt confirming the payment for the use of motorways is not in violation of constitutional standards.[93] The CC rejected the possibility of defense by delivering the proof of payment after the traffic control has ended (especially on appeal stage) as well as the argument that such approach discriminates against those who paid the fee (and could not prove it during a control) from those who did not pay the fee at all. The CC expressed a view that the same, fixed amount of fine imposed in each of these two situations disciplines people to obey the law in question. Thus in this case, the CC accepted the combination of automatic liability despite the fact that the fine in question might have been considered to be very severe for cases where the payment was in fact made. Such an approach may be contrasted with the CJEU's conclusion in *Skanavi* that "treating a person who has failed to have a license exchanged as if he were a person driving without a license, thereby causing criminal penalties (...) would also be disproportionate to the gravity of that infringement in view of the ensuing consequences".[94] In similar lines, the CC attitude runs counter the judgement in *Marton Urban* where the CJEU found the Hungarian system of automatic, flat-rate fines for breaches of rules on the use of the tachographs[95] to be in violation of the proportionality principle.[96] A recent CC judgment in a case concerning the owner's automatic liability for removal of a tree suggest however that the CC sees the need for existence of the possibility of invoking exonerative circumstances when the imposition of administrative sanction is at stake.[97] Time will tell whether such approach will become predominant in the CC's case-law.

---

92 See also the CC judgment in case SK 52/04.

93 The CC judgment in case P 9/08. See also the judgment P 8/10 (9 July 2012).

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

95 Hungarian rules provided for the imposition of a flat-rate fine for all breaches, no matter how serious.

96 Case C-201/10 *Marton Urban* [2012] ECR I-00000, para. 55-56. See also *Spector Photo Group*, as far as the CJEU posits that lack of fault can be taken into consideration when imposing a sanction: "The fact that Article 2(1) of Directive 2003/6 does not expressly provide for a mental element does not, however, mean that that provision needs to be interpreted in such a way that any primary insider in possession of inside information who enters into a market transaction, automatically falls within the prohibition on insider dealing." (para. 45).

97 In the judgment in case SK 6/12 (1 July 2014) the CC found that lack of possibility of invoking exonerative circumstances in cases concerning fines for cutting out a tree without prior administrative permission disproportionally limits ownership rights.

Automatic administrative liability should be rejected in the areas of administrative law that involve cases that are substantially or factually complex. The competition law area where economic determinations play a crucial role is surely an example thereof. In this area, even if liability is considered by Poland's Supreme Court to be objective, in the sense of being non-fault based[98], the firms charged with an anticompetitive behavior may rely on defenses of both substantive (for example by invoking procompetitive justifications of the alleged practice and factual character (for example by offering counter-evidence to prove that they did not participate in a meeting during which supposedly the horizontal agreement restricting prices was formed). However, even in the case of competition law, it is possible to distinguish those in its area that are more complex, and those that are less complicated and thus to differentiate the rigor of liability rules. Cartels[99] are an area of competition law where the substance of the practice is not complex – they are considered to have almost always anticompetitive effects.[100] In order to build an efficient system on combating cartels, the U.S. Supreme Court considers them to be a *per se* unreasonable restraint of trade under Section 1 of the Sherman Act.[101] This irrefutable presumption largely limits the scope of defenses available to the firms accused of forming a cartel. In fact, they may only invoke facts that show that the cartel was not formed or that they did not participate in it. After this is established, the presumption of *per se* illegality of the cartel is employed.[102]

---

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

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

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

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

102 The US Supreme Courts notes "(t)hus the Court in *Standard Oil* recognized that inquiry under its rule of reason ended once a price-fixing agreement was proved, for there was a conclusive presumption which brought [such agreements] within the statute"; *Arizona v. Maricopa*, at 344-345.

5.2. The Scope of Procedural Rights

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

As discussed above, the level of procedural guarantees accorded to parties depends in Poland's constitutional law on the prior determination of whether the law scrutinized by the Constitutional Court is criminal or administrative.[103] Article 42 of the Constitution does not find application in the area of administrative law.[104] Still, the rejection of the application of Article 42 in proceedings leading to the imposition of administrative sanctions does not mean that there are no constitutional grounds for the assessment whether the law under constitutional scrutiny provides an adequate level of procedural guarantees. Article 2 of the Constitution (discussed above as a main source for the identification of the values of procedural fairness) can provide a ground for this. For instance, despite finding Article 42 of the Constitution as inapplicable in case of proceedings leading to the imposition of administrative sanctions in the fishing industry, the CC relied in case K 13/08 on Article 2 of the Constitution to find the law in question to be unconstitutional. The CC found that that the law providing the basis for the imposition of fines, namely the violation of relevant Polish and EU fisheries law "in any other way", was indeterminate and imprecise and so violates the constitutional standard applicable to the imposition of severe administrative sanctions. Similarly, in case P 29/09, Article 2 of the Constitution served as a source for the identification of the *ne bis in idem* principle and so it made it possible to strike down as unconstitutional the provisions of the criminal code and the social security system act that provided – in parallel – liability for the non-payment of the insurance premium.[105] Therefore, the procedural guarantees associated with Article 42 of the Constitution may be referred to on an analogous basis – when this is dictated by the complexity of the area of ad-

---

[103] See *supra* point 4.1.

[104] *Id*.

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

ministrative law and the severity of the sanctions in question – also to administrative proceedings leading to the imposition of such sanctions. The wording of Principle 6. of the Council of Europe Recommendation No. R (91) 1. on Administrative Sanctions supports such approach[106] – it lists the guarantees of criminal origin applicable in the proceedings leading to the imposition of administrative sanctions suggesting however that they may be limited in cases of minor importance.

It may be argued that the CC should follow the case law of the ECtHR in its flexible approach as to the level of guarantees accorded to the parties of the proceedings, especially since the CC generally considers ECHR standards as an important source for the interpretation of constitutional provisions.[107] Most probably, the ECtHR would identify many of the proceedings classified in Polish law as administrative (such as competition proceedings or market regulation proceedings involving fines in the energy, telecommunication, railway and postal sector), to be criminal for the purposes of application of Article 6 of the ECHR[108], yet outside the scope of the hard core of criminal law. Following such approach by the CC might give it an opportunity for establishing what level of guarantees are necessary for the given area of administrative law in question.

The best example of such approach is likely to be found in the CC judgment in case Kp 4/09 concerning the decriminalization of traffic offences. In this case, the CC may be seen to be dissatisfied with the way the lawmaker reconciled efficiency and procedural fairness.[109] In case Kp 4/09 the CC underlined that decriminalization of the infringements of road law, and the change of criminal sanctions into administrative ones, meant to achieve faster and more effective reaction for the violation of law, cannot result in the deprivation of parties' procedural rights such as the right to be heard.[110] The CC noted that even if the proceedings are run under the Code of Administrative Procedure[111] (and not

---

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

107 See the CC judgments P 8/04 (18 October 2004), K 11/10 (19 July 2011 r.,) and K 37/11 (11 December 2012).

108 For the discussion in this respect when it comes to competition proceedings and market regulation proceedings in the energy, telecommunication, railway and postal sector in Poland, see M. Bernatt, 'Prawo do rzetelnego procesu w sprawach konkurencji i regulacji rynku' [*Right to a fair hearing in competition and market regulation matters*], (2012/ 1) *Państwo i Prawo*, 50-63, at 55-58 and A. Błachnio-Parzych, 'The Nature of Responsibility of an Undertaking in Antitrust Proceedings and the Concept of 'Criminal Charge' in the Jurisprudence of the European Court of Human Rights', (2012/Vol. 5/6) *Yearbook of Antitrust and Regulatory Studies* 35-55, at 46-52. Comparatively, for analysis of similar Italian system competition law see *Menarini v Italy*, at para. 38-44.

109 The CC judgment in case Kp 4/09.

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

111 Administrative sanctions are imposed in Poland by administrative agencies in administrative proceedings. Divergent procedures prescribed in different legal acts regulate these administrative proceedings. These acts modify or exclude to some extent the application of the general rules of the Act of 14 June 1960 Code of Administrative Procedure (*Journal of Laws*, No. 30/1960,

under the Code of Criminal Procedure) the parties should be given an opportunity for a hearing so that the facts may be adequately established.[112] Lack of access to a hearing where the person accused of road law violations could present his/her views, and so influence the result of the process, was the reason for the CC to find the new law unconstitutional.

It is debatable whether the area of administrative liability for traffic law violations involves in Poland high fines. Still, the facts of such cases are usually not complex. Some limitations of parties' procedural rights in this area may thus well be accepted. There are however other areas of administrative law where their greater complexity may be seen as a reason for broader procedural guarantees. Competition law for the reasons given above is one of them. Here, one can observe interesting judgements of the Polish Supreme Court that in fact require the presence of guarantees interpreted on the constitutional level from Article 42 of the Constitution.[113] Such an approach is in line with the approach of the EU Courts which, in cases of competition proceedings conducted by the European Commission, require the presumption of innocence to be respected.[114]

The EU Courts' approach to the scope of the privilege against self-incrimination is also instructive for a discussion about the balance between efficiency and procedural fairness. The EU Courts see the need for the observance of this privilege but they accept that its scope may be more limited when compared with the general standards elaborated by the ECtHR in cases falling into the scope of the hard core of criminal law.[115] The European Commission cannot

---

item 168). However, this Code is applicable as to general principles of administrative proceedings (Art. 6-16), most notably the principle of legalism and the principle of the objective truth, the obligation to provide information to the parties, the principle of active participation of the party in the administrative proceedings and the possibility to contest an administrative decision before the court circumscribe parties' rights to administrative proceedings. See Z. Kmieciak, 'Idea sprawiedliwości proceduralnej w postępowaniu administracyjnym' [*The idea of procedural fairness in administrative proceedings*] (1994/10) *Państwo i Prawo* 55-63, at 58-59.

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

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

114 See *supra* point 4.3.

115 See case 374/87 *Orkem v Commission*, [1989] ECR 3283, para. 34-35. See also the cases C-238, 244-245, 247, 250, 251-251 and 254/99 *Limburgse Vinyl Maatschappij NV and others v Commission* [2002] ECR I-8375. For ECHR standards compare the ECtHR's judgement of 17 December 1996 in case *Saunders v United Kingdom*, no. 19187/91, par. 68-69. For a discussion of the scope of privilege against self-incrimination in EU competition proceedings see B. Turno, A. Zawłocka-Turno, 'Legal Professional Privilege and Privilege Against Self-Incrimination in EU Competition Law after the Lisbon Treaty – Is there a need for a substantial change?' (2012/Vol.5/No. 6) *Yearbook of Antitrust and Regulatory Studies* 193-214.

compel the company under its investigation to provide it with answers which might involve an admission on its part of the existence of an infringement which the Commission must prove.[116] However, the Commission may

"in order to preserve the useful effect of Article 11(2) and (5) of Regulation No 17 [EU law that regulated the competition proceedings] (...) compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct".[117]

5.3. Institutional Organization

The third area where a balanced approach is to be recommended concerns the institutional organization of the system under which administrative sanctions are imposed. Here two spheres are of special importance. The first one concerns impartiality – the level of the division of prosecutorial and adjudicative functions provided in the structure of the administrative agency. The second concerns the scope of judicial review of the decisions imposing administrative sanctions. Again, it may be argued that the more complex the area of administrative law is, and the heavier the sanctions, the greater the division of the aforementioned functions should be. In addition, the level of the severity of sanctions and the observance of procedural rules during administrative proceedings should be reviewed by courts. By contrast, the complicated, specialized character of a particular area of administrative law may be seen as an argument for efficiency-driven approval of a more deferential judicial review of the administrative expert-agencies decisions.

The question of the division of prosecutorial and adjudicative functions has not yet been discussed in the case-law of the Polish Constitutional Court concerning administrative sanctions. This seems to be a consequence of the generalist approach to the classification of the Polish administrative sanctions system as administrative rather than criminal.[118] The fact that the system of administrative sanctions was found on many occasions to be in accordance with the Constitution implies the acceptance of the most common institutional shape of Polish administrative agencies where a single-person administrative body (more rarely a collective one) imposes a sanction in a process leaving little room for internal division of prosecutorial and adjudicative functions.[119] Notably, there are usually no legal counter-indications for having the same case-handlers being

116 *Orkem*, at para. 35.
117 *Id.*, para. 34.
118 See *supra* point 4.1.
119 See the CC approach in case K 13/08.

responsible for the investigation, the running of the whole proceedings and for the preparation of the final draft of the decision (there are no "internal walls" in the structure of the agency). The same person may be responsible for the initiation of the proceedings (raising charges), collection of evidence and preparation of the final draft of the decision (which is subject to the acceptance by the head of the agency).

In EU law, the European Commission has been criticized by competition law scholars and practitioners for the accumulation of prosecutorial and adjudicative functions.[120] Some changes of the institutional model have been introduced in recent years. Most importantly, the mandate of hearing officer who polices the observance of companies' right of defense during the proceedings was expanded. However, several scholars call for further changes[121] even if the ECtHR generally accepts a model where fines for competition law violations (classified as criminal under Article 6 of the ECHR) are imposed by an administrative authority (rather than a court).[122] Comparative studies[123] may suggest that the imposition of sanctions when these two functions are divided (at least to some extent) does not necessarily have to bring a risk to the efficiency of the system. The U.S. Federal Trade Commission (the FTC) provides an example of a model that better guarantees the impartiality of the decision-maker. The FTC is a collegial body and only three out of the five Commissioners can belong to the same political party.[124] Proceedings are adversary in nature - during the 1st stage, proceedings are run before the impartial Administrative Law Judge (the ALJ)[125] without the involvement of the FTC Commissioners.[126] It is for the FTC counsel to prove the infringement. During the 2nd stage of the proceedings, decisions are taken by the Full Board of the FTC and individual Commissioners

---

120 See for example Ian S. Forrester, 'Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures' (2009/34) *European Law Review* 817-843, at 836-839.

121 See for example R. Nazzini, 'Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law: A Comparative Contextual-Functionalist Perspective' (2012/Vol. 49/No. 3) *Common Market Law Review*, 971-1005, at 999-1005.

122 *Menarini*, at para. 59.

123 See T. Skoczny, 'Modele instytucjonalne ochrony konkurencji na świecie – wnioski dla Polski' [*The institutional models of the protection of competition in the world –conclusions for Poland*] (2011/2) *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 77-98, at 94-95.

124 15 U.S.C.A. § 41.

125 The ALJ is independent both from FTC counsels filing the complaint and the FTC's Commissioners.

126 It is underlined that the FTC Commissioners are 'walled-off' from discussion of the matter with FTC staff while the matter is under adjudication, see W. Wils, *The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis* (2004/Vol. 27/No. 2) *World Competition: Law and Economics Review* 202, available at SSRN, at 7.

have the right to issue dissenting opinions.[127] Therefore, the FTC institutional structure guarantees impartiality to a significant extent - in practice different individuals are responsible for the investigation (members of FTC Bureau of Competition) and for the decision-making (FTC Commissioners and ALJ). Such division of prosecutorial and decision-making functions does not seem to adversely affect the FTC's performance. The Polish legislator might take this into account when constructing the internal structure of administrative agencies that have the power to impose administrative sanctions.[128]

When it comes to the scope of judicial review, ECHR-standards in cases involving criminal charge under Article 6 ECHR require that the party's right is observed to bring an administrative decision before a judicial body that has full jurisdiction.[129] Full jurisdiction means that a court should be entitled, and actually examine all of the relevant facts as well as have the power to quash the administrative decision in all its aspects (facts and law).[130] The Polish model of judicial review exercised by administrative courts is considered by the ECtHR to be in accordance with the requirements of Article 6 of the ECHR.[131] However, such judicial review has to be practical and effective rather than theoretical or illusory.[132] In case Kp 4/09, the CC rightly pointed out that judicial review limited to the legality of administrative decisions imposing a fine for road law violations is insufficient when this law does not provide any criteria character-

---

127 The FTC Full Board has a right to overturn in appeal the decision of the ALJ. In such situation the U.S. court of appeals may analyze the appealed FTC's decision more closely see *California Dental Association v. FTC*, 128 F.3d 720, 725 (9th Cir. 1997).

128 For such *de lege ferenda* postulates with regards to institutional arrangement of Polish competition authority see M. Bernatt, T. Skoczny, 'Publicznoprawne wdrażanie reguł konkurencji w Polsce. Czas na zmiany?' [*Public enforcement of competition rules in Poland. Time for changes?*] in: H. Gronkiewicz-Waltz, K. Jaroszyński (eds.), *Europeizacja publicznego prawa gospodarczego* [*Europeanization of public economic law*], (Warszawa: C.H. Beck 2011), pp. 4-5.

129 Generally, see the ECtHR judgments in cases: *Albert and Le Compte v Belgium* of 10 February 1983, no. 7299/75, 7496/76, para. 29; *Gautrin and others v France* of 20 May 1998, no. 21257/93, para. 57; *Frankowicz v Poland* of 16 December 2008, no. 53025/99, para. 60. Specifically for judicial review of administrative actions see judgments: *Bendenoun v France*, at para. 46; *Umlauft v Austria* of 23 October 1995, no. 15527/89, para. 37-39; *Schmautzer v Austria* of 23 October 1995, no. 15523/89, para. 34; *Janosevic v Sweden* of 21 May 2003, no. 34619/97, para. 81.

130 The ECtHR judgments in cases: *Umlauft v Austria*, para. 38-39; *Schmautzer v Austria*, para. 35-36; *Janosevic v Sweden* of 21 May 2003, no. 34619/97, para. 81; *Janosevic v Sweden*, para. 81. For differences in the ECtHR approach when it comes to required standard of judicial review in cases classified as civil and cases classified as criminal in a meaning of Art. 6 of the ECHR see more M. Bernatt, *supra* note 74, at 309-327.

131 The ECtHR judgment of 4 October 2001 in case *Potocka v. Poland*, no. 33776/96, para. 55-59, dictates so undoubtedly when the administrative case of civil nature under Art. 6 ECHR is at stake. However, the ECtHR decisions in *Menarini v. Italy*, *Grande Stevens v. Italy*, *Valico Srl v. Italy* and *Segame v. France* (see more *supra* part 4.3.) suggest that the ECtHR would reach a similar conclusion as to the judicial review by Poland's administrative courts also where the review of administrative decisions imposing fines would be at stake. See also the CC assessment of administrative proceedings involving fines in case K 13/08.

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

izing the administrative liability that could be examined by the administrative court.[133] Judicial review may also become illusory when an administrative law in question involves an automatic administrative liability.[134] In such a case, the sole fact of an administrative law violation forces the court to uphold the decision even if exonerative circumstances (such as *vis major* or third person fault) could actually be identified by the court.

On the other hand, a balanced approach to judicial review under which the efficiency of the proceedings is also taken into consideration should not be rejected.[135] In particular, the ECHR requirement of full jurisdiction does not exclude a U.S.-style deferential standard of review of this part of the administrative decision that requires the administrative agencies' factual expertise and special knowledge in the given area of administrative law.[136] In the U.S., when reviewing an administrative agency's interpretation of a statute which it administers, the courts defer to that agency's interpretation of the statute unless the interpretation is unreasonable.[137] When the interpretation is reasonable, a court cannot substitute it with its own, different one. An expert-character of administrative agencies, required by the specialized and complex character of the cases decided by these agencies, is an argument for accepting such deferential standard of review.[138] Similarly, the substantial evidence test used by U.S. courts to review agencies' factual determinations and fines does not exclude a deferential approach.[139] Such approach may improve the efficiency of the proceedings as it delegates the power to decide an issue which requires special knowledge to those who possess such knowledge. A more limited, deferential scope of judicial review can be more readily approved when prosecutorial and adjudicative functions are divided during the administrative phase of the proceedings.[140]

---

133 See the CC judgment in case Kp 4/09.

134 See *supra* point 5.1.

135 In the European context there are more grounds for deferential approach when it comes to the review of administration's factual determination rather than legal ones; for a discussion in this respect see M. Bernatt, *Transatlantic Perspective on Judicial Deference in Administrative Law* (2016/Vol. 22/2) *Columbia Journal of European Law* 275, 320-324, available at http://ssrn.com/abstract=2648232.

136 The ECtHR judgment of 22 November 1995 in case *Bryan v. UK*, no. 19178/91, para. 44-48. For a discussion to what extent such deferential standard of review is permissible under the criminal head of Art. 6 of the ECHR see M. Bernatt, *supra* note 135, at 294-301.

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

138 *Id.*, at 865. See more M. Bernatt, *supra* note 135, at 283-284. In Europe, on the basis of the ECtHR ruling in case *Menarini v. Italy* it is argued that deferential standard of review meets the requirements of full jurisdiction also in case of cases of criminal character in a sense of Art. 6 of the ECHR, see Renato Nazzini, *supra* note 121, at 985-986. See also M. Bernatt, *supra* note 74, at 325-327. For different opinion see D. Gerard, 'Breaking the EU Antitrust Enforcement Deadlock: Re-empowering the Courts?' (2011/Vol. 36) *European Law Review* 457-479, at 478-479.

139 See M. Bernatt, *supra* note 121, at 287-289.

140 *Bryan v. UK*, para. 47. See more M. Bernatt, *supra* note 121, at 325.

Judicial review should cover the check on the severity of sanctions (amounts of fines). Importantly, under Article 6 ECHR standards the courts should have a power both to lower (in frame of the limits prescribed by law) and annul a fine.[141] The CC's reasoning in judgments in cases P 64/07 and P 19/06 limits judicial review as to the amount of the sanction. The CC accepted therein that the amount of an administrative fine may be fully determined by the calculation provided in construction law. In particular, in case P 64/07, the CC rejected the possibility of individualization of the amount of administrative sanctions on the basis of time (the duration of the use of the building without permission), the size of the building or the financial situation of the entity that is punished.[142] Similarly, in case P 19/06, the CC accepted the fixed size of the sanction independent from the individual circumstances of given infringement.[143]

The more complex the area of administrative law is, the closer should be judicial review with respect to possible procedural infringements committed by administrative agencies in the course of administrative proceedings. In the context of the Polish system of administrative sanctions, such judicial review should be exercised not only by administrative courts but also by the Court of Competition and Consumer Protection (a court that has jurisdiction over appeals against decisions imposing administrative sanctions of the competition authority as well as the energy, telecommunications, postal and railway transport agencies) even if it acts as a first instance court deciding on the merits of a case.[144] The complex character of competition and market regulatory cases (its complicated evidentiary nature) requires judicial control over the course of the administrative proceedings before the competition authority and regulatory agencies.[145] Such an observation finds its support in ECHR standards. The ECtHR expects the judiciary to be able to conduct an assessment going beyond whether the im-

---

141 See for example the ECtHR judgements in: *Menarini v. Italy*, at para. 65, *Segame v France*, at para. 56 and *Diennet v. France*, at para. 34 (judgement of 26 September 1995, no. 18160/91). See more M. Bernatt, *supra* note 74, at 322-324. Art. 31 of the Regulation 1/2003 clearly gives the EU Courts such a power. It provides that "(t)he Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed".

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

143 See also the CC judgment in case SK 52/04.

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

145 The practice of the Court of Competition and Consumer Protection was not satisfying. The Court did not exercise sufficient control over possible breach of procedural rules by the Polish competition authority, see Maciej Bernatt, *supra* note 69, at 266-267. The judgment of Supreme Court III SK 37/12 (3 October 2013) brings improvements in this respect. The EU Courts are concentrated on possible procedural infringements during the proceedings before the European Commission, see for instance case T-44/90 *La Cinq SA* [1992] ECR II-1, para. 86.

pugned decision is compatible with substantive law.[146] Courts shall be also empowered to review, and to set aside, an administrative decision in its entirety or in part, if it is established that procedural requirements of fairness had not been met in the proceedings which have led to the decision's adoption.[147]

6. Conclusion

By taking the Polish Constitutional Court's case-law as a primary material for analytical assessment, this article presented arguments for a balanced approach as far as procedure and liability rules governing the imposition of administrative sanctions are concerned. It was argued that efficiency and procedural fairness have to be balanced. To achieve that, the scope of procedural guarantees provided to the parties, the institutional arrangement of the system and the rigor of rules governing administrative liability should not be determined *in abstracto* for the whole area of administrative law. On the contrary, the decision in this respect should depend on the complexity of the particular area of administrative law and the severity of the sanctions that may be imposed by the administrative agencies for a given violation. Constitutional grounds as well supranational and comparative arguments support the introduction of such a balanced, flexible approach. In areas of administrative law that involve simple, usually numerous and repetitive cases, and where the sanctions are not very harsh, the scope of the parties' procedural rights may be more limited and the rules governing the attribution of liability less favorable to the parties. By contrast, where the cases are complex (for instance, very complicated from an economic point of view) and the sanctions very severe, procedural guarantees should be broader and the parties should be given an opportunity to invoke exonerative circumstances that might show that they did not violate administrative law. Tailor-made rules are needed.

146 *Potocka v. Poland*, para. 55 and 58.
147 *Id.*