Collection of Papers
from the International Academic Conference
12 – 13 September 2022

ADMINISTRATIVE PUNISHMENT AND ADMINISTRATIVE SANCTIONS IN EUROPE

BLF BRATISLAVA LEGAL FORUM 2022

Zborník príspevkov
z medzinárodnej vedeckej konferencie
12. a 13. septembra 2022

SPRÁVNE TRESTANIE A SPRÁVNE SANKCIE V EURÓPE

BPF BRATISLAVSKÉ PRÁVNICKÉ FÓRUM 2022

SYMPÓZIÁ, KOLOKVIÁ, KONFERENCIE

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Collection of Papers from the International Academic Conference
Bratislava Legal Forum 2022
organised by the Comenius University in Bratislava, Faculty of Law
on 12 – 13 September 2022
under the auspices of the Alumni Club of Comenius University in Bratislava, Faculty of Law.

Zborník príspevkov z medzinárodnej vedeckej konferencie
Bratislavské právnické fórum 2022
organizovanej Univerzitou Komenského v Bratislave, Právnickou fakultou
v dňoch 12. – 13. septembra 2022
pod záštitou
Alumni Klubu Univerzity Komenského v Bratislave, Právnickej fakulty.

This collection of papers was supported by the Agency for Research and Development under Contract No. APVV-20-0436 New Legislation on Administrative Punishment.

Univerzita Komenského v Bratislave
Právnická fakulta
2022

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This publication has been double blinded peer reviewed.
Všetky príspevky prešli dvojitým anonymným recenzným konaním.

ISBN 978-80-7160-675-8
EAN 9788071606758

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FOREWORD

This year, the Bratislava Legal Forum took place from September 12 to 13th, 2022, at the Faculty of Law of Comenius University in Bratislava. The main topic of the conference was 'Rule of Law and Academia in the Turbulences of Turbulence'. Our colleagues and we have decided that within these boundaries, for the purposes of administrative law, we would focus on administrative punishment and administrative sanctions within Europe.

For the day of the conference, we have welcomed our distinguished guests from Poland, Hungary, Ukraine, and Slovakia and discussed many topics related to the administrative punishment, from a more general point of view to the very specific aspects of the administrative punishment.

This collection of papers is the result of fruitful presentations and conversations that we have led on this topic. The respective papers follow a pattern of sorting from the general ones to the specific ones. We start by distinguishing between a civil and criminal limb of art. 6 ECHR, then it is a note on perception of sanctions in a modern society. Next, we discuss a special principle of punishment, *reformatio in peius*, and after that a new legislation on administrative liability of legal persons in Lithuania. We end this collection with two papers dedicated to the area of road traffic offences, and, last but not least, we analyse administrative punishment regarding usage of state symbols.

We believe that every paper in this collection will have many readers and that it will help to promote and deepen the theoretical knowledge of every distinctive aspect that it discusses.

This collection of papers was supported by the Agency for Research and Development under Contract No. APVV-20-0436 New Legislation on Administrative Punishment.

Bratislava, December 2022

Matej Horvat and Juraj Vačok
guarantees of the section

Collection of Papers from the International Academic Conference
Bratislava Legal Forum 2022

ADMINISTRATIVE PUNISHMENT AND ADMINISTRATIVE SANCTIONS IN EUROPE

CIVIL AND CRIMINAL LIMB OF THE ART. 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS[1]

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Abstract: The article will compare the civil and criminal limbs of Article 6 of the European Convention on Human Rights from the point of view of the case law of the European Court of Human Rights and the likelihoods when it is possible to conclude that decisions of public authorities can have mixed features of a criminal charge and of a civil right or obligation.

Keywords: Article 6 ECHR, European Convention on Human Rights, criminal charge, civil right or obligation, European Court of Human Rights, ECtHR

1 INTRODUCTION

Article 6 of the European Convention on Human Rights (hereafter only 'ECHR') represents one of the key principles common to democratic countries within Europe. In its wording, the Council of Europe obliges all Member (Contracting) States to comply with the principle of fair trial.

In general, overall fairness is the goal of Article 6 ECHR. The European Court of Human Rights (hereinafter only as 'ECtHR') reiterates that the key principle governing the application of Article 6 is fairness.[2] The right to a fair trial holds such prominent a place in a democratic society that there can be no justification for interpreting the guarantees of Art. 6 § 1 of the ECHR restrictively.[3]

The aim of this paper is to uphold the general fairness in all proceedings. Therefore, there is no single rule that would easily depict what overall fairness is. There are many views and many aspects to each case that have to be taken into consideration while assessing upholding of right to a fair trial.

In accordance with the formulation of art. 6 § 1 ECHR, this article secures the right to a fair trial in two different areas, namely cases concerning 'civil rights and obligations' and 'criminal charges'. The ECtHR case law developed autonomous concepts to assess what a 'criminal charge' or a 'civil right or obligation' is.

The purpose of this paper is to analyse concerning ECtHR's case law and to assess whether it is possible that one case could be seen simultaneously through the lenses of a 'criminal charge' and a 'civil right or obligation'.

2 CRIMINAL LIMB OF ART. 6 ECHR

Among lawyers (theorists and practitioners) in Slovakia, the criminal limb of art. 6 ECHR is probably more known. The case law of administrative courts regularly references this

[1] This paper was supported by the Agency for Research and Development under Contract No. APVV-20-0436 New Legislation on Administrative Punishment.

[2] *Gregačević v. Croatia*, application No. 58331/09, § 49.

[3] E.g. *Moreira de Azevedo v. Portugal*, application No. 11296/84, § 66.

article in justifications of their decisions.[4] This approach is very much needed as it helps overcome the unsatisfactory situation when it comes to administrative punishment in Slovakia. In general, the legal regulation in this area is not codified and is known to contain many legal gaps[5] that the case law of national courts is trying to overcome.

When it comes to the criminal limb of the art. 6 ECHR, all principles enshrined in this article come into play, meaning that public authorities have to use all 3 paragraphs of the article and all principles enshrined therein. All the fairness requirements stipulated within Article 6 ECHR apply to all criminal proceedings. However, in order to do so, several conditions must be met.

First, the existence of a 'criminal charge' against a person. When revealing the meaning of a 'criminal charge', the ECtHR applies its own procedures and considerations. The ECtHR in its case law has elaborated the so-called autonomous concept of a 'criminal charge'. The autonomous concept of a criminal charge means that the ECtHR applies this notion irrespective of a meaning within national legal regulation of a Member State. The ECtHR reiterated and confirmed this approach in many of its judgments, including the Grand Chamber judgments. For example, in the case of *Blokhin v. Russia*: 'The Court reiterates that the concept of a 'criminal charge' within the meaning of Article 6 1 is an autonomous one.'[6]

When considering the existence of a 'charge', the ECtHR applies a broad approach to this notion. Therefore, the existence of a charge is derived from all official documented charges (official notifications) against a person (a formal approach), but also from non-formal charges against a person (a material approach), e.g., a questioning of a person for a reason that he/she is a suspect of an offence[7] even if it is irrespective of the fact that he/she was formally treated as a witness.[8]

To identify a 'charge' as 'criminal', the ECtHR developed a test consisting of three steps. These steps (criteria) are known as Engel criteria, and the ECtHR formulated them in the case *Engel and Others v. the Netherlands*, application Nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, in § 82 – 83. In all respects, the final consideration whether the charge is of a criminal nature belongs to the ECtHR; otherwise leaving this consideration to the discretion of the Member States could lead to exclusion of some offences and would lead to results incompatible with the object and purpose of the ECHR.

As legal theory specifies, if the Member States could, at their own will, exclude the application of the substantive provisions of Art. 6 and 7 of ECHR by designating an offence as 'administrative' instead of 'criminal', the application of those provisions would be subject to their sovereign will. Such a wide discretion could lead to consequences incompatible with the object and purpose of the ECHR. Thus, by 'recolouring' a case with 'administrative paint', the member states cannot avoid the requirements of the ECHR.[9]

The Engel criteria are as follows:

1. classification in domestic law,
2. nature of the offence,

[4] See e.g. one of the latest decisions of the Supreme Administrative Court, file No. 1Asan/36/2020, file No. 1Asan/30/2020 or file No. 2Asan/11/2020.

[5] See e.g. HORVAT, M. In HAMUĽÁKOVÁ, Z., HORVAT, M. Základy správneho práva trestného. Bratislava : Wolters Kluwer, 2020, pp. 43.

[6] *Blokhin v. Russia*, application No. 47152/06, § 179.

[7] E.g. *Stirmanov v. Russia*, application No. 31816/08, § 39.

[8] E.g. *Kalēja v. Latvia*, application No. 22059/08, § 36 – 41.

[9] MIKULE, V. In MUSIL, J., VANDUCHOVÁ, M. Pocta prof. Otovi Novotnému k 70. narozeninám, Praha : Codex Bohemia, 1998, pp. 67 – 68.

3. severity of the penalty that the person concerned risks incurring.

The first criterion for assessing the existence of a criminal charge is the national classification of the offence under consideration. However, failure to satisfy this criterion is not decisive for the assessment of the concept of a 'criminal charge.' The ECtHR understands the concept of 'any criminal charge' in substantive rather than formal terms and places the emphasis on the significance of the violated legal rule and the nature and severity of the possible penalty, so that a 'criminal charge' includes a charge of a more serious administrative offence punishable by a more serious penalty.[10] Accordingly, where a person is charged with committing an act which is a criminal offence under domestic law, art. 6 of ECHR and the rights thereunder apply to that person as a whole. However, where a person is charged with an administrative offence, the second and third criteria must be examined, and the affirmative answer to even one of them leads to the conclusion that the person is charged with a offence which, for the purposes of ECHR, constitutes a criminal charge, and therefore that person also enjoys the rights under art. 6 ECHR. The second criterion must first be examined, and if it is not met, the third criterion must also be examined. If the second criterion is already satisfied, the third criterion is not required to be examined.[11]

Therefore, the first criterion has a relative meaning. As ECtHR states, the first of the Engel criteria is of relative weight and serves only as a starting point.[12] Regarding the first criterion, the ECtHR will enquire whether the provision(s) defining the offence charged belong, under the legal system of the respondent Member State, to criminal law. In examining, next, the nature of the offence and, finally, the nature and degree of severity of the penalty that the person concerned risked incurring, the ECtHR will have regard to the object and purpose of art. 6 ECHR, to the ordinary meaning of the terms of that article and to the laws of the Contracting States (see *Öztürk v. Germany*, application No. 8544/79, § 50).[13]

The second criterion is the nature of the offence, in the sense of whether the subject of the offence may be anyone or only a limited group of persons. In this case, the ECtHR considers whether the legal rule in question is addressed to anyone or only a certain group of persons with special status, whether the interest protected by the offence is general or particularized.[14] There needs to be a general interest at stake as opposed to a particular interest, and a legal norm must be addressed to all, not just a particular group with special status, in order to be recognized as criminal.[15] Therefore, as stated in *Jussila v. Finland*, the second criterion, the nature of the offence, is more important.[16]

According to the case law, the following factors can be taken into account while considering the second criterion, for example:

- whether the legal rule in question is directed solely at a specific group or is of a generally binding character,[17]

[10] HAMUĽÁKOVÁ, Z. Správne delikty právnických osôb – vybrané inštitúty a problémy. Bratislava : Wolters Kluwer, 2018, pp. 33 – 34.
[11] HORVAT, M. In HAMUĽÁKOVÁ, Z., HORVAT, M. Základy správneho práva trestného. Bratislava : Wolters Kluwer, 2020, pp. 36 – 37.
[12] *Gestur Jónsson and Ragnar Halldór Hall v. Iceland*, application Nos. 68273/14 68271/14, § 85
[13] Ibid., § 77.
[14] FIALA, Z., HORZINKOVÁ, E. In FIALA, Z., FRUMAROVÁ, K., HORZINKOVÁ, E., ŠKUREK, M. et al. Správní právo trestní. Praha : Leges, 2017, pp. 42 – 43.
[15] See HAMUĽÁKOVÁ, Z. In VRABKO, M. et al. Správne právo hmotné. Všeobecná časť. Bratislava : C. H. Beck, 2018, p. 239.
[16] *Jussila v. Finland*, application No. 73053/01, § 38.
[17] *Bendenoun v. France*, application No. 12547/86, § 47.

- whether the legal rule has a punitive or deterrent purpose,[18]
- whether the imposition of any penalty depends on a finding of guilt.[19]

The third criterion is the nature and severity of the sanction. The determining factor is whether the sanctions that may be imposed constitute substantial harm, i.e., whether the threatened sanction has a regressive purpose and is capable of significantly affecting the sphere of the offender (sanctions that have a deterrent and repressive purpose, and not only a reparative purpose, correspond to the criminal nature). It is also relevant whether the sanction can be converted into a prison sentence.[20] The only exceptions are sanctions that, by their nature, duration, and method of enforcement, cannot be significantly harmful.[21] Therefore, the third criterion assesses whether the sanction has only a reparative function or also a preventive and repressive function. If it is preventive and repressive in nature, the severity of the sanction must be further assessed. The decisive factor is not what sanction has been imposed in a given case, but what sanctions the offender faces, that is to say, what is the highest sanction the law allows the imposition of for the offence in question.[22]

When considering the third criterion, the maximum amount of penalty of the most severe penalties must be considered and not only the penalties that were imposed.[23] It is also important to determine whether a prison sentence is at stake.

The case law also stated that the second and third criteria are alternative and not necessarily cumulative.[24] However, a cumulative approach may be adopted where a separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge.[25]

In case the Engel criteria are met, the criminally charged person is entitled to all rights that arise from art. 6 and 7 ECHR and art. 4 of Protocol No. 7 to the ECHR. According to these articles: art. 6 § 1: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly, but the press and the public may be excluded from all or part of the trial in the interests of morals, public order, or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. § 2: Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. § 3: Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to

[18] *Öztürk v. Germany*, application No. 8544/79, § 53.
[19] *Benham v. the United Kingdom*, application No. 19380/92, § 56.
[20] POTĚŠIL, L. Správní trestání a soudní přezkum. In Právní rozhledy, No. 11/2012, p. 383.
[21] HAMUĽÁKOVÁ, Z. In VRABKO, M. et al. Správne právo hmotné. Všeobecná časť. Bratislava : C. H. Beck, 2018, p. 239.
[22] FIALA, Z., HORZINKOVÁ, E. In FIALA, Z., FRUMAROVÁ, K., HORZINKOVÁ, E., ŠKUREK, M. et al. Správní právo trestní. Praha : Leges, 2017, p. 43.
[23] C/f *Campbell and Fell v. the United Kingdom*, application Nos. 7819/77; 7878/77, § 72.
[24] *Jussila v. Finland*, application No. 73053/01, § 31; *Gestur Jónsson and Ragnar Halldór Hall v. Iceland*, application Nos. 68273/14 68271/14, § 78.
[25] *Bendenoun v. France*, application No. 12547/86, § 47.

examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Art. 7 § 1: No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. § 2: This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Art. 4 § 1: No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State. § 2: The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case. § 3: No derogation from this Article shall be made under Article 15 of the Convention.

3 CIVIL LIMB OF ART. 6 ECHR

Applicability of art. 6 ECHR in its civil limb by judicial or administrative authorities in Slovakia is not very common. As already mentioned, the focus is on the criminal limb of the ECHR.

The main difference between the applicability of the civil limb compared to the criminal limb is that the rights guaranteed by the ECHR in civil matters are limited strictly to art. 6 § 1 ECHR only. Only in criminal matters all the paragraphs apply. This means that in civil matters, a person's rights regarding a fair trial include fair hearing, public hearing within a reasonable time, hearing conducted by an independent and impartial tribunal established by law, and the judgment must be pronounced publicly.

The 'fair hearing' right of ECHR's Article 6(1) does not apply to all government decisions, nor to all court proceedings. The civil limb of ECHR Article 6(1) is applicable only when someone's 'civil rights and obligations' are to be determined.[26] What is considered 'civil rights or obligations' befalls the determination of the ECtHR, which means that there is a similar concept to 'criminal charges' - civil rights and obligations also have an autonomous interpretation. As ECtHR states: The ECtHR reiterates that the concept of 'civil rights and obligations' cannot be interpreted solely by reference to the domestic law of the respondent State's domestic law; it is an 'autonomous' concept deriving from the ECHR.[27] Therefore, what is and what is not of civil rights is to be decided by the ECtHR and could also fall under not only civil matters in national law, but also public (e.g. administrative) law.[28] This means that the character of the legislation which governs how the matter is to be determined (civil,

[26] SETTEM, O. J. Applications of the 'Fair Hearing' Norm in ECHR Article 6(1) to Civil Proceedings. Springer, 2016, p. 53.

[27] *Grzęda v. Poland*, application No. 43572/18, § 278.

[28] In particular, disputes considered to belong to the 'public law' domain of the national legal order, often engage the civil limb of ECHR Article 6(1) due to their effect on the civil rights or obligations of the private party; SETTEM, O. J. Applications of the 'Fair Hearing' Norm in ECHR Article 6(1) to Civil Proceedings. Springer, 2016, p. 54.

commercial, administrative law, and so on) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, and so forth) are not of decisive consequence.[29]

The broad definition of civil rights and obligations comes from the fact that many typical civil rights and obligations are being determined by public authorities (bodies). The ECtHR has refused to define what constitutes 'civil rights and obligations'. Instead, it prefers to adopt an inductive approach. This phrase came from the civil law system and initially referred to private rights. As European states have increasingly moved to become administrative states, under which private rights are increasingly determined by public organs, the ECtHR responded by adopting an expansive approach, initially through the test of economic or pecuniary interest, to enlarge the scope of civil rights and obligations.[30]

In order to apply art. 6 § 1 ECHR in the civil limb, several conditions must be met. The applicability of Article 6 § 1 in civil matters first depends on the existence of a dispute ("contestation" in French). Further, the dispute must relate to "rights and obligations" which, arguably at least, can be said to be recognised under domestic law. Lastly, these "rights and obligations" must be "civil" ones within the meaning of the ECHR, although Article 6 does not itself guarantee any particular content for them in the substantive law of the Contracting States.[31]

The approach towards what is a dispute is not a formal (technical) one, but a substantial one,[32] and the dispute must be genuine and of serious nature;[33] it may also relate not only to the actual existence of a right, but also to its scope and the manner of its exercise.[34] This means that the dispute and its outcome are directly decisive for the civil right. The ECtHR reiterates that, according to the principles enunciated in its case-law (see, amongst others, the *Skärby v. Sweden* judgment of 28 June 1990, Series A no. 180-B, p. 36, para. 27; and the *Kraska v. Switzerland* judgment of 19 April 1993, Series A no. 254-B, p. 48, para. 24), it has first to ascertain whether there was a dispute (contestation) over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question.[35] Basically, two parties must disagree about the right or obligation at issue (whether the right or obligation at all exists, or about its scope or a similar question), and one of them must bring or try to bring this disagreement before a judicial body.[36]

The civil right or obligation must not necessarily be recognised under the ECHR; however, it has to be recognised, on at least arguable grounds, under national law. As stated in *Denisov v. Ukraine* there must be a "dispute" regarding a 'right' which can be said, at least

[29] *Bochan v. Ukraine (no. 2),* application No. 22251/08, § 43.
[30] CHAN, J. M. Application of Article 6 of the ECHR to Administrative Decisions: The Experience of a Common Law Jurisdiction. In WEBER, R., NOTTER, M., HEINEMANN, A. (eds.) Europäische Idee und Integration – mittendrin und nicht dabei (European Ideas and Integration – in the middle and not involved?) Liber Amicorum in Honour of Professor Andreas Kellerhals. Basel : Schulthess, 2018, p. 38.
[31] *Naït-Liman v. Switzerland,* application No. 51357/07, § 106.
[32] *Moreira de Azevedo v. Portugal*, application No. 11296/84, § 66.
[33] *Cipolletta v. Italy*, application No. 38259/09, § 31.
[34] *Boulois v. Luxembourg*, application No. 37575/04, § 90.
[35] *Zander v. Sweden*, application No. 14282/88, § 22.
[36] SETTEM, O. J. Applications of the 'Fair Hearing' Norm in ECHR Article 6(1) to Civil Proceedings. Springer, 2016, p. 55.

on arguable grounds, to be recognised under domestic law, regardless of whether it is protected under ECHR.[37] It is a crucial role for national authorities to assess the existence of the right in national legislation. The ECtHR reiterates the fundamental principle according to which it is the responsibility of national authorities, notably courts, to interpret and apply domestic law. It follows that the ECtHR cannot call into question the findings of the domestic authorities on alleged errors of domestic law unless they are arbitrary or manifestly unreasonable.[38] It means that if national law, however, expressly refuses to recognize the right which the advanced claim relates to, then it is possible that ECHR Article 6 does not apply to the proceedings in question.[39]

Whether or not a right, or an obligation, is to be regarded as civil in the light of the ECHR, it must be determined by reference to its substantive content and effects – and not to its legal classification – under the domestic law of the State concerned.[40] Disputes between a private party and a public authority are often covered by ECHR Article 6, irrespective of whether national law classifies the dispute as a 'public law' dispute (as opposed to a 'private law' dispute), and irrespective of whether the state in question has established separate administrative courts to conduct judicial review of administrative decisions.[41]

Examples where ECtHR concluded the existence of civil rights and obligations are:

- administrative proceedings concerning a ban on fishing in the applicants' waters (*Alatulkkila and Others v. Finland*),
- permission to sell land (*Ringeisen v. Austria*),
- building permission (see, inter alia, *Sporrong and Lönnroth v. Sweden*),
- administrative procedures concerning revocation of a firearms licence (*Pocius v. Lithuania*),
- claim against a public authority for compensation for non-pecuniary damage and costs (*Rotaru v. Romania),*
- running a private clinic (*König v. Germany*),
- disciplinary proceedings before professional bodies where the right to practise a profession is directly at stake (*Reczkowicz v. Poland*),
- in the area of social matters, including proceedings concerning social security benefits (*Feldbrugge v. the Netherlands*).

4 CONCLUSION

Given the fact that the criminal charge and subsequent procedure represent a more serious breach of rights, it is clear that the scope of rights concerning the right to a fair trial is broader. However, the rights enshrined in procedures concerning civil rights and obligations are also a core part of a right to a fair trial.

As already described, there are more similarities between those two approaches that are stipulated within the art. 6 § 1 ECHR, e.g., in both cases ECtHR developed an autonomous concept in assessing them. As another example may serve to show that a typical outcome of a 'criminal charge' within administrative liability is a fine, while in the civil limb the ECtHR

[37] *Denisov v. Ukraine*, application No. 76639/11, § 44.
[38] *Naït-Liman v. Switzerland,* application No. 51357/07, § 116.
[39] SETTEM, O. J. Applications of the 'Fair Hearing' Norm in ECHR Article 6(1) to Civil Proceedings. Springer, 2016, p. 54.
[40] European Court of Human Rights. Guide on Article 6 of the Convention – Right to a fair trial (civil limb), p. 14.
[41] SETTEM, O. J. Applications of the 'Fair Hearing' Norm in ECHR Article 6(1) to Civil Proceedings. Springer, 2016, p. 58.

discussed that civil, in nature, are disputes relating 'pecuniary rights'. This leads to the question whether there can be examples in which both approaches could be combined.

The legal theory and the case law of ECtHR are positive about the answer.

Because the term 'criminal charge' is also interpreted autonomously, the line between 'criminal charge' and 'civil rights and obligations' can be porous. This is particularly so as regards sanction-like reactions, which are not considered as belonging to the core of criminal law according to the national law of the respondent state. The ECtHR will sometimes conclude that the reaction at issue can be considered as *at least* a determination of 'civil rights and obligations', without finding it necessary to consider whether the reaction also amounted to a 'criminal charge'.[42] As stated in *Užukauskas v. Lithuania* ECtHR notes the applicant's argument that the revocation of his firearms license had meant that he was obliged to hand in the guns which he already owned to the State authorities for disposal, albeit in exchange for money. There can be little doubt that this involved an interference with another civil right, guaranteed both by Article 23 of the Lithuanian Constitution and Article 1 of Protocol No. 1 to the ECHR, that is, the right to the protection of property. In light of the above, the ECtHR finds that Article 6 § 1 is applicable to the impugned proceedings under its civil head. Consequently, the Government's objection that the applicant's complaint is incompatible *ratione materiae* must be dismissed. Having regard to its conclusion in the preceding paragraph, the ECtHR does not find it necessary to determine whether the criminal limb of Article 6 § 1 of the ECHR was applicable in the present case to the proceedings before the Lithuanian courts.[43]

Therefore, in cases in which there is no clear distinction between a 'criminal charge' and a 'civil right or obligation', especially when it comes to pecuniary rights, the ECtHR's case law supports the right to a fair trail, which applies at least in accordance with art. 6 §1 ECHR. Such a case could be a legal regulation on European Union funding schemes in which rules of public procurement were not upheld. If such a situation occurs, the person who breached the rules on public procurement has to return some percentage of the funding. It can be discussed whether this move to return the funding is of a criminal or civil nature. A clear conclusion on this topic will be a question for further research.

In this article, based on the case law of ECtHR, I discussed article 6 of the ECHR and what cases befall within its criminal limb or civil limb. This distinction is viable because based on it, a different set of rules governing right to a fair trial will apply to a case. These rights are broader when it comes to the criminal limb. As a conclusion, I mentioned that in several cases, the line between criminal and civil limb is unclear. In these cases, we still need to apply the right to a fair trial, at least as a part of a civil limb of art. 6 § 1 ECHR. Further research on the topic will be conducted in the future.

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[42] Ibid.

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SANCTIONS IN MODERN SOCIETY[1]

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Abstract: The paper analyses the sanctions currently regulated within administrative punishment in the Slovak Republic. The author particularly focuses on sanctions in the field of minor offences. He also analyzes the protective measures. The article aims to outline the potential development in the future. The main methods used are analysis and comparison.

Key words: offences, administrative punishment, sanctions, protective measures, fine

1 INTRODUCTION

The position of administrative punishment is subject to a wide discussion in professional society. Its aim and manner of punishment are different from that of criminal law. Now, often under the influence of international documents, especially the Convention on Fundamental Rights and Freedoms, its position has changed.

The new trends push administrative punishment to situations that are not typical for this area. We may notice the words of Katarína Tóthová, who emphasized that punishment is not a typical activity for public administration. However, the intensive activities of administrative punishment are visible in many areas. Therefore, there is a legitimate question – Is administrative punishment the aim or the means within public administration? I am sure it should be a means to ensure the main tasks. The reality shows something different. Administrative punishment always finds a stronger place in public administration.

This uncertainty also touches on sanctions and their ways of development. Moreover, contemporary times offer new calls connected with scientific and technical development and changes in the system of living. The correct setting of sanctions is crucial because only good sanctions may bring about the desirable effect of administrative punishment.

The aim of this article is the analysis of current legislation of sanctions for administrative delicts and consequently the attempt to formulate the ways of development of legislation of sanctions in the future. The research methods are analysis and comparison.

2 THE LEGAL FRAMEWORK OF SANCTIONS

The legislation on sanctions depends on kinds of administrative delicts. The theory distinguished between minor offences, delicts of natural persons and legal entities punishable without guilt, disciplinary delicts, and public order offences.[2]

The legal framework of these delicts is enshrined in various laws. Therefore, the scale of sanctions is varied with regard to special acts. Minor offences have an exemption. The basics of these delicts are enshrined in Act No. 372/1990 Coll. on minor offences as amended (hereinafter referred to as „Minor Offences Act").

[1] This paper was supported by the Agency for Research and Development under Contract No. APVV-20-0436 New Legislation on Administrative Punishment.

[2] See HAMUĽÁKOVÁ, Z., HORVAT, M. Základy správneho práva trestného. Bratislava: Wolters Kluwer, 2019, pp. 19 – 22.

The Minor Offences Act distinguishes four kinds of sanctions. These are reprimand, fine, prohibition of activity, and confiscation.

Despite this fact, the most typical kind of sanctions is a fine.[3] It is interesting that under Section 88a (1) of the Minor Offences Act there is a possibility for offenders to perform public works instead of paying a fine. The offender shall perform one hour of public works instead of 3 € from the imposed fine.

This is a relatively new element in the Minor Offences Act that entered into force on 1 January 2011. According to my information, this provision is used only a little with many application problems.

When the legislator establishes this kind of provision, it is also necessary to appoint an authority for its performance and provide sources to this authority. I have information from practice that this has not been fulfilled exactly.

Compared to the Minor Offences Act, criminal law offers many other sanctions. The Act No 300/2005 Coll. The Criminal Code as amended contains twelve sanctions, which include imprisonment, domestic imprisonment, community service, fine, confiscation of property, prohibition of activity, travel restrictions, prohibition of participation in public events, loss of honour titles and honours, loss of army or other ranks and expulsion.

The variety of sanctions in criminal law requires large participation from state authorities to carry out them. This could be a problem for public administration, which has different tasks in comparison with authorities in criminal law.

The decision about crimes belongs to the courts. The system has more possibilities to ensure the performance of sanctions of their decisions. The different situation is in public administration, where the public administration bodies decide on administrative delicts and sanctions. These administration bodies belong to many resorts and follow various interests. Therefore, the requests for ensuring resources and conditions for different kinds of sanctions would probably be higher.

It is crucial to note that sanctions interfere with the rights and duties of every natural person and legal entity. Therefore, the sanctioning legitimacy of courts is higher than administrative bodies. Administrative bodies do not have a direct request for independence and therefore it is very dangerous and irresponsible to give them the power to impose strict sanctions.

The independence of courts should guarantee that the sanctions will not be abused against natural persons and legal entities. The public administration cannot make the same guarantees. Especially the state administration relates to politicians, and therefore it may be dangerous to strengthen its role in the area of sanctioning.

Moreover, I must repeat, that this is not the role of public administration. Therefore, I consider it to be ineffective to build deeper mechanisms of sanctions for public administration bodies. If we decide to widen the system of administrative sanctions, I see a solution in centralization. For good sanctioning, we should identify or create specialized authorities, which would have sanctioning proceedings and subsequent execution of the issued decisions in their scope.

[3] This fact demonstrates that the legal framework of all minor offences in Minor Offences Act enables to impose a fine as a sanction.

It would be difficult to analyse sanctions for other administrative delicts than minor offences. The reason is, that a wide variety of acts regulate these delicts and sanctions for them. Notwithstanding, the dominating sanction in this kind of delicts is still a fine.[4]

3 CRITERIA FOR IMPOSING SANCTIONS

The second problem is in the criteria for imposing sanctions. Long-terming, the decision about appropriate sanction and its amount concerns to administrative discretion. This term gives administrative bodies the power to choose the best variant from the range stated by law.[5]

The wide possibilities of discretion have two consequences. The first is that the administrative bodies may deeply react to the specifics of every case and take account of all the circumstances. The second is that the results of the proceedings may diverge between bodies. The wider administrative discretion also offers a higher lever for possible abuse of power.

The Slovak legislation contains general criteria for deciding on sanctions for some kinds of delicts. For instance, Section 12 (1) of the Minor Offences Act establishes that the administrative bodies shall consider the seriousness of a particular minor offence, especially the circumstances, in which the minor offence was committed, the level of culpability, incentives, and person of the perpetrator.

This provision is crucial to deciding about sanctions for all minor offences. However, other delicts have regulations of criteria for imposing sanctions in special laws. Some of them do not have the criteria regulated.

The visible examples are delicts in the protection of personal data. The domestic legislation regulates administrative delicts for infringement of the obligations in the Fifth Chapter of the Fifth Part of Act No 18/2018 Coll. on protection of personal data and on amending certain acts as amended. This Act gives the possibility to impose a fine to the amount up to 10.000.000,- € and in special situations until 20.000.000,- €. The whole Fifth Chapter contains only three provisions without any criteria for deciding about the fine.

The discussion about criteria for administrative delicts may also be resolved and concluded with the statement that administrative bodies know what to do. Moreover, we have the popular proverb from the past: God gave an office, God gave a brain.[6]

I do not consider this direction to be a proper solution in contemporary times. The wide criteria may lead to arbitrary decisions. Moreover, the bodies controlling decisions could also consider mainly administrative discretion, which is often connected with the own feelings and convictions of officers.

The wide possibility for discretion leads to a scare from state power too. The high number of sanctions without clear criteria suffers uncertainty. Moreover, the state administration is governed by political power. Therefore, the political offer for the liquidation of a subject through administrative sanctioning cannot be excluded.

The wide extent of administrative discretion cannot be stabilised by general criteria. The administrative sanction should be able to send the message to society that wrongs relate

[4] See for instance Section 106 of Act No. 50/1976 Coll. on spatial planning and building code (Building Code) as amended or Section 90 of Act No. 545/2003 Coll on protection of nature and country as amended.

[5] To administrative discretion see closer HENDRYCH, D. et al. Správní právo. Obecná část. Praha: C. H. Beck, 2012, pp. 771-772.

[6] https://citaty-slavnych.sk/citaty/1989461-slovenske-prislovie-komu-dal-pan-boh-urad-tomu-dal-i-rozum/, cited 12 September 2022.

to appropriate consequences. In addition, we do not need to design the legislation of sanctions with fixed sanctions. For instance, the fines may be bound to income from salaries, etc.

Despite these, in my opinion, it is crucial to maintain small administrative discretions also to administrative bodies for considering the specifics of cases.

4 CONCLUSION

The ideal world would probably offer various kinds of sanctions. However, we are limited with traditions, sources, and the proposed role of public administration in society. I think big changes will not come with sanctions. Punishment belongs primarily to criminal law. Therefore, it is crucial to remind that the goals of public administration are different and punishment plays only helping role.

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LEGAL REGULATION OF THE REFORMATIO IN PEIUS IN SELECTED LEGAL SYSTEMS[1]

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Abstract: The article discusses the legal regulation of the principle of reformatio in peius in selected legal systems. The author compares this foreign regulation and presents de lege ferenda proposals in relation to the Slovak regulation of this institute.

Key words: prohibition of reformatio in peius, administrative offence, foreign legislation.

1 INTRODUCTION

The prohibition of reformatio in peius is an important procedural institute of the remedies procedure. The prohibition of reformatio in peius means the prohibition of changing a decision for the worse, i.e. to the detriment of the person who has been affected by the contested decision and has himself brought an appeal against that decision or in whose favour such an appeal has been brought. The legal regulation of this institute in the Slovak Republic is unsatisfactory since there is a different legal regime in the application of the prohibition of reformatio in peius in the derivation of administrative liability for offences and other administrative offences. In the present article, the author compares the legal regulation of the institute of the prohibition of reformatio in peius in the Slovak legal system with the aim of possible inspiration of the legal regulation of this institute in the legal systems of Austria and Czech Republic.

2 THE LEGAL REGULATION OF THE PROHIBITION OF REFORMATIO IN PEIUS IN AUSTRIA

In Austria, the legal regulation of administrative procedure was adopted as early as 1925. The National Council adopted four laws in 1925, which entered into force in 1926.

These were the Introductory Act to the Administrative Procedure Acts ('*Einführungsgesetz zu den Verwaltungsverfahrensgesetzen 2008*', regulating the scope of the other three Acts, the General Administrative Procedure Act 1991 ('*Allgemeines Verwaltungsverfahrensgesetz 1991*', abbreviated AVG), the Administrative Penalty Act 1991 ('*Verwaltungsstrafgesetz 1991*', abbreviated VStG) and the Administrative Enforcement Act 1991 ('*Verwaltungsvollstreckungsgesetz 1991*'). All these laws have undergone several amendments but are still in force today. They were re-published in the Federal '*Bundesgesetzblatt*' in 1991. Under the General Administrative Procedure Code, the appellate authority deals with the case before it to the same extent as the first-instance authority in the appeal proceedings before a decision is given. It is not bound by the grounds of appeal or by the facts established by the administrative authority at first instance but is bound by the subject-matter of the proceedings relating to the decision of the first instance. The appellate authority may modify the first-instance decision in all respects, even to the detriment of the

[1] Tento príspevok bol podporený Agentúrou na podporu výskumu a vývoja na základe Zmluvy č. APVV-20-0436 Nová právna úprava správneho trestania/This paper was supported by the Research and Development Agency under Contract No. APVV-20-0436 New Legal Regulation of Administrative Punishment.

appellant - that is to say, the principle of the prohibition of reformatio in peius does not apply in general administrative proceedings.[2]

However, a specific feature of the organisation of the Austrian public administration is the so-called independent administrative chambers, which also act as appellate courts in certain circumstances and in certain cases (in the context of criminal administrative proceedings). Their main role, however, is that they are involved, together with the Administrative Court of Justice, in the control of public administration. Apart from the archaic language of Austrian administrative law, this principle is formulated in a very vague, indirect and negative way - Section 52a(1) of the Austrian VStG provides that 'Decisions which are no longer subject to complaint before an administrative court, which have manifestly infringed the law to the detriment of the person punished, may be annulled or reversed ex officio, both by the first-instance authority and in the course of the supervision of the substantively competent superior authority'. § Section 68(7) AVG shall apply mutatis mutandis."

Compared to the quoted provision, the prohibition of reformatio in peius is substantially clearer and more explicit in Section 42 of the Administrative Procedure Act 2013 (*Verwaltungsgerichtsverfahrensgesetz - VwGVG*), the heading of which is "prohibition of imposing a higher sentence") and the provision itself reads as follows: "on appeal by or in favour of the accused, no higher sentence may be imposed in the judgment or in the preliminary decision on the complaint than in the contested decision."

3 THE LEGAL REGULATION OF THE PROHIBITION OF REFORMATIO IN PEIUS IN CZECH REPUBLIC

In the Czech Republic (hereinafter referred to as "the CR"), the situation in the field of administrative punishment was until relatively recently very similar to that in the Slovak Republic. Misdemeanours were the only type of administrative offence, the legal regulation of which was to some extent codified in Act No. 200/1990 Coll. on offences. With effect from 1 July 2017, the new Act No. 250/2016 Coll., the Act on Liability for Offences and Proceedings thereon (hereinafter referred to as "Act No. 250/2016 Coll." or "the new Czech Offences Act"), is in force in the CR. This Act constitutes a fundamental reform in the area of administrative punishment in the CR. Act No. 250/2016 Coll. is the creation of a unified code of offence law, which regulates both the general part of the substantive offence law and the procedural code regulating offence proceedings. The provisions of this Act shall apply to the proceedings for all offences, unless another specific (special) law expressly provides otherwise in the case of specific offences or specific situations. In the new legal regulation of administrative punishment, the principle of the prohibition of reformatio in peius is regulated in Section 90(3) and Section 98(2) of Act No. 250/2016 Coll. Pursuant to Section 90(3) of Act No. 250/2016 Coll. "If the order has been resisted, no other type of administrative penalty may be imposed on the accused in the proceedings, except a reprimand or a higher administrative penalty than that imposed by the order; this shall not apply if the administrative authority

[2] According to Section 66(4) AVG: „Except in the case referred to in paragraph 2, the appellate authority shall decide the case itself, provided that it does not dismiss the appeal on the ground that it is inadmissible or out of time. The appellate authority shall be empowered to substitute its own view for that of the subordinate authority, both in the operative part and in the reasoning (Article 60), and to modify the contested decision in any of the following respects".

changes the legal classification of the act in the proceedings." The principle of the prohibition of reformatio in peius is also regulated in appeal proceedings. Pursuant to Section 98(1) and (2) of Act No. 250/2016 Coll. "The appellate administrative authority reviews the contested decision in its entirety. The appellate administrative authority may not alter the sentence of the contested decision on the administrative penalty or the sentence on compensation for damages or the sentence on the award of unjust enrichment against the accused." The new legislation extends the application of this prohibition in such a way that the appellate administrative authority cannot change not only the sentence of the contested decision on the administrative penalty, but also the sentence on compensation for damages or the sentence on the recovery of unjust enrichment against the accused. This conclusion on the above-mentioned sentences applies if the appeal is lodged (a) by the accused or (b), if the accused is a juvenile, by the child welfare authority or by the legal representative or guardian of the juvenile. According to the Explanatory Memorandum and the Commentary to Act No. 250/2016 Coll., the principle of reformatio in peius does not apply to the case where the appellate body annuls the contested decision and returns the case for a new trial.[3]

Both in the case of the previous and the current regulation of offences (as well as some other administrative offences), Act No. 500/2004 Coll. Administrative Code[4] (hereinafter referred to as "the Administrative Code) applies to the proceedings in the alternative. The regulation in Section 98(1) and (2) of Act No. 250/2016 Coll is a special regulation of the prohibition of change for the worse (lex specialis) in relation to Section 90(3) of the Administrative Code except in the case of the defendant charged with an offence and the sentence on the administrative penalty, the sentence on compensation for damages and the sentence on the release of unjustified enrichment, in which the legal regulation of the prohibition of reformatio in peius in the Offences Act (Act No. 250/2016 Coll.) prevails, the regulation of the prohibition of alteration of the contested decision by the appellate administrative authority to the detriment of the appellant pursuant to Section 90(3) of the Administrative Code shall apply to the other sentences of the decision on the offence and to the other parties to the offence proceeding. The Administrative Code normatively enshrines the principle of the prohibition of reformatio in peius with certain exceptions. The essence of this principle is, as in the Slovak Republic, that in appeal proceedings the appellate authority cannot decide against the appellant. According to the Czech literature[5], the prohibition of reformatio in peius in the Administrative Code is regulated in Article 90(1)(c) and Article 90(3) of the Administrative Code.

Pursuant to Article 90(1)(c) of the Administrative Code "If the appellate administrative authority concludes that the contested decision is contrary to law or that it is incorrect, it shall amend the contested decision or part of it; the amendment may not be made if this would cause prejudice to one of the parties on whom an obligation is imposed by reason of the loss of the possibility of appeal; pursuant to Section 36(1) of the Administrative Code, the appellate administrative authority shall amend the contested decision. If it is necessary to eliminate defects in the grounds, the appellate administrative authority shall amend the decision in part of the grounds; the appellate administrative authority may not

[3] ONDRUŠOVÁ, M., ONDRUŠ, R., VYTOPIL, P. Zákon o odpovědnosti za přestupky a řízení o nich. Praktický komentář k zákonu č. 250/2016 Sb. Praha: Leges, 2017, p. 683 and BOHADLO, D., BROŽ, J., KADEČKA, S., PRŮCHA,P., RIGEL, F., ŠŤASTNÝ, V. Zákon o odpovědnosti za přestupky a řízení o nich. Komentář. Praha: Wolters Kluwer ČR, 2018, p. 574.

[4] Zákon č. 500/2004 Sb. Správní řád.

[5] MATES, P. Reformatio in peius ve správním řádu. In Právní rozhledy, 2006, Vol. 14, No. 18, p. 673, BOHADLO, D., POTĚŠIL, L., POTMĚŠIL, J. Správní trestání z hlediska praxe a judikatury. Praha : C. H. Beck, 2013, p. 29.

amend by its decision a decision of a self-governing local authority made in an independent capacity." Accordingly, a decision cannot be reversed against a party against whom an obligation is imposed if that party would be prejudiced by the loss of the opportunity to appeal. The legislator thus avoids the making of surprise decisions against which the party to the proceedings would not be able to defend himself by means of an ordinary remedy. The appellate administrative authority cannot change the contested decision by "taking one step away from the party". For example, to impose a more severe sanction. This does not preclude that, if the decision is annulled and a new decision is given at first instance, the sanction will not be more severe.[6]

However, in this statutory provision, some authors point to possible application problems in practice. In order for the prohibition of reformatio in peius to apply, the decision must be reversed not only on the ground of illegality but also 'merely' on the ground of error. The distinction between illegality and incorrectness is not at all easy even for lawyers dealing explicitly with this issue, let alone for administrative officials, who have to deal with cases as quickly as possible and often with a minimum of knowledge of legal theory and case law. Moreover, as a rule, any incorrectness may also give rise to illegality (for example, infringement of the principle of substantive truth).[7]

Paragraph 90(3) of the Administrative Code formulates the prohibition of reformatio in peius more generally, but allows for certain exceptions to it: "If the appellate administrative authority concludes that the contested decision is contrary to law" "The appellate administrative authority may not change the contested decision to the detriment of the appellant unless the appeal has also been filed by another party whose interests are not identical or the contested decision is contrary to law or other public interest."

The first exception to the prohibition of reformatio in peius arises where the appeal has also been brought by another party whose interests are not identical to those of the appellant. Such a mismatch of interests will generally be the case in contentious proceedings as well as in multi-party proceedings (for example, in construction law).

The second exception to the prohibition of reformatio in peius arises where the contested decision is contrary to the law or other public interest. This provision is often referred to in the Czech professional community as one of the most complicated and controversial provisions of the Administrative Code and is criticised in particular for the vagueness of these conditions (in particular the term 'public interest').[8] In relation to the application of the prohibition of reformatio in peius, the provisions of Section 90(1)(c) and Section 90(3) of the Administrative Code have been described as problematic and contradictory, and many Czech authors have reservations about them. The interrelation of these two provisions has been the subject of several expert discussions, which, however, have not led to an unambiguous conclusion. It is true that the purpose of both provisions is to ensure legal certainty and to exclude surprising decisions. It is questionable which of the two

[6] POTEŠIL, L., HEJČ, D., RIGEL, F., MAREK, D. Správní řád. Komentář. Praha: C.H.Beck, 2015, p. 460.
[7] SČERBOVÁ, M. Zákaz reformace in peius v české právní úpravě řízení o správních deliktech. In MASLEN, M. (ed.) Právo na spravodlivý proces a správne trestanie. Krakow: Spolok Slovákov v Poľsku, 2015, p. 185.
[8] For example SČERBOVÁ, M. Zákaz reformace in peius v české právní úpravě řízení o správních deliktech. In MASLEN, M. (ed.) Právo na spravodlivý proces a správne trestanie. Krakow: Spolok Slovákov v Poľsku, 2015 or MATES, P. K některým otázkám projednávání správních deliktů právnických osob a smíšených správních deliktů. In Správní právo, Vol. XLIII, 2010, No. 4.

prohibitions on change for the worse is of a general nature in relation to the other, and which is of a specific (special) rule, and therefore which should prevail in its application.[9]

The ambiguity of the application of the prohibition of reformatio in peius in the Administrative Code is all the more problematic because the Administrative Code has a relatively wide "reach" also in administrative proceedings other than in the field of administrative criminal law. The legal regulation of the principle of the prohibition of reformatio in peius applies not only to the field of administrative punishment, but to all decision-making processes in the public administration, in so far as the legislation of the Administrative Code applies. In the same way, this ambiguity of the regulation the prohibition of reformatio in peius has an impact on misdemeanour proceedings, which are not covered by the regulation of the Act on Misdemeanours (Act No. 250/2016 Coll.), i.e. on all sentences of the decision on the misdemeanour, except for the sentence on the administrative penalty, the sentence on compensation for damages, the sentence on the release of unjustified enrichment.

4 CONCLUSION

From the analysis of the legal regulation of the prohibition of reformatio in peius in Austria and Czech Republic it can be concluded that the legal systems of these compared countries contain this prohibition. The Czech Republic have already regulated this prohibition in **the general procedural regulations of administrative proceedings**, i.e. in regulations similar to the Administrative Procedure Code in the conditions of the Slovak Republic, Austria prefer to regulate the prohibition of reformatio in peius in regulations that can be classified in the field of administrative criminal law, loosely translated as laws regulating the procedure of imposing administrative liability for administrative offences and judicial review of decisions in administrative court proceedings. One can agree with this approach, since this type of legal regulation contains specific features typical for the field of administrative punishment, and legal theory also includes the principle of reformatio in peius among such specific features. The Czech Republic has enshrined the prohibition of reformatio in peius both in the Offences Act (in Act No. 200/1990 Coll. and in the new Act No. 250/2016 Coll.) and in the general procedural regulation of administrative proceedings, i.e. the Administrative Code.

A certain ambiguity or imprecise wording of the examined institute in some regulations (Austrian VStG) can be considered as a negative, which may cause ambiguous application of this principle in practice, therefore the author does not consider it suitable for adoption in such wording as a possible inspiration for the Slovak legislator.

The situation in the field of administrative punishment in the Slovak Republic and the CR was almost identical under the previous Act on Misdemeanours (Act No. 200/1990 Coll.) and the previous Administrative Code (Act No. 71/1967 Coll.).In the case of the new legal regulation of liability for misdemeanours under Act No. 250/2016 Coll., it can certainly be appreciated that its introduction has improved or equalised the position of perpetrators of administrative offences other than misdemeanours, namely administrative offences of legal persons and natural persons engaged in business, with regard to the application of the prohibition of reformatio in peius. I also believe that the adoption of such a relatively uniform code of administrative punishment should be an inspiration for the Slovak legislator not only

[9] VEDRAL, J. Správní řád. Komentář. Praha: BOVA Polygon, 2012. In BOHADLO, D., POTĚŠIL, L., POTMĚŠIL, J. Správní trestání z hlediska praxe a judikatury. Praha : C. H. Beck, 2013, p.85.

in the matter of reformatio in peius, given the current inconsistent and inadequate legal regulation of administrative punishment in the Slovak Republic.

On the other hand, it is questionable whether the new legislation, which extends the prohibition of reformatio in peius to the sentence on administrative punishment, the sentence on compensation for damages and the sentence on the release of unjust enrichment to the detriment of the accused, is not too lenient towards the accused and defined quite broadly, and thus whether it can be considered optimal also for the conditions of administrative punishment in the Slovak Republic. In this respect, Horvat draws attention to the practical impact of the inclusion of the prohibition of change for the worse also on the sentence on damages. If the injured party appealed in the matter of compensation for damages and the appellate administrative authority wished to uphold his claim, it could only annul the first-instance decision on compensation for damages and refer the case back to the first-instance authority for further proceedings, with the first-instance authority being bound by the legal opinion of the appellate authority. In that case, however, a lengthy administrative and, if an administrative action were brought, judicial process would ensue, in which the accused would appeal. Such a procedure is both time-consuming and costly, and cannot be considered to be beneficial to either of the parties involved in the administrative procedure. Otherwise, too, if the appellate administrative authority were not to uphold the aggrieved party's claim for compensation, the aggrieved party would have to bring an administrative action on the matter. Also, the scope of the administrative action is limited only as regards the statement on damages. Even the administrative court would thus not be able to uphold the injured party's claim in the amount claimed in its decision and would either reject the administrative action or annul the decision of the administrative authority and refer the case back to it (the first-instance authority) for further proceedings, thus starting again a lengthy administrative and, in the case of an administrative action, judicial process.[10] From this point of view, the new legislation on the prohibition of reformatio in peuis is also not appropriate for the Slovak Republic.

The Administrative Code (Act No. 500/2004 Coll.) regulates the prohibition of reformatio in peius in the provisions of § 90(1)(c) and § 90(3). However, these provisions regulate the prohibition of reformation for the worse to different degrees and, as the previous chapter has shown, their interpretation causes problems both in legal theory and in practice. The greatest (contradictory) debate is caused by the relationship between these two statutory provisions, namely the relationship between the special and the general, which then raises the question which of these provisions takes precedence in the application of the prohibition of change for the worse in administrative proceedings. I therefore do not believe that a literal transposition of the legal regulation on the prohibition of reformatio in peius into the Slovak legal order would be an appropriate solution. From the point of view of the effectiveness of the application of appeals or ordinary remedies, the ambiguity and inconsistency in the interpretation and application of these provisions of the Administrative Code, which has not been fully resolved even by court case-law, appears to be problematic.

In terms of possible inspiration for the Slovak legislator with regard to the regulation of the principle of the prohibition of reformatio in peius, I would be inclined towards the possibility of enshrining this principle in legislation within the framework of a uniform law in the field of administrative criminal law, which would reflect the specifics of administrative punishment and which would also regulate the institute of the prohibition of reformatio in

[10] HORVAT, M. Administratívnoprávna zodpovednosť právnických osôb. Bratislava: Wolters Kluwer, 2017, p. 179-180.

peius in the same way for all offences falling under the concept of a criminal charge within the meaning of Article 6 of the Convention.

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ADMINISTRATIVE LIABILITY OF NATURAL PERSONS IN THE REPUBLIC OF LITHUANIA

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Abstract: In 2017 the Code on Administrative Misdemeanours of the Republic of Lithuania came into force. Before that the soviet Code on Administrative Violations was valid. In the conference report, the author talks about the structure and essential provisions of the new code.

Key words: administrative liability, Code on Administrative Misdemeanours of the Republic of Lithuania, administrative penalties, administrative effective measures.

1 INTRODUCTION

The conference report talks about the structure and essential provisions of the Code on Administrative Misdemeanours of the Republic of Lithuania that came into force on 1st of January 2017. Also, it gives information about the roots of the institute of administrative liability in Lithuania. However, the biggest attention is paid to the structure of administrative penalties, including administrative effective measures, to the spectrum of officials and institutions that are enabled to impose administrative sanctions.

2 THE ORIGINS OF ADMINISTRATIVE LIABILITY IN LITHUANIA[1]

Traces of administrative liability could be found in the Code of Pamedė from 1340, in the Code of Kazimieras from 1468, and in the Statutes of Grand Duchy of Lithuania from 1529 (First Statute), 1566 (Second Statute), and 1588 (Third Statute). The Third Statute of Grandy Duchy of Lithuania was valid until 1840. After the Third Statute of Lithuania ceased to be valid, until the entry into force of the criminal laws of Germany and Russia, it can be assumed that separate legal acts and rules were in force in the current territory of Lithuania, setting monetary fines, for example, Rules from 1892 approved by the tsar regarding fines for secret training in the governorates of Vilnius, Kaunas, Gardin, Minsk, Vitebsk, Mogilev, Kiyv, Podole and Volhynia, etc. In addition, since 1845 the Statute of Punishments of tsarist Russia was introduced, which established a complex system of punishments for crimes and misdemeanours and types of punishments, including criminal, educational, and additional. Later in the Territory of Memel *Strafgesetzbuch für das Deutsche Reich* from 1871 and in other parts of Lithuania *Уголовное уложение* from 1903 were valid. Both criminal laws contained provisions regulating not only the punishments for crimes but also administrative penalties for minor offenses.

After the Republic of Lithuania in 1918 declared its independence, it was necessary to decide on the further legal regulation of administrative offenses, because it was obvious that the existing legal regulation was not sufficient, flexible, and modern. However, not a single legal act was adopted that regulated the legal rules and sanctions of administrative

[1] This section of the article is written using the manuscript of the monograph "Administrative Liability of the Natural Persons" by the author of this article.

liability. Sanctions and some legal issues of administrative offenses were provided for in legal acts regulating various public areas – personal identity, finance, economy, work, conscription, electricity, emigration, pharmacy, alcoholic beverages, weapons, veterinary, medicine, smuggling, infectious diseases, food, units of measurement, hunting, taxes and duties, gambling, competition (criminal liability was applied in this area), media (radio and press), cinema, bookstores, elections, social security, statistics, meetings, communication, legal status of aliens, education, topography, law and order and justice, national security, state of emergency, agriculture, fisheries, etc. In addition, some sanctions were laid down in the Criminal Procedure Code that was inherited from tsarist Russia[2].

Since 1940 until 1961 the Criminal Code of Soviet Russia[3] was applied in Lithuania, which included actions for which, in modern society, not criminal, but administrative liability applies. The Criminal Code of the Soviet Socialist Republic of Lithuania entered into force in 1961.[4] This legal act also included provisions establishing administrative liability, although only concept of crime in the legal act was used. In the long run, it was sought to separate criminal liability from administrative liability, and since 1985 the Code of Administrative Law Violations of the Soviet Socialist Republic of Lithuania entered into force.[5] This code governed administrative liability of natural persons in the fields of labour and healthcare, socialist property, environment, use of natural resources, protection of natural, historical, and cultural monuments, industry, electricity, and thermal energy use, agriculture, veterinary sanitary rules, transport, road farming, communications, citizens' housing rights, communal farming, management of apartments, trade and finance, public order, governing order. The Code consisted of five chapters – I. General Provisions, II. Administrative Law Violations and Administrative Liability, III. Officials Authorized to Investigate Cases and Law Violations, IV. Procedural Law of Administrative Misdemeanours Cases, V. Enforcement of Decisions to Impose Administrative Penalties. That was the longest valid legal act in independent Lithuania that was adopted during the years of Soviet occupation. The Code was in force until 1st of January 2017. Of course, it was amended more than three hundred times.

3 STRUCTURE OF THE CODE OF ADMINISTRATIVE MISDEMEANOURS

The new Code of Administrative Misdemeanours was adopted in 2015 and entered into force on 1st of January 2017.[6] This code was also dedicated to natural persons. The Code consists of three parts:

I. **General Part:** general provisions, purpose of the Code, main provisions of administrative liability, validity of laws on liability of for administrative misdemeanours, administrative penalties, and administrative liability, circumstances administrative liability is not allocated or a person is exempted from administrative liability, administrative penalties and administrative effect measures, allocation of administrative penalties and administrative effect measures, features of administrative liability of misdemeanours.

[2] „Law of Criminal Procedure with Commentary, Non-official Gazette. Ed. by KAVOLIS, M. Kaunas: „Literatūros" knygyno leidinys, 1933.

[3] The Criminal Code of Russian Soviet Federative Socialist Republic with Amendments made before 15th of November, 1940. Kaunas: Lietuvos TSR Teisingumo liaudies komisariato leidinys, 1941.

[4] The Criminal Code of the Soviet Socialist Republic of Lithuania with Amendments and Additions made before 1st of August, 1962. Vilnius: Valstybinė politinės ir mokslinės literatūros leidykla, 1962.

[5] The Code of Administrative Law Violations of the Soviet Socialist Republic of Lithuania. *Official Gazette*, 1985, No. 1-1.

[6] The Code of Administrative Misdemeanors of the Republic of Lithuania, TAR, 2015, No. 11216.

II. **Special Part:** sanctions on protection of life and health; family and children; equality and personal inviolability; labour and social rights, voting rights of citizens and the procedure for the elections of the Seimas of the Republic of Lithuania, the President of the Republic, municipal councils and mayors of municipalities, elections to the European Parliament or referendums, property rights and property interests; economics and business order; trade, financial system and official statistics; justice; possession of weapons, ammunition or explosives; environmental protection, use of natural resources and heritage protection; energy; agriculture, veterinary and care of animals; housing, environment management and construction; transport and road farming; communications system; public order; governing order; national service of defence.

III. **Procedure of Administrative Misdemeanours:** general provisions of procedure of administrative misdemeanours, persons participating in the procedure of administrative misdemeanours, their rights, and obligations, initiation of the procedure and investigation of administrative misdemeanours, forceful measures of administrative misdemeanours, end of investigation, administrative misdemeanours protocol and administrative order, assignment of administrative misdemeanours, examination of administrative misdemeanours out of court procedure, appeal to the court of first instance of decisions made out of judicial procedure in cases of administrative misdemeanours, consideration of administrative misdemeanours cases in the court of first instance, particulars of examination of complaints regarding decisions adopted out of court procedure in cases of administrative misdemeanours, appeal process on procedural decisions of the court of first instance, update of administrative misdemeanours cases, damages and court costs, enforcement of decisions, decisions in administrative misdemeanours cases and administrative order.

4 ADMINISTRATIVE PENALTIES AND ADMINISTRATIVE EFFECTIVE MEASURES

The Code governs the concept of administrative misdemeanour. Under Article 5 of the Code of Administrative Misdemeanours an administrative misdemeanour is dangerous act (action or omission) committed by the perpetrator prohibited by this Code, which corresponds to the characteristics of an administrative misdemeanour for which an administrative penalty is provided.

The Code governs the age of a person to whom the administrative penalty can be imposed. According to Article 6 of the Code Administrative Misdemeanours, a person is liable when he reaches the age of sixteen before committing an administrative misdemeanour. In the case of act with signs of an administrative misdemeanours was committed by a minor who had not reached the age of sixteen before committing this act, after the investigation, information about this act and the minor must be forwarded to the director of the municipality's administration, as well as to the State Child Rights Protection and Adoption Service at the Ministry of Social Security and Labour.

Certain circumstances when a person is removed from administrative liability or exempt from administrative liability are governed by the Code. Under Article 12 of the Code when certain acts are of low risk. The criteria, according to which the administrative misdemeanour is considered to be of low risk, are determined by the heads of the institutions whose officials have the right to initiate administrative misdemeanour proceedings. Among the circumstances when a person is removed from administrative liability are necessary

defence, performance of professional duties, execution of tasks of law enforcement authorities, execution of orders, scientific experiment, following the wrong official advice, professional or economic risk, exemption of the reporter from administrative liability (Articles 13–21).

There are two types of administrative sanctions according to the rules of the Code of Administrative Misdemeanours of the Republic of Lithuania: administrative penalties and administrative effective measures. There are three categories of administrative sanctions – warning; fine; community services. There are five administrative effective measures – deprivation of a special right granted to a person; asset confiscation; obligation to participate in alcoholism and drug addiction prevention, early intervention, health care, resocialization, improving communication with children, changing violent behaviour or other programs (courses); prohibition to attend events held in public places; prohibition to drive vehicles that are not equipped with anti-alcohol engine locks.

Based on the provisions of the Code we will discuss each of them.

Administrative penalties. Under Article 24 of the Code of Administrative Misdemeanours of the Republic of Lithuania, *a warning* is an official written condemnation of an act committed by a natural person in the cases provided for in the special part of the Code. According to the Article 25, a person may be *fined* no less than ten and no more than six thousand euros. An administrative order may impose a fine of no less than five euros. The sanctions of the articles of the special part of the Code indicate the minimum and maximum amounts of fines imposed after the investigation of an administrative misdemeanour case. Under Article 26 *community services* are unpaid works useful to the public, assigned as an alternative administrative penalty instead of a fine or its part. Community services are assigned only to able-bodied or partially able-bodied persons and may not be assigned to pregnant women, when this may harm the health, or persons raising a child younger than seven years old, taking into account the child's interests, or for disabled people who cannot perform these jobs due to their health condition. Article 676 of the Code governs that the fine can be replaced by community services only with the consent of the offender.

Administrative effective measures. The measures may be imposed together with an administrative penalty. According to Article 28 of the Code of Administrative Misdemeanours of the Republic of Lithuania, *deprivation of a special right* granted to a person (the right to drive vehicles, the right to hunt, the right to drive inland water vehicles, etc.) is an administrative effective measure, which is imposed with an administrative penalty, if a person has committed an administrative misdemeanour by using this right. Deprivation of a special right may be imposed when it is provided for in the article of the special part of the Code. Deprivation of certain right may not be given to a person who uses these means due to a disability, except in cases where this person drove them while intoxicated or under the influence of narcotic, psychotropic or other psychoactive substances, or when he avoided the intoxication test, consumed alcohol (more than 0.4, not more than 1.5 per thousand intoxication), narcotic, psychotropic or other psychedelic substances after the traffic accident until the circumstances of the accident are determined. Under Article 29 of the Code only property that is the property of the offender may be *confiscated,* except for the specified cases. Article 30 governs that the *obligation to participate in alcoholism and drug addiction prevention, early intervention, health care, resocialization, improving communication with children, changing violent behaviour or other programs* is assigned only with the consent of the person. A person's consent is considered as a mitigating circumstance when imposing an administrative penalty. According to Article 31 of the Code, the duration of *the ban on*

attending events in public places can be from one month to two years. A ban on attending events held in public places may be imposed when it is provided for in the article of the special part of this Code, which establishes administrative liability for the act committed by a person. *A ban on driving vehicles that are not equipped with anti-alcohol engine locks* can be imposed only with the consent of a person, when it is provided for in the article of the special part of the Code of Administrative Misdemeanours of the Republic of Lithuania. Driving bans for vehicles that are not equipped with anti-alcohol engine locks can last from one to two years. Article 39 of the Code governs that an administrative penalty may be imposed no later than within two years from the date of the administrative offence, and in the case of a long-term administrative offence – within two years from the date of its discovery.

5 OFFICIALS AND INSTITUTIONS INVESTIGATING ADMINISTRATIVE MISDEMEANOURS AND WRITING PROTOCOLS

There are around one hundred public administration bodies that has an obligation to impose sanctions for the offenders: Ombudspersons, prosecutors, journalist ethics inspector, officials of the National Bank, the Central Election Commission, Lithuanian Radio and Television Commission, the Competition Council, the Service of Special Investigations, the National Audit Office of Lithuania, the Department of State Security, the State Cultural Heritage Commissions, the Senior Ethics Commission, the Ministry of Finance, other ministries, the Communications Regulatory Authority, the Department of Statistics, the State Nuclear Energy Safety Inspectorate, etc.

According to Article 614 of the Code of Administrative Misdemeanours of the Republic of Lithuania, a court, not a public administration entity, examines cases of administrative misdemeanours, if a fine, the maximum amount of which exceeds one thousand five hundred euros, is provided, or cases of administrative misdemeanours for which, according to the article of the special part of the Code, confiscation, confiscation of property, which is required to be legally registered according to the legislation of the Republic of Lithuania, may be awarded.

6 ADMINISTRATIVE LIABILITY OF LEGAL PERSONS

Administrative liability of legal persons is governed by different laws, for example, the Law on Competition, the Law on Pharmacy, the Law on Tax Administration, the Law on Banks, etc.

Administrative sanctions differ because they depend on the area in which they are applied, for example, public announcement of a violation, a warning, an obligation to stop an illegal act, an obligation to perform actions that restore the previous situation or eliminate the consequences of the violation, including an obligation to terminate, change or enter into contracts, registration of a medicinal product suspension or cancellation of the validity of a certificate, temporary removal of a member of the company's board, temporary ban on providing one or another service, announcement of a restriction (moratorium) on the activity of a company's branch, suspension of the license to provide one or more services, cancellation of a license issued to the company, supply of a medicinal product to the market ban, withdrawal from the market, etc.[7]

[7] DEVIATNIKOVAITĖ, I. Administrative Law. Common Part. Vilnius: Mykolas Romeris University, 2021, p. 574.

7 CONCLUSIONS

The administrative liability has deep historical roots from approximately 1340 in the current territory of Lithuania. The Code of Pamedė, the Code of Kazimieras, and the Statutes of Grand Duchy of Lithuania from 1529, 1566, and 1588 are the most obvious evidence of this. Later in the Territory of Memel *Strafgesetzbuch für das Deutsche Reich* from 1871 and in other parts of Lithuania *Уголовное уложение* from 1903 were valid. After the Republic of Lithuania in 1918 declared its independence administrative sanctions and some legal issues of administrative misdemeanours were provided for in the legal acts regulating various public areas. Also, the Criminal Procedure Code from tsarist Russia was valid and *Strafgesetzbuch für das Deutsche Reich.* From 1940 soviet criminal codes governed administrative sanctions. Since 1985 the Code of Administrative Law Violations entered into force. The Code was in force until 1st of January 2017. The new Code of Administrative Misdemeanours was adopted in 2015 and entered into force on 1st of January 2017.

The administrative liability applied to natural persons is regulated by the Code of Administrative Misdemeanours of the Republic of Lithuania. Sanctions are governed by the special part of the Code of Administrative Misdemeanours of the Republic of Lithuania.

According to the administrative procedure, a person who has reached the age of sixteen before committing an administrative misdemeanour is liable. If an administrative offense is committed by a person under the age of sixteen, he is liable under a separate procedure provided for in the Law on Minimum and Average Child Care of the Republic of Lithuania.

In the sense of the Code of Administrative Misdemeanours of the Republic of Lithuania, a person under the age of eighteen is considered a minor, but a person over the age of sixteen is a subject of administrative liability.

Along with the administrative penalty, administrative effective measures may be imposed.

Administrative penalties include warning, fine, community service. An administrative penalty may be imposed no later than two years from the date of the commitment of the administrative misdemeanour. Administrative effective measures include revocation of a special right granted to a person, confiscation of property, obligation to participate in relevant courses, ban on attending events in public places, ban on driving vehicles that are not equipped with anti-alcohol engine locks.

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ADMINISTRATIVE PENALTIES FOR AUTOMATICALLY DETECTED ROAD SAFETY RELATED TRAFFIC OFFENCES IN UKRAINE

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Abstract: Administrative penalties for automatically detected road traffic offences have been successfully introduced in many European countries. Decreased number of traffic accidents confirms the efficiency of this instrument. However, the national regimes of administrative enforcement of traffic rules in part of automatic detection of road traffic offences have certain peculiarities, in comparison with non-automatic detection, that lead to practical difficulties. Imposing administrative penalties on an owner of a vehicle, who was not an actual driver at the moment when the road traffic offence was automatically detected, is one of such problems. In Ukraine, the mechanism of automatic detection of road safety related traffic administrative offences has been implementing since June 2020. However, the constitutionality of legislative provisions regarding this mechanism is currently a subject of disputes. In this conference paper the author analyses the historical aspects, current state and constitutional challenges of the legal framework for administrative penalties for automatically detected safety related traffic offences in Ukraine.

Key words: administrative penalties, administrative offences, road safety related traffic offences, right to fair trial

1 INTRODUCTION

Administrative penalties for automatically detected road safety related traffic administrative offences are essential part of the legal mechanism of protection of road safety in many European countries. Decreased number of traffic accidents confirm the efficiency of this instrument[1]. However, the national regimes of administrative enforcement of traffic rules in part of automatic detection of road traffic offences have certain peculiarities, in comparison with non-automatic detection, that lead to some practical problems. Imposing the administrative penalties on an owner of a vehicle, who had not been an actual driver at the moment of a road traffic offence, is one of such problems. On the one hand, individualization of administrative penalties is one of the key principles of administrative liability. On the other hand, the owners of the vehicles while realizing their right to property possession and enjoyment became a subject to the road safety protection national regime by their own will. This second approach is supported by the European Court of Human Rights in a set of decisions[2].

In Ukraine, this mechanism was initially introduced in 2008. However, the certain provisions of the Code of Ukraine on Administrative Offences (art. 14^1) were considered as

[1] GRAHAM, D., NAIK, C., McCOU, E., LI, H. Quantifying the causal effect of speed cameras on road traffic accidents via and approximate Bayesian doubly robust extimator, 2017; JANNIS, G., PAPADIMITRIOU, E., ANTONIOU, C. Impact of enforcement on traffic accidents and fatalities: a multivariate multilevel analysis, 2008.

[2] O'Halloran and Francis v. the United Kingdom [GC], § 45; Falk v. the Netherlands (dec.), no. 66273/01, ECHR 2004-XI.

unconstitutional in 2010 (Judgment N023-pn/2010 of 22.12.2010). The main argument – violation of the principle of individualization of punishment stipulated by the Constitution of Ukraine.

In 2015, the Ukrainian authorities returned to the idea of automatic detection of road traffic offences and administrative liability in this case. The Code of Ukraine on Administrative Offences was amended with certain provisions; a set of regulations related to the automatic detection of road traffic offences were approved. First cameras were installed in June 2020. The positive changes have been detected, starting from the first days of the implementation of this mechanism. However, some scholars and practitioners warn about unconstitutionality of the provisions of the Code of Ukraine on Administrative Offences related to road traffic offences detected in the automatic mode. Moreover, their constitutionality is currently again under the consideration by the Constitutional Court of Ukraine

This conference paper devoted to the analysis of the current state of the mechanism of administrative penalties for automatically detected road safety related traffic offences in Ukraine and its perspectives in the light of current constitutional proceedings in Ukraine and case law of the European Court of Human Rights.

The author's opinion, significant legislative developments related to the introduction of the autodetection of road traffic offences were made in Ukraine and positive results of the implementation of such a mechanism were achieved. Taking into consideration of the case law of the European Court of Human Rights, the provisions of the Code of Ukraine on Administrative Offences shall be recognized as constitutional by the Constitutional Court of Ukraine.

2 LEGAL REGULATION FOR THE ADMINISTRATIVE PENALTIES FOR AUTOMATICALLY DETECTED ROAD SAFETY RELATED TRAFFIC OFFENCES IN UKRAINE: HISTORICAL ASPECTS

The first attempt to introduce automatic detection of road traffic offences in Ukraine was made in 2008. The Code of Ukraine on Administrative Offences (1984) was amended with article 14-1 "Liability of owners (co-owners) of vehicles". As referred to in this article, owners (co-owners) of vehicles were subjected to administrative liability for road safety related offences in case of their detection via automatically worked special technical equipment with photo- and video-recording functions or photo- and video-recording equipment. In case of circumstances prove the fact of an abovementioned offence made by another person an owner (co-owner) of the vehicle can inform about such circumstances (another person possessed or used a vehicle, a vehicle was excluded from the possession of an owner (co-owner) due to illegal actions of other persons, etc.) the authority (public official) issued an administrative act on imposing the administrative penalties within ten days from the day of provision of such administrative act. During the period of clarification and evaluation of such circumstances the validity of the administrative act on imposing the administrative penalties suspends until the person made an offence detected.

However, when those legislative changes became applicable and first "letters of happiness" (as they were cold by people) were sent to owners and co-owners of vehicles, many drawbacks arisen in practice (e.g., use of not-automatic equipment by responsible authorities). Courts were flooded with complaints and case law became non-uniform.

In 2010, the Constitutional Court of Ukraine started constitutional proceedings upon the constitutional application on official interpretation of provisions of art. 14^1 of the Code of

Ukraine on Administrative Offences submitted by the advocate Artem Baginsky. The applicant argued that courts of general jurisdiction differently apply the provisions of art. 14-1 of the Code regarding the use of data detected by technical equipment as evidences of administrative offences of owners and co-owners of vehicles, even in case of similar circumstances. That led to gross violations of constitutional human rights and freedoms stipulated by art. 29, part 2 of art. 61, art. 63 of the Constitution of Ukraine. The opinions regarding the subject of the constitutional appeal were provided by the Head of the Verkhovna Rada of Ukraine (the Parliament of Ukraine), the Supreme Court of Ukraine, and representative of the academia.

The Constitutional Court of Ukraine by its Judgment No23-pn/2010 of 22.12.2010 recognized the provisions of art. 14^1 and part six of art. 258 (regarding the procedure of imposing administrative sanctions on owners (co-owners) of vehicles) of the Code of Ukraine on Administrative Offences as unconstitutional. This Judgment has been based on the following key arguments. Firstly, only equipment specifically constructed in order to automatically detect road traffic offences can be used of such purposes. Secondly, the principle of individualization of administrative penalties shall be followed. Thirdly, based on the Administrative Law doctrine and official position of the Constitutional Court of Ukraine only natural person can be a subject of administrative liability, whereas the provisions of art. 14^1 in question define owners (co-owners) of vehicles as subjects of administrative liability and do not consider that the right to ownership can be enjoyed by both natural persons and legal entities.

The Constitutional Court of Ukraine also recommended to the Verkhovna Rada of Ukraine to put the procedure of the imposing the administrative penalties for the offences in the sphere of road traffic safety in case of their detection by automatically worked special technical equipment with functions of photo- and video recording or photo-and video equipment in accordance with this Judgment.

3 LEGAL FRAMEWORK FOR THE ADMINISTRATIVE PENALTIES FOR AUTOMATICALLY DETECTED ROAD SAFETY RELATED TRAFFIC OFFENCES IN UKRAINE: A CURRENT STATE

The legislation of Ukraine regarding the traffic rules includes, first of all, Law of Ukraine "On Road Traffic" (No 3353-XII of 30 June 1993) and Traffic Road Rules approved by Regulation of the Cabinet of Ministers of Ukraine No 1306 of 10 October 2001. The Law of Ukraine "On National Police" (No 580-VIII of 02 July 2015) defines the powers of police, in particular related to administrative offences.

In 2015, the Code of Ukraine on Administrative Offences was amended with new provisions related to administrative penalties for automatically detected road safety related traffic offences (Law of Ukraine No 596-VIII of 14.07.2015) – articles 14^2, 279^1-279^4. These provisions are supplemented by the following regulations: Regulation of the Cabinet of Ministers of Ukraine No 833 of 10 November 2017 "On Functioning of the System of Automatic Detection of Road Safety Related Traffic Offences", Procedure on Submission of the Vehicle Proper User Data to the Single State Vehicle Register (Regulation of the Cabinet of Ministers of Ukraine No 1197 of 14.11.2018), Instruction on Preparation of Materials on Automatically Detected Road Safety Related Traffic Offences by Police Officers (Order of the Ministry of Interior of Ukraine No 13 of 13.01.2020).

The System of automatic detection of road safety related traffic offences (hereinafter – the System) became operational since 1 June 2020 and during the first days

demonstrated it's efficiency. During the first year of the work of the System 1 738 119 administrative acts on imposing the administrative penalties were issued; 259 598 532 UAH were paid as fines[3].

It should be noticed that concrete road safety related traffic offences are stipulated by special articles of the Code of Ukraine on Administrative Offences. For instance, administrative liability for the one of the most common violations – exceeding speed limits – is stipulated by art. 122 of the Code. The legislation defines the list of offences that can be automatically detected. Thus, the following road safety related traffic offences are detected via the System:

- exceeding established vehicle speed limits;
- red light running;
- stop and parking rules infringement;
- infringement of traffic and stop rules on the bus line;
- entering an oncoming lane in case it is prohibited;
- infringement of railway level crossing rules;
- infringement of prohibition of traffic on pedestrian crossings and pavements.

According to the certain provisions of the Code of Ukraine on Administrative Offences the following persons are defined as possible subjects of administrative liability for automatically detected road safety related traffic offences in Ukraine: the responsible person and the person that imported the vehicle to the territory of Ukraine. The category of the "responsible person" includes: the natural person – the owner of the vehicle, the manager (or the acting manager, if there are no data regarding the manager in the Single State Register on Legal Entities, Natural Persons – Entrepreneurs, and Civil Organizations by the moment of the request) of the legal entity that is the owner of the vehicle, and the appropriate user (registered in the Single State Register of Vehicles).

The consideration of cases on automatically detected road safety related traffic offences is conducted via simplified proceedings (offence record is not prepared). Such cases are considered at the offence processing and record keeping place in the responsible body (department) of the National Police of Ukraine. The police officer detects a responsible person or a person that imported a vehicle to the territory of Ukraine and issues the administrative act on imposing the administrative penalties. The administrative act is generated in the electronic format via the System. The administrative act is automatically inserted to the Register of road safety related traffic administrative offences via the System. Only 50 % of the fine shall be paid, if the subject of administrative liability pays it within 10 days after the administrative act was issued. Otherwise, the full sum of the fine shall be paid. In this case the administrative act shall be printed out and sent to the address of the subject of administrative liability (address of registration/place of residence of the natural person or the principal place of business) via the national postal service operator with the information regarding the receipt.

The persons can check if there any administrative acts on imposing administrative penalties for the road safety related traffic offences via electronic resources, first of all, via the personal driver electronic cabinet or via the special mobile application of the Ministry of Interior of Ukraine "Штрафи ПДР" (fines road traffic rules – author).

It shall be noticed that the law defines the exhaustive list of cases when the responsible person or a person that imported a vehicle to the territory of Ukraine can be

[3] https://ccu.gov.ua/novyna/konstytuciynyy-sud-rozglyadaye-chy-zakonna-avtofiksaciya-porushen-pravyl-na-dorogah-09092021.

released from administrative liability for the automatically detected road safety related traffic offences:

- submission by the responsible person (person that imported a vehicle to the territory of Ukraine) to the responsible authority a document about illegal withdrawal of a vehicle from possession;
- submission by the actual driver to the responsible authority an application about the recognition of the fact of the administrative offence, a consent to be imposed with administrative penalties, and a document on fine payment (art. 279^3 of the Code of Ukraine on Administrative Offences).

4 CURRENT DEBATES ON CONSTITUTIONALITY OF THE LEGISLATIVE PROVISIONS REGARDING THE ADMINISTRATIVE PENALTIES FOR AUTOMATICALLY DETECTED ROAD SAFETY RELATED TRAFFIC OFFENCES IN UKRAINE

Despite positive impact of the implementation of the mechanism of the administrative penalties for automatically detected road safety related traffic offences in Ukraine, scholars and practitioners in Ukraine are currently debating on constitutionality of the certain provisions of the Code of Ukraine on Administrative Offences.

In particular, M. Pluhatyr argues that establishment of the presumption of guilt of the vehicle owner or the person that imported the vehicle to the territory of Ukraine in making the administrative offences in case of their automatic detection and imposing on them an obligation to prove their innocence is a mistaken step in law making. The implementation of administrative liability in such frames can lead to serious violations of human rights. Provisions of part one of art. 14^2 also establish legal uncertainty and create difficulties in implementation of a set of articles of the Special part of the Code of Ukraine on Administrative Offences that stipulate administrative liability for road safety related offences. In his opinion, it is necessary to amend the Constitution of Ukraine, Code of Ukraine on Administrative Offences, and laws that regulate relations in the sphere of road traffic safety in order to enhance the legal regulation in the researched field. He concluded that such legislative changes require future research[4].

Several constitutional complaints regarding this issue are under consideration by the Constitutional Court of Ukraine: constitutional complaints submitted by Alyona Zabara, Gagik Martyrosian, and Sergii Trutniev on constitutionality of the provisions of part one of art. 14^2 of the Code of Ukraine on Administrative Offences, and the constitutional complaint submitted by Nadiia Kopylova on constitutionality of provisions of part one of art. 14^2, part five of art. $279^1$of the Code of Ukraine on Administrative Offences.

The first constitutional complaint in the issue in question was submitted to the Constitutional Court of Ukraine by Gagik Martyrosian (No18/94 of 02 March 2020). In his opinion, the provisions of part one of art. 14^1 of the Code of Ukraine on Administrative Offences contradict to part two of art. 61 and part three of art. 62 of the Constitution of Ukraine, because allow the imposing the administrative sanctions on vehicle owners even so such persons did not make an administrative offence[5].

Nadia Kopylova in her constitutional complaint (No18/267 of 30.06.2020) states that the disputed provisions of the Code of Ukraine on Administrative Offences contradict to the provisions of art. 59 of the Constitution of Ukraine, because she was not informed about

[4] PLUHATYR, M. Observance of constitutional guarantees when considering cases of administrative offenses recorded automatically, 2021, p. 161.

[5] https://ccu.gov.ua/sites/default/files/18_942020.pdf.

imposing administrative penalties and, therefore, she was illegally deprived of her right to professional legal aid. Also, she mentions that disputed provisions of the Code are not in correspondence with part two of art. 61 of the Constitution of Ukraine, because allow to impose administrative penalties on vehicle owners even so they did not make an administrative offence. Such approach contradicts to the main constitutional principles regarding the individual character of legal liability. Additionally, the author of the constitutional complaint argues that imposing on her administrative sanctions is a serious violation of part three of art. 62 of the Main Law of Ukraine[6].

Alyona Zabara in her constitutional complaint (No18/436 of 8 September 2020) states that provisions of part one of art. 14^1 of the Code of Ukraine on Administrative Offences contradict to art. 61, 62 of the Constitution of Ukraine concerning the individual character of legal liability. In this constitutional complaint devoted to the issue of imposing the sanctions on the managers of legal entities – owners of the vehicles. The author of the complaint explained that she was imposed with administrative sanctions as the manager of the legal entity. She argues that in such situation there are limitations of rights and guaranties prescribed by the Code of Ukraine on Administrative Offences, her access to fair trial was limited and she was imposed with additional burden of proof of her innocence[7].

Sergii Trutniev (constitutional complaint No18/259 of 7 July 2021) argues that provisions of art. 14^1 and part one of art. 279^3 contradict to parts one and two of art. 8, part three of art. 22, part two of art. 61, parts two and three of art. 62, part one of art. 64 of the Constitution of Ukraine and infringe the constitutional principles of individualization of legal liability and innocence.[8]

Thus, the main arguments presented in all complaints devoted to the constitutional principle of individualization of legal liability and principle of innocence. They argued that it is unconstitutional to impose administrative sanctions on persons that were not actual drivers at the moment of the administrative offence.

During the hearings in the Constitutional Court of Ukraine the representatives of the Verkhovna Rada of Ukraine and the President of Ukraine in the Constitutional Court of Ukraine expressed their opinions regarding the constitutionality of the disputed provisions of the Code of Ukraine on Administrative Offences. Thus, the representative of the Verkhovna Rada of Ukraine in the Constitutional Court of Ukraine Olga Sovgyria (currently – newly appointed judge of the Constitutional Court of Ukraine) argued that the owner has an opportunity to register the appropriate user in the Single State Register of Vehicles and by these means to state who will be liable in case of infringements of the Road Traffic Rules. Otherwise, it will be considered as careless usage of the source of increased danger. The representative of the President of Ukraine in the Constitutional Court of Ukraine Fedir Venislavskiy said that the disputed provisions of the Code of Ukraine on administrative offences are in correspondence with the Constitution of Ukraine, and the ignorance of the road traffic rules is one of the biggest problems in Ukraine. Therefore, in his opinion, the harsher administrative sanctions are preventive measure[9].

By this moment, these constitutional complaints are still under consideration by the Grand Chamber of the Constitutional Court of Ukraine. The complainants and the society are

[6] https://ccu.gov.ua/sites/default/files/18_267_2020.pdf.
[7] https://ccu.gov.ua/sites/default/files/18_4362020.pdf.
[8] https://ccu.gov.ua/sites/default/files/18_259_2021.pdf.
[9] https://ccu.gov.ua/novyna/konstytuciynyy-sud-rozglyadaye-chy-zakonna-avtofiksaciya-porushen-pravyl-na-dorogah-09092021.

looking forward for the judgment. Would it be the same as in 2010 or would the Constitutional Court of Ukraine confirm the constitutionality of the disputed provisions?

On the one hand, individualization of legal liability in general and administrative sanctions in particular is one of the key principles of legal liability (part two of art 61 of the Constitution of Ukraine). On the other hand, the owners of the vehicles while realizing their right to property possession and enjoyment became a subject to the road safety protection national regime by their own will. This second approach is supported by the European Court of Human Rights in a set of decisions[10]. In particular, in its decision in the case "O'Halloran and Francis v the Great Britain" the Court states: "Those who choose to keep and drive motor cars can be taken to have accepted certain responsibilities and obligations as part of the regulatory regime relating to motor vehicles, and in the legal framework of the United Kingdom these responsibilities include the obligation, in the event of suspected commission of road-traffic offences, to inform the authorities of the identity of the driver on that occasion.[11]" In the decision in the case "Falk v the Netherlands" the Court concludes: However, a person's right in a criminal case to be presumed innocent and to require the prosecution to bear the onus of proving the allegations against him or her is not absolute, since presumptions of fact or of law operate in every criminal-law system and are not prohibited in principle by the Convention, as long as States remain within reasonable limits, taking into account the importance of what is at stake and maintaining the rights of the defence (see *Salabiaku v. France*, judgment of 7 October 1988, Series A no. 141-A, pp. 15-16, § 28). Thus, in employing presumptions in criminal law, the Contracting States are required to strike a balance between the importance of what is at stake and the rights of the defence; in other words, the means employed have to be reasonably proportionate to the legitimate aim pursued (see *Västberga Taxi Aktiebolag and Vulic v. Sweden*, no. 36985/97, § 113, 23 July 2002)[12]." By the way, this decision of the ECHR was used as an argument for the constitutionality of the disputed provisions by public authorities' representatives during the hearings in the Constitutional Court of Ukraine[13]. It should be noticed that in this decision the European Court of Human Rights also pays attention to the importance of guarantied right of a vehicle owner to protect him/herself before the fair trial: "It further notes that a person fined under Article 5 of the Act can challenge the fine before a trial court with full competence in the matter and that, in any such proceedings, the person concerned is not left without any means of defence in that he or she can raise arguments based on Article 8 of the Act and/or claim that at the material time the police had a realistic opportunity of stopping the car and establishing the identity of the driver."

5 CONCLUSION

Administrative penalties for automatically detected road safety related traffic offences have been used in many European countries and already proved their efficiency.

In Ukraine, the first legislative attempt to introduce this mechanism was made in 2008. However, the provisions of the Code of Ukraine on Administrative Offences regarding this mechanism were considered as unconstitutional by the judgement of Constitutional

[10] O'Halloran and Francis v. the United Kingdom [GC]; Falk v. the Netherlands (dec.), no. 66273/01, ECHR 2004-XI.

[11] O'Halloran and Francis v. the United Kingdom [GC] no. 15809/02 i 25624/02 ECHR 29.06.2007.

[12] Falk v. the Netherlands (dec.), no. 66273/01, ECHR 2004-XI.

[13] https://auto.24tv.ua/chy_vidminyt_konstytutsiinyi_sud_avtofiksatsiiu_yaki_shansy_n33216.

Court of Ukraine in 2010. The main argument – violation of the principle of individualization of legal liability stipulated by the Constitution of Ukraine.

In 2015, the Code of Ukraine on Administrative Offences was amended with the provisions regarding the administrative penalties for automatically detected road safety related traffic offences. Legislators took into consideration the abovementioned judgement of the Constitutional Court of Ukraine, in particular, regarding the subject of administrative liability of automatically detected road safety related traffic offences (only natural persons).

However, some scholars and practitioners doubt that certain provisions of the Code of Ukraine on Administrative Offences are in correspondence with the Constitution of Ukraine. And again, the main problem of individualization of legal liability, considering that current provisions allow the imposing the administrative sanctions on vehicle owners and persons that imported the vehicles to the territory of Ukraine even if they were not the actual drivers at the moment when the administrative offence was made.

Several constitutional complaints regarding the constitutionality of the certain provisions (first of all, of part one of art. 14^1) of the Code of Ukraine on Administrative Offences are under consideration by the Constitutional Court of Ukraine. By this moment, the complainants and the society are waiting for the final decision of the Constitutional Court of Ukraine.

In author's opinion, the disputed provisions of the Code of Ukraine on Administrative Offences do not contradict to the Constitution of Ukriane. On the one hand, individualization of legal liability in general and administrative sanctions in particular is one of the key principles of legal liability. On the other hand, taking into consideration the case law of the European Court of Human Rights, the owners of the vehicles while realizing their right to vehicle possession and enjoyment at the same time accept certain responsibilities and obligations as part of the regulatory regime related to vehicles.

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A FEW NOTES TO THE NOTION "CRIMINAL" FOR THE PURPOSES OF THE COUNCIL FRAMEWORK DECISION 2005/214/JHA IN THE CONTEXT OF ROAD TRAFFIC OFFENCES[1]

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Abstract: The Council Framework Decision 2005/214/JHA has been part of the EU legal framework since 2005. The purpose of its adoption was to ease a mutual recognition and enforcement of decisions requiring a financial penalty to be paid by a natural or legal person among Member States, if criminal offences, which fall within a scope of the Framework Decision, were committed. Basically, for the purposes of the Framework Decision a decision which shall be recognised and enforced has to be made either by a court in respect of a criminal offence under the law of the issuing State or otherwise by an authority other than a court in respect of a criminal offence under the law of the issuing State, provided that the person concerned has had an opportunity to have the case tried by a court having jurisdiction in particular in criminal matters. This contribution is focused on the analyses of the notion „criminal" used for the purposes of the Framework Decision in the context of road traffic offences with regard to autonomous interpretation of such notion in the case-law of the ECtHR and the CJEU.

Key words: The Council Framework Decision 2005/214/JHA, notion "criminal", interpretation, road traffic offences, extraterritoriality

1 INTRODUCTION

"Smouldering Effect"[2] of integration brings with it a deeper unification and harmonization of legal standards of the EU Member States. The unification and convergence of legal systems, which are also built on respect for common values such as human dignity, freedom, the rule of law, democracy, equality and human rights, is a basic prerequisite for creating an environment of trust in which Member States are not "afraid" to accept the effects of foreign legal acts on their territory without the need for their recognition[3] or at least their mutual recognition in a faster and more efficient way. An example of the application of the accelerated mutual recognition regime is primarily the recognition and enforcement of court decisions issued by a court of a Member State in civil and commercial matters pursuant

[1] This article was prepared with the support and is the output of a research project supported by the Scientific Grant Agency VEGA no. 1/0187/22 entitled Extraterritorial effects of foreign administrative decisions in the conditions of the European Union.

[2] For the notion "smoldering effect", see MAZÁK, J., JÁNOŠÍKOVÁ, M. Základy práva Európskej únie : (Ústavný systém a súdna ochrana). Bratislava : IURA EDITION, 2009, p. 23.

[3] The so-called „transterritorial administrative acts". See more JAKAB, R., SEMAN, T., JANČÁT, L. Transteritoriálne správne akty v podmienkach Európskej únie a Slovenskej republiky. Košice : ŠafárikPress, 2020, p. 208.

to Regulation 1215/2012 (Brussels Ia),[4] in matrimonial matters and matters of parental rights and obligations according to Regulation 2019/1111,[5] but it also finds its application in criminal matters. According to Art. 82 par. 1 TFEU,[6] after the Lisbon Treaty comes into effect, judicial cooperation in criminal matters in the EU is based on the principle of mutual recognition of judgments and other judicial decisions, and for this purpose the EP and the Council are to adopt measures aimed at, inter alia, the creation of rules and procedures to ensure the recognition throughout the EU of all forms of judgments and judicial decisions and facilitating cooperation between the judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.[7] One of the legal instruments, the subject of which are measures aimed at creating rules and procedures for ensuring the recognition of judgments and judicial decisions throughout the EU and facilitating cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions, is also Framework Decision 2005/214/JHA as amended later.[8]

The aim of this contribution is to open a discourse in the area of the researched issue through the formulation of a few notes based on the analysis carried out on the notion "criminal" used for the purposes of the Framework Decision 2005/214/JHA in the context of road traffic offences, with regard to the autonomous interpretation of this notion in the jurisprudence of the European Court of Human Rights (hereinafter referred to as the "ECtHR") and the Court of Justice of European Union (hereinafter referred to as the "CJEU"). The author believes that in the abovementioned context and with regard to the autonomous interpretation in question, the notion "criminal" for the purposes of Framework Decision 2005/214/JHA is interpreted too formalistically, which leads to a narrowing of its substantive scope and prevents a faster and more efficient circulation of decisions on road traffic offences between Member States.

2 ESSENCE, PURPOSE AND SCOPE OF THE FRAMEWORK DECISION 2005/214/JHA

The Framework Decision 2005/214/JHA is in accordance with Art. 82 par. 1 TFEU based on the principle of mutual recognition, which should apply to financial penalties imposed by judicial or administrative authorities for the purpose of facilitating the enforcement of such penalties in a Member State other than the State in which the penalties

[4] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 (OJ L 351, 20.12.2012, p. 1). It is considered a reformed version of the Brussels I Regulation and contains a number of significant changes to the original text of the Brussels I Regulation.

[5] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (OJ L 178, 2.7.2019, p. 1–115).

[6] Former Article 31 TEU.

[7] The European Commission has defined the principle of mutual recognition in criminal matters as the belief that even if a Member State did not treat a particular matter in the same or similar way in terms of regulation, the results of the procedure are equivalent to those obtained in the Member State where the request was made. In this matter, the Court of Justice of the European Union has tried to find the optimal balance between the principle of mutual recognition and the protection of fundamental rights. See GROZA, A. The principle of mutual recognition: from the internal market to the European area of freedom, security and justice. In Juridical Tribune. Vol. 2, 2022, p. 89-104. Available at: http://www.tribunajuridica.eu/arhiva/An12v1/7.%20Groza%20Anamaria.pdf.

[8] Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (OJ L 76, 22.3.2005, p. 16–30).

are imposed. At the same time, it is highlighted in the preamble of the Framework Decision 2005/214/JHA that it should also apply to financial penalties imposed in respect of road traffic offences.

According to Art. 6 of the Framework Decision 2005/214/JHA, the competent authorities in the executing State shall recognise a decision which has been transmitted in accordance with Article 4 without any further formality being required and shall forthwith take all the necessary measures for its execution, unless the competent authority decides to invoke one of the grounds for non-recognition or non-execution provided for in Article 7. As ruled by the CJEU, the application of grounds for refusal to recognise or refusal to enforce such a decision under Art. 7, however, must be interpreted restrictively, since mutual confidence between Member States, which is the cornerstone of judicial cooperation within the Union, is coupled with appropriate safeguards.[9]

Speaking about a scope of the Framework Decision 2005/214/JHA, basically, it applies to offences exhaustively defined in Art. 5, to which recognition applies regardless of the verification of double criminality of the act and to other criminal acts that the executing State may recognise and execute subject to the condition that the decision is related to conduct which would constitute an offence under the law of the executing State, whatever the constituent elements or however it is described, i.e. double criminality is assessed. One of the 39 exhaustively defined offences in Art. 5 is therefore also the "conduct which infringes road traffic regulations, including breaches of regulations pertaining to driving hours and rest periods and regulations on hazardous goods" or so-called "road traffic offences".

In view of the above, it can be stated that the essence of the framework decision is the creation of a special procedure for the recognition and enforcement of decisions imposing a financial penalty for offence according to Art. 5 of the Framework Decision 2005/214/JHA between Member States for the purpose of faster and more efficient circulation of such decisions in the European Union. At the same time, the scope also includes conduct, which infringes road traffic regulations, which can be recognised regardless of the assessment of double criminality of the act, which de facto fulfills the specially highlighted scope of the Framework Decision, namely that it also applies to financial penalties imposed in respect of road traffic offences.

3 THE NOTION "DECISION" FOR THE PURPOSES OF THE FRAMEWORK DECISION 2005/214/JHA AND ITS LIMITS

For the purposes of the Framework Decision 2005/214/JHA, the notion "decision" has autonomous definition established in its Article 1.

"Decision" must be understood as a final decision requiring a financial penalty to be paid by a natural or legal person where the decision was made by:

i. a court of the issuing State in respect of a criminal offence under the law of the issuing State;

ii. an authority of the issuing State other than a court in respect of a criminal offence under the law of the issuing State, provided that the person concerned has had an opportunity to have the case tried by a court having jurisdiction in particular in criminal matters;

iii. an authority of the issuing State other than a court in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the

[9] See CJEU Case C- 60/12 Marián Baláž ECLI:EU:C:2013:733.

rules of law, provided that the person concerned has had an opportunity to have the case tried by a court having jurisdiction in particular in criminal matters;

iv. a court having jurisdiction in particular in criminal matters, where the decision was made regarding a decision as referred to in point (iii).

Analysing aforementioned definition in connection with other definitions of notions used for the purposes of the Framework decision 2005/214/JHA, especially definition of notion "financial penalty", it is possible to reach following generalizations about the notion "decision". A decision for the purposes of the Framework Decision 2005/214/JHA must:

i. be "final",[10]

ii. impose an obligation on a person to pay a "financial penalty",[11]

iii. be issued either by the court of the issuing state[12] or by an authority of the issuing State other than a court, provided that the person concerned has had an opportunity to have the case tried by a court having jurisdiction in particular in criminal matters,

iv. be issued in respect of a criminal offence under the law of the issuing State or in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law.

If the decision meets the abovementioned conceptual features; it falls within the scope of Art. 5; it was sent in accordance with Art. 4; and no reason is given for its refusal, the executing state is basically obliged to recognise and execute the decision. However, if any conceptual feature wouldn´t be met, it is not a decision for the purposes of the Framework Decision 2005/214/JHA. This implies that such decision can´t be even recognised and enforced in accordance with the procedure established by the Framework Decision 2005/214/JHA, though all other conditions for recognition and execution of a decision would be met. In our view, the third conceptual feature appears to be problematic in terms of the impact on the scope of application of Framework Decision 2005/214/JHA due to the ambiguity of its interpretation.

While the interpretation of the notion "court" used in the case of the third conceptual feature is relatively settled thanks to the case-law of the CJEU,[13] thus, with the notion "an authority of the issuing State other than a court", such stabilization is absent. In our opinion, in absence of such interpretation, it is possible to understand as such an authority essentially any state authority that is different from a court. However, an authority of the issuing State other than a court will primarily be administrative body, since in most Member States they

[10] Based on the Commission document no. COM/2000/495/final of 26.07.2000, by which it communicated its position to the Council and the European Parliament in the matter of "Mutual Recognition of Final Decisions in Criminal Matters", a final decision must be understood as an act by which a certain matter is resolved in a binding way. Above all, it is necessary to consider as such all decisions that rule on the substance of a criminal case, and against which no more ordinary appeal is possible, or, where such an appeal is still possible, it has no suspensive effect. Similarly, see ZÁHORA, J. Zákon o uznávaní a výkone rozhodnutí o peňažnej sankcii v Európskej únii. Komentár. Bratislava : Wolters Kluwer SR, 2020, p. 29.

[11] See Art. 1 of the Framework Decision 2005/214/JHA for the definition of the notion „financial penalty".

[12] According to Art. 1 of the Framework Decision 2005/214/JHA, the "issuing state" for the purposes of the Framework Decision is Member State in which a decision within the meaning of this Framework Decision was delivered.

[13] In accordance with the case-law of the CJEU, the conceptual features that make a national authority a court are, in particular, the legal basis of the authority, its permanent mandate, the binding nature of its legal acts, the adversarial nature of proceedings before it, the application of the principles of the rule of law and its independence. If the authority of the Member State meets these characteristics, regardless of its formal designation, it is necessary for the purposes of EU law to be considered as a court. See e.g. See CJEU Case C-196/09 Miles and Others ECLI:EU:C:2011:388 and the case-law cited in its point 37.

are authorized to decide infringements of lesser severity than criminal offences, the so-called administrative offences. Since the criminal policy of individual Member States, including criminalization, or decriminalization of a certain action is fundamentally within their exclusive competence, it is not excluded that any of the exhaustively defined offences under Art. 5, from the point of view of national legal classification, in some Member States will fall under criminal offences, which are decided by a courts, and in another, under administrative offences, which are decided by an administrative authorities. The answer to this question is crucial for assessing whether offences according to Art. 5 classified in national law as administrative, should be recognised and executed in accordance with the procedure according to Framework Decision 2005/214/JHA.

To the best of our knowledge, the CJEU has not yet decided on the interpretation of the notion "court having jurisdiction in particular in criminal matters" for the purposes of Framework Decision 2005/214/JHA, as well as EU Law as a whole. We believe that, if we were to assess a meaning of the given notion formally, using a purely linguistic interpretation, we would come to the conclusion that it is a judicial body according to EU law, the essential part of whose jurisdiction regulated by the law of the Member State concerns the decision on guilt and punishment for criminal offence. A contrario, such a body of a judicial nature according to EU law, the essential part of whose jurisdiction according to the law of a Member State will not concern the decision on guilt and punishment for a criminal offence, should not be considered as a "court having jurisdiction in particular in criminal matters". It follows from the above that the formal concept of the given notion de facto excludes from the scope of the Framework Decision 2005/214/JHA decisions of administrative bodies of those Member States, whose legal system does not allow the person concerned to challenge a decision of administrative body before a court, the essential part of which jurisdiction regulated by the law of the Member State concerns the decision on guilt and punishment for a criminal offence. The Slovak Republic is one of such Member States as administrative actions of person concerned challenging the decision of an administrative body on an administrative offence in the Slovak Republic are decided by the administrative court according to a special procedural regulation,[14] and which scope is considerably wider. Moreover, in these cases it is not a matter of deciding on guilt and punishment for a crime stricto sensu.

The aforementioned formal concept is in accordance with the opinion of prof. Záhora, who presents it in his recently published commentary.[15] He states that administrative authorities whose decisions a person can challenge before a court having jurisdiction in particular in criminal matters must be understood as administrative authorities with authority within the so-called administrative criminal law, which are introduced in some Member States, such as Austria, Germany or Finland. Within the Austrian legal system, e.g. after the exhaustion of remedies before such administrative bodies, a specialized independent administrative panel, which is a body of a judicial nature, is competent to decide on the appeal. However, in the conditions of several Member States, such a specialized system is not in place, and therefore decisions of administrative authorities imposing a financial penalty for offences within the scope of Art. 5 won´t be recognised and executed in accordance with the procedure according to the Framework Decision 2005/214/JHA. According to him, the legal system in the Slovak Republic also "suffers" from such a limit, the consequence of which is that the Act no. 183/2011 Coll. on the recognition and enforcement of decisions on financial

[14] Act no. 162/2015 Coll. Administrative court order as amended.

[15] ZÁHORA, J. Zákon o uznávaní a výkone rozhodnutí o peňažnej sankcii v Európskej únii. Komentár. Bratislava : Wolters Kluwer SR, 2020. p. 23-25.

penalties in the European Union and on the amendment and supplementation of certain laws (hereinafter referred to as the "Act no. 183/2011 Coll."), which transpose the Framework Decision 2005/214/JHA into Slovak legal order, applies only in relation to decisions of Slovak courts issued in criminal proceedings.

As mentioned in the previous chapter, the scope of the Framework Decision 2005/214/JHA also includes "conduct which infringes road traffic regulations", ergo road traffic offences, which can be recognised regardless of the assessment of double criminality of the act. At the same time, road traffic offences represent a typical category of offences according to Art. 5, for which a financial penalty is imposed, and which is being decided by administrative authorities in several Member States, including the Slovak Republic.[16] Applying the knowledge of the analysed formal concept of the notion "court having jurisdiction in particular in criminal matters" to road traffic offences, it is true that the decision of an administrative authority on a road traffic offence can be recognised and executed according to the procedure according to Framework Decision 2005/214/JHA only if it was issued either by a court of a Member State or an administrative authority whose decision the person concerned had the opportunity to challenge before a court, the essential part of whose jurisdiction regulated by the law of a Member State concerns the decision on guilt and punishment for criminal offence. The abovementioned implies that the formal concept of the notion prevents Member States that do not have established judicial review of decisions of administrative bodies on road traffic offences by a court of such a nature from recognizing and enforcing decisions of administrative authorities on road traffic offences that impose a financial penalty in accordance with the procedure according to the Framework Decision 2005/214/JHA. In our opinion, this is a factor that limits faster and more efficient circulation of decisions on road traffic offences between Member States, which the Slovak Republic also pays for as issuing state of such decisions.[17]

4 THE MATERIAL CONCEPT OF THE NOTION "COURT HAVING JURISDICTION IN PARTICULAR IN CRIMINAL MATTERS" IN THE CONTEXT OF THE INTERPRETATION OF THE NOTION "CRIMINAL" BY THE CASE-LAW OF THE ECTHR AND THE CJEU

According to Art. 6 par. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the "ECHR"), in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. According to the case-law of the ECtHR, the notion "criminal" for the purposes of the applicability of the guarantees arising from Art. 6 in its criminal limb in the given proceedings must be interpreted autonomously from the meaning attributed to this notion by the national legal system of any Contracting State. In the autonomous interpretation of the notion "criminal", according to the ECtHR, its material concept is decisive, which means that it is necessary to examine the fulfilment of at least one of the three so-called Engel criteria. These criteria are:

- classification in national law,
- nature of the offence and

[16] In the Slovak Republic, traffic offences are dealt with mainly in the proceedings on misdemeanours according to Act no. 372/1990 Coll. on misdemeanours as amended or in proceedings on the administrative offence of the vehicle keeper pursuant to Act no. 56/2012 Coll. on road traffic as amended.
[17] See § 1 of Act no. 183/2011 Coll.

- severity of the penalty that the person concerned risks incurring.[18]

According to the first criterion, the national classification of the offence is only the starting point for examining whether the act committed by the offender is criminal. In the event that the perpetrator's offence is classified in national law as a criminal offence, the proceedings are automatically covered by the guarantees of the right to a fair trial according to the ECHR. In the event that it is not classified as such, but is classified e.g. as an administrative offence, it is necessary to proceed to the examination of two other criteria, the aim of which is to reveal the material nature of the committed offence.

The second and third criteria are examined fundamentally alternatively. Therefore, it is enough if at least one of them is fulfilled and the right to a fair trial according to the ECHR is applied. The ECtHR, however, does not completely rule out that in a specific case in which it is not possible to arrive at the application of Art. 6 only on the basis of a separate assessment of these criteria, they were examined cumulatively. As a rule, however, the ECtHR applies these criteria separately and in chronological order. This means that if the second criterion points to the criminal nature of the offence, then the third criterion is no longer examined. On the contrary, if it is not possible to draw a conclusion on the applicability of Art. 6, the ECtHR proceeds to examine the third criterion.[19]

In assessing whether the second criterion is met, the ECtHR examines a range of factors.[20] However, two of these factors have been established as the most important. The first of them is the examination of whether the object of the offence protects the general interest of society and at the same time whether it can be committed by anyone (not only a narrow group of persons defined by "status" such as soldiers, policemen, judges, prosecutors, etc.). The second of them is the examination of whether the sanction imposed for the offence has a punitive or deterrent purpose. In the event that the legal regulation of the offence is not general, it applies only to a narrow circle of persons with some status (typical for disciplinary offences), or if the sanction has not punitive or deterrent purpose, the assessed offence will not be a criminal for the purposes of Art. 6.

The third criterion examines the nature in connection with the severity of the sanction that potentially threatens for the commission of the offence in question. As stated by the ECtHR, an offence will be considered as criminal under the Art. 6, if the sanction by its nature and degree of severity generally falls within the criminal sphere.[21] It is fundamentally valid that if the sanction has serious consequences for the convict, Art. 6 applies to proceedings despite the fact that the sanction is of a reparative nature.[22]

[18] See ECtHR Case Engel and Others v. the Netherlands, no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, 8 June 1976.

[19] For example in Albert v. Romania, the ECtHR proceeded to examine the third criterion after finding that, from the point of view of the subject of the delict, it can be committed by a relatively specific group of persons, while the nature of the potential sanction was preventive-repressive. See ECtHR Case Albert v. Romania, no. 31911/03, 16 February 2010.

[20] For a summary of the factors, see SCHABAS, A., W. The European Convention on Human Rights : A Commentary. Oxford : Oxford University Press, Incorporated, 2015, p. 277. In addition to those mentioned further in the text, this includes e.g. also how other legal systems of the Contracting States of the Convention classify a similar act; whether proceedings are initiated by a public authority with the authority to execute a decision; or whether the imposition of any sentence depends on a guilty plea.

[21] For example ECtHR Case Lutz v. Germany, no. 9912/82, 25 August 1987 or ECtHR Case Öztürk v. Turkey, no. 8544/79, 21 February 1984.

[22] ĽALÍK, M. Právo na spravodlivý súdny proces a zásada ne bis in idem podľa Dohovoru a správne trestanie. In Justičná revue, 2015, p. 1381-1402.

The autonomous interpretation of the notion "criminal" for the purposes of the applicability of the guarantees of the right to a fair trial formulated by the ECtHR was also adopted by the CJEU in the intention of applying the Engel criteria, also in view of the imperative of ensuring a consistent interpretation of the guarantees of the right to a fair trial guaranteed by the Charter of Fundamental Rights of the European Union (hereinafter referred to as the "Charter") in accordance with the guarantees of the right to a fair trial guaranteed by the ECHR resulting from Art. 52 par. 3 Charter.[23] For example in the *Case of Bonda* the CJEU stated that: "*36. The administrative nature of the measures provided for in the second and third subparagraphs of Article 138(1) of Regulation No 1973/2004 is not called into question by an examination of the case-law of the European Court of Human Rights on the concept of 'criminal proceedings' within the meaning of Article 4(1) of Protocol No 7, to which the Sąd Najwyższy refers. 37. According to that case-law, three criteria are relevant in this respect. The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur (see, inter alia, ECHR, Engel and Others v. the Netherlands, 8 June 1976, §§ 80 to 82, Series A no. 22, and Sergey Zolotukhin v. Russia, no. 14939/03, §§ 52 and 53, 10 February 2009)* ", while taking into account the Engel criteria in the case in question, he came to the conclusion that the measures consisting in the exclusion of the subject from the provision of aid in the field of agricultural policy do not constitute a sanction for a "criminal" offence.[24]

With the material concept of the notion "criminal", the ECtHR and the CJEU seek to ensure uniform protection resulting from the right to a fair trial in all Member States. Punishment of offences in Member States, however, it is considerably diverse both from the point of view of the authority that decides on the given offence and, on the other hand, from the point of view of their legal classification. As mentioned, it is not excluded that the same act is classified as criminal according to the legal system of one State and decided by a court, and according to another as administrative and decided by an administrative body. The Engel criteria are thus intended to make it impossible for the State to purposefully "move" acts which are punishable to the non-criminal area in order to avoid its obligation to guarantee individuals the right to a fair trial. In other words, if a Member State decides to decriminalize certain proceedings to the level of an administrative offence, the second and third Engel criteria are intended to ensure that in such administrative proceedings the guarantees of the right to a fair trial will be ensured to the same extent as if it were proceedings under national law classified as "criminal".

According to the case-law of the ECtHR, road traffic offences are fundamentally considered "criminal" for the purposes of the right to a fair trial under the ECHR.[25] This means that even if road traffic offences are classified as administrative offences by the national legal system, it is the duty of a state to ensure the rights of the person concerned in such proceedings to the same extent as the person concerned of a criminal offence stricto sensu. The guarantees of the right to a fair trial, which must be ensured in criminal proceedings,

[23] According to Art. 52 par. 3 of the Charter in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

[24] CJEU Case C-489/10 Bonda ECLI:EU:C:2012:319. Similarly, see CJEU Case C-45/08 Spector Photo Group NV and Chris Van Raemdonck v. Commissie voor het Bank-, Financie- en Assurantiewezen (CBFA) ECLI:EU:C:2009:806.

[25] ECtHR Case Marčan v. Croatia, no. 40820/12, 10 July 2014 and the case-law cited in its points 33 and 34.

include, on the one hand, general guarantees as the right of access to the court; the right to an independent and impartial tribunal established by law; the right to a fair trial; the right to a public hearing; the right to a hearing within a reasonable time, and, on the other hand, the specific criminal law guarantees as the right not to incriminate oneself; the presumption of innocence principle; the right of the defense within the scope of rights under Art. 6 par. 3 ECHR; the the nullum crimen, nulla poena sine lege principle; the right of appeal in criminal matters; the ne bis in idem principle; or the right to compensation for wrongful decision. An immanent part of the right of access to the court in connection with the right to an independent tribunal is the requirement that, in the event that an administrative offence was decided by an administrative body that did not provide guarantees of independence, the person concerned should be allowed to challenge such a decision at the body that materially provides such guarantees. i.e. at the court, which has full jurisdiction including the power to quash the decision both on grounds of law and fact.[26]

Considering the autonomous interpretation of the notion "criminal" for the purposes of the right to a fair trial according to the ECHR and EU Law, which aims to eliminate the exclusion of proceedings on an administrative offence of a criminal nature from the protection of the right to a fair trial ensured by the ECHR and EU law, the question is, in our opinion, appropriate, whether such an autonomous interpretation would and could also have an impact on the interpretation of the notion "court having jurisdiction in particular in criminal matters". Specifically, we believe that the notion should be interpreted in substantive way[27] as a judicial body according to EU Law, in which jurisdiction is the hearing of an administrative offence of a criminal nature for the purposes of Art. 6 as part of the remedy procedure, which has full jurisdiction including the power to quash the decision both on grounds of law and fact. Indeed, such a court is obliged to provide the person concerned de facto with the same basic procedural guarantees as he would have before a court that would decide on a criminal offence stricto sensu. Materially, such a court would be, in our view, a court deciding on a "criminal" offence.

We believe that the aforementioned material concept of the notion "court having jurisdiction in particular in criminal matters" should and could its impact on extension of the scope of Framework Decision 2005/214/JHA to the decisions of administrative authorities on road traffic offences in Member States where such decisions are reviewed by a court that has full jurisdiction and authority to review the matter both factually and legally, although such court´s essential part of substantive competence regulated by the law of the Member State does not concern the decision on guilt and punishment for criminal offence. The material concept would undoubtedly contribute to a faster and more efficient circulation of decisions on traffic offences between Member States, which would fulfil the declared scope of the Framework Decision 2005/214/JHA from the preamble to the effect that it should also apply to financial penalties imposed for road traffic offences.

Last but not least, in our opinion, the material concept should also have an impact on the possibility of expanding the scope of Act No. 183/2011 Coll., in the sense that its provisions should also apply to the procedure of authorities of the Slovak Republic when

[26] See ZRVANDYAN, A. Casebook on European fair trial standards in administrative justice. Strasbourg : Council of Europe Publishing, 2016, p. 28-29, and the ECtHR case-law cited there.

[27] In addition, the Commission document no. COM/2000/495/final from 26.07.2000, when explaining the notion "criminal matters", understands it materially. Specifically, it states: "*(Material) criminal law is traditionally understood as the rules whereby a state foresees sanctions as a reaction to behavior that it deems incompatible with its social norms, for the purpose of deterring the offender from repeating his offenses and deterring others from committing similar acts. Recently, this understanding has widened to include elements of rehabilitation*.".

transmitting a decision of an administrative authority that imposes a financial penalty for road traffic offence on its recognition and enforcement in another Member State, not only when transmitting the decision on a financial penalty issued by a court in criminal proceedings.[28] In our opinion, in the Slovak Republic, the person concerned has the possibility to have his case heard before an administrative court as part of the proceedings on an administrative action in matters of administrative punishment, which, although not formally, but materially provides guarantees that the case of the given individual will be heard by a court that has full jurisdiction and authority to review the matter both factually and legally.[29] In our opinion, this is due to the fact that Act No. 162/2015 Coll. The Administrative Court Code, as amended (hereinafter referred to as the "Administrative Court Code") provides a sufficient normative prerequisite for ensuring the above-mentioned requirement on a specific level, because it regulates the possibility of the administrative court to apply full jurisdiction in proceedings on an administrative action in matters of administrative punishment in the form of a sanction moderation[30] and financial moderation;[31] the possibility of conducting evidence in relation to the establishment of the factual situation beyond the scope of the factual situation established by the administrative body[32] and last but not least, the possibility to annul a decision and return the case to the administrative body for reasons,[33] by which it is possible to eliminate both the factual and legal deficits of the decision of the administrative body in the continuous proceedings.[34] At the same time, the court, in proceedings on an administrative action in matters of administrative punishment, is obliged, in the case of a road traffic offence, to ensure the basic guarantees arising from the right to a fair trial according to the ECHR,[35] as well as apply by analogy the principles of criminal procedure according to the Criminal Code, which must be used for administrative punishment and the principles of imposing penalties according to the Criminal Code, which must also be used for imposing sanctions within the framework of administrative punishment.[36]

[28] See § 1 of Act no. 183/2011 Coll.

[29] The ECtHR examines the requirement of full jurisdiction and the possibility to review the decision from a factual as well as a legal point of view in the circumstances of each case, which means that it prefers its fulfillment on a concrete level rather than an abstract one. See KMEC, J., KOSAŘ, D., KRATOCHVÍL, J., BOBEK, M. Evropská úmluva o lidských právech, Velké komentáře. 1. Praha : C. H. Beck, 2012, p. 625.

[30] § 192 of the Administrative Court Code.

[31] § 198 of the Administrative Court Code.

[32] § 120 of the Administrative Court Code.

[33] § 191 par. 1 of the Administrative Court Code.

[34] See BARICOVÁ, J., FEČÍK, M., ŠTEVČEK, M., FILOVÁ, A. et al. Správny súdny poriadok. Komentár. Bratislava : C. H. Beck, 2018, p. 648-649.

[35] Road traffic offences classified as misdemeanours as well as administrative offences of vehicle keeper are, in our opinion, matters of a criminal nature for the purposes of the right to a fair trial under the ECHR. The criminal nature of offences was ruled by the ECtHR in ECtHR Case Lauko v. Slovakia, No. 26138/95, 2 September 1998 and ECtHR Case Kadubec v. Slovakia, no. 27061/95, 2 September 2 1998. In the case of administrative offences of the vehicle keeper, such case-law is absent, but given the constant jurisprudence of the ECtHR on the criminal nature of traffic offences in other states, it is legitimate to assume that the administrative offences of vehicle keeper also have such a character. See ECtHR Case Lutz v. Germany, no. 9912/82, 25 August 1987 or ECtHR Case Öztürk v. Turkey, no. 8544/79, 21 February 1984, ECtHR Case Marčan v. Croatia, no. 40820/12, 10 July 2014 ECtHR Case Igor Pascari v. Moldova, no. 25555/10, 30 August 2016.

[36] § 195 of the Administrative Court Code.

5 CONCLUSION

The aim of this contribution was to open a discourse in the area of the researched issue through the formulation of a few notes based on the analysis carried out on the notion "criminal" used for the purposes of the mentioned Framework Decision 2005/214/JHA in the context of road traffic offences, with regard to the autonomous interpretation of this notion in the case-law of the ECtHR and the CJEU.

Based on the analysis of the essence, purpose and scope of Framework Decision 2005/214/JHA, as well as the notion "decision" used for its purposes, we can formulate the following notes:

- One of the conceptual features of the notion "decision" for the purposes of Framework Decision 2005/214/JHA is also the feature according to which a decision must be issued either by the court of the issuing state or by an authority of the issuing State other than a court, provided that the person concerned has had an opportunity to have the case tried by a court having jurisdiction in particular in criminal matters.
- In our opinion, the mentioned conceptual feature is problematic in terms of the impact on the scope of application of Framework Decision 2005/214/SJV to road traffic offences due to the ambiguity of the interpretation of the notion "court having jurisdiction in particular in criminal matters".
- The formal concept of the notion "court having jurisdiction in particular in criminal matters" is currently preferred, according to which it is a judicial body according to EU Law, the essential part of whose jurisdiction regulated by the law of the Member State concerns the decision on guilt and punishment for criminal offence.
- The formal concept of the notion "court having jurisdiction in particular in criminal matters" thus prevents Member States that do not have an established judicial review of the decisions of administrative bodies on road traffic offences by a court, the essential part of whose jurisdiction regulated by the law of the Member State concerns the decision on guilt and punishment for criminal offence, so that they can recognise and execute the decisions of administrative authorities on road traffic offences that impose a financial penalty in accordance with the Framework Decision 2005/214/JHA.
- The formal concept of the mentioned notion also represents a factor that limits faster and more efficient circulation of decisions on road traffic offences between Member States, which the Slovak Republic also pays for as the issuing state of such decisions.

Based on the analysis of the notion "court having jurisdiction in particular in criminal matters" in the context of the interpretation of the notion "criminal" by the case-law of the ECtHR and the CJEU, we can formulate the following notes:

- According to the case-law of the ECtHR and the CJEU, Member States are obliged to interpret the notion "criminal" for the purposes of the right to a fair trial under the ECHR and EU law autonomously.
- The essence of the autonomous interpretation of the notion "criminal" is its material concept, the aim of which is to reveal the criminal or non-criminal nature of the given action, regardless of its formal classification in the national law of a Member State, in order to ensure uniform protection resulting from the Art. 6 of ECHR in its criminal limb in any Member State.

- In view of the above-mentioned autonomous interpretation, in our opinion, a legitimate question arises as to the possibility of interpreting the notion "court having jurisdiction in particular in criminal matters" materially, namely as a judicial body according to EU Law, in which jurisdiction is the hearing of an administrative offence of a criminal nature for the purposes of Art. 6 as part of the remedy procedure, which has full jurisdiction including the power to quash the decision both on grounds of law and fact, since such a court would materially be a court deciding on a criminal matter with the obligation to guarantee the person concerned de facto the same basic procedural guarantees as would available before a court that would decide on a criminal offence stricto sensu.
- The material concept of the notion "court having jurisdiction in particular in criminal matters" would extend the scope of Framework Decision 2005/214/JHA to decisions of administrative authorities on road traffic offences in Member States, including the Slovak Republic, where such decisions are reviewed by a court that has full jurisdiction and the right to examine the matter both from a factual and legal point of view, but it is not a court, the essential part of which jurisdiction regulated by the law of a Member State concerns the decision on guilt and punishment for a criminal offence.
- The material concept of the mentioned notion would remove the limit of the formal concept and would contribute to a faster and more efficient circulation of decisions on road traffic offences between Member States, which would fulfil to a greater extent the declared scope of the Framework Decision 2005/214/JHA that the framework decision should also apply to financial penalties imposed in respect of road traffic offences.

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ADMINISTRATIVE PUNISHMENT IN THE AREA OF STATE SYMBOLS AND MUNICIPAL SYMBOLS[1]

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Abstract: The paper deals with issues of administrative punishment in the area of state symbols and symbols of municipalities and self-governing regions. It deals with the topic both on the level regulated by the Act on Infringements and on the level regulated by the Act on State Symbols of the Slovak Republic. It also deals with the relationship between the administrative punishment in this area and punishment for the crime of disorderly conduct.

Key words: State symbol, symbol of a municipality, administrative punishment, infringement, administrative offence, criminal offence, disorderly conduct, defamation of a state symbol.

1 INTRODUCTION

The state symbols are of utmost importance as symbols of the state and the statehood, of the history of the state[2], as symbols of state authority and the bodies of the state, but also of their performance of the state power. They are also symbols of the Slovak nation as the constituent nation of the Slovak republic[3]. The quite rigorous legal regulation of state symbols serves the interest of preserving respect for the state, preserving the cohesion of society[4] and of preserving the state as such.

Positive and negative protection of state symbols is provided for in Slovak legislation. The negative protection may be understood as a set of rules, which prohibit or restrict certain ways of dealing with state symbols, whether expressly or implicitly. This includes also laws penalising certain forms of handling of state symbols – in terms of criminal liability and liability for administrative offences.

The aim of this paper is to outline these two types of public liability in relation to state symbols, but also to analyze the problematic aspects of their mutual relationship, and to propose possible changes in legislation.

In addition to state symbols, the article also pays attention to the symbols of municipalities and self-governing regions and their penal protection within the framework of administrative law.

The paper will focus on legal institutes regulated mainly in these Laws: Act No 63/1993 Coll. on the State symbols of the Slovak Republic and their use, as amended

[1] This paper is a scientific output of the research project supported by the Slovak Research and Development Agency APVV-20-0436 „Nová právna úprava správneho trestania".

[2] DRGONEC, J. Ústava Slovenskej republiky. Teória a prax. Bratislava: C. H. Beck, 2015, p. 220.

[3] PALÚŠ, I. et al. Ústavné právo Slovenskej republiky. Košice: Pavol Jozef Šafárik University, Faculty of Public Administration, 2016, p. 113.

[4] According to Ľ. Cibulka, state symbols are „a certain tool for identifying citizens with their state". See SVÁK, J., CIBULKA, Ľ., KLÍMA, K. Ústavné právo Slovenskej republiky. Všeobecná časť. 2nd edition. Bratislava: BVŠP, 2009, p. 275.

(hereinafter referred to as 'the State symbols Act'); Act No 300/2005 Coll., the Criminal Code, as amended (hereinafter referred to as the "Criminal Code") and Act No 372/1990 Coll. on infringements, as amended (hereinafter referred to as the "Infringements Act").

In terms of methodology, the method of heuristic inquiry (focusing mainly on normative texts and scientific literature) was used in the research, together with the methods of analysis, synthesis, deduction and induction.

2 STATE SYMBOLS OF THE SLOVAK REPUBLIC

According to the Constitution of the Slovak Republic (Article 8), the state symbols of the Slovak Republic are the Coat of arms, the Flag, the State seal and the State anthem. Article 9 contains a brief description of the symbols and provides, that a Law shall lay down the details and use of the state symbols.

For the purposes of this paper, I do not consider a detailed description of the state symbols of the Slovak Republic to be expedient.

3 LEGAL CONSEQUENCES OF BREACH OF LEGAL OBLIGATIONS RELATING TO STATE SYMBOLS

Incurrence of tortious public liability, be it criminal liability or liability under administrative law (liability for infringements or administrative offences), can be a legal consequence of a breach of the legal obligation relating to the use of state symbols.

3.1 Criminal offences

Criminal protection of state symbols is covered by the provision in Paragraph 364 of the Criminal Code. This provision regulates the crime of disorderly conduct. This criminal offence is committed, inter alia, by a person who commits, in words or physically, publicly or in a place accessible to the public, gross indecency or disorder by defamation of a state symbol (Section 364(1)(b) of the Criminal Code). For such conduct, the offender can be punished by imprisonment for up to three years (the lower limit of the rate is not provided for in the law in this case).

Under Section 122(2) of the Criminal Code, a criminal offence is committed publicly – when committed

(a) by the content of a book or print media or by the distribution of the file, or by film, radio, television, using a computer network or other similarly effective means; or

(b) in front of more than two persons present at the same time.

According to J. Ivor, a gross indecency is a serious breach of the rules of civil coexistence and the principle of civil morality, whereas disorder is an act which seriously undermines peace and public order, and, unlike gross indecency, it is usually an act of physical or psychological violence directed against persons or against property, or actions that raise concerns about the safety of people or property, or significantly reduce esteem of a larger number of people; [5]

[5] IVOR, J. et al. Trestné právo hmotné. Osobitná časť. 2nd edition. Bratislava: Wolters Kluwer, 2021, p. 506. According to another work, gross indecency means conduct that grossly violates the principles of civil coexistence and the principles of civil morality. It must be a more serious indecency. The gross nature of indecency cannot be assessed only on the basis of the character of the perpetrator's personality, but also from his specific expression, even in relation to the environment where it occurred. SAMAŠ, O., STIFFEL, H., TOMAN, P. Trestný zákon. Stručný komentár. 2nd edition. Bratislava: Iura Edition, 2010, p. 773.

Section 364(1)(b) of the Criminal Code protects not only state symbols of the Slovak Republic. A state symbol, according to J. Ivor, must be understood as meaning any state symbol. [6] In the work of other scholars (E. Burda et al.), one can also encounter a slightly modified view of this question, based rather on what real social concern the defamation of a foreign state symbol will cause. [7]

Exhaustively listed criminal offences within the meaning of Act No 91/2016 Coll. on the criminal liability of legal persons do not include the offence of disorderly conduct, thus, criminal penalties for disorderly conduct are possible only in the case of a natural person. The offence may be committed only by deliberate action.

The Section 364(1) of the Criminal Code governs the basic merits of the criminal offence and the corresponding penalty. However, the Criminal Code also regulates the qualified merits (in Paragraph 364(2)), with a higher penalty rate (six months to three years). In the light of the scope of penalties laid down by law, the offence is only a misdemeanour[8], which applies both to the offence in the primary form (Paragraph 364(1)) and to the more serious form (Paragraph 364(2)).

This is important in terms of finding a distinction between criminal and administrative liability for undesirable actions involving state symbols. Under Paragraph 10(2) of the Criminal Code, there is no misdemeanour where, having regard to the manner in which the act was carried out and its consequences, the circumstances in which the act was committed, the degree of fault and the motivation of the offender, the seriousness of the offence is minor. It is the so-called „material corrective".

In my opinion, sometimes in relation to the defamation of State symbols the possibility of committing certain other criminal offences is also given. In particular, these may include the offences of defamation of the nation, race and belief (Section 423 of the Criminal Code) and incitement to national, racial and ethnic hatred (Section 424 of the Criminal Code).

3.2 Administrative offences

In addition to the criminal offences, in relation to the topic on hand, other types of public law offences should also be mentioned:

- infringements and
- so-called hybrid administrative offences (these are sanctioned regardless of fault, and the culprits may generally be legal persons and natural persons authorised to conduct a business) [9].

Pursuant to Section 42(1)(a) of the Infringements Act, a person who intentionally damages, abuses or derogates a state symbol or other symbol protected by a generally binding legal act commits an infringement in the field of general internal administration. Under paragraph 2 of the same article, a fine of up to EUR 99 may be imposed on the offender in respect of that offence.

[6] IVOR, J. et al. Trestné právo hmotné. Osobitná časť. 2nd edition. Bratislava: Wolters Kluwer, 2021, p. 507.
[7] BURDA, E. et al. Trestný zákon. Komentár. II. diel. Osobitná časť. Praha: C. H. Beck, 2011, p. 1235.
[8] In terms of types of offences, the Slovak Criminal Code divides offences into two categories — misdemeanours or felonies (Section 9 of the Criminal Code). Under Section 10(1) of the Criminal Code a misdemeanour is a
(a) an offence committed negligently; or
(b) an intentional criminal offence for which this Act provides, in its special part, for a maximum term of imprisonment not exceeding five years.
[9] HAMUĽÁKOVÁ, Z., HORVAT, M. Základy správneho práva trestného. Bratislava: Wolters Kluwer, 2019, p. 179, or VRABKO, M. et al. Správne právo hmotné. Všeobecná časť. Bratislava: C. H. Beck, 2012, p. 301.

In view of the construction of this infringement and its comparison with the criminal offence under Section 364(1)(b) of the Criminal Code (disorderly conduct), it is necessary to examine the dividing line between these public offences. Under the ne bis in idem principle[10] and the prohibition of double punishment, it is impossible for a person to commit this infringement and this crime in one act.

Several aspects may be relevant:

- a conduct not committed publicly or in a place accessible to the public can´t be the criminal offence of disorderly conduct,

- in the case of the criminal offence intentional defamation of a state symbol is required, whereas in relation to the infringement it is abuse, damage or derogation; „defamation" must be seen as more serious compared to „derogation",

- in order to constitute a criminal offence, the action also has to fulfill the first part of Section 364(1) of the Criminal Code in its entirety (it must also be „gross indecency" or „disorder", mere disrespect for a state symbol is not enough),

- the difference concerning, what the will of the culprit is aimed at - both offences require deliberate action, but the intent must relate to the entire object and conduct - thus, in the case of the criminal offence, there must be an intention to defamate the state symbol (at least indirectly, so that the perpetrator is aware of this consequence),

- the distinction between the two offences in question is generally determined by the already mentioned substantive corrective - if the circumstances of the case justify the use of this corrective, the conduct will probably be only a infringement under Section 42(1)(a) of the Infringements Act.

Only a natural person can be held responsible for an infringement. However, the State symbols Act (Section 14) also regulates another category of administrative offences, which can only be committed by legal persons. Pursuant to Section 14, for a violation of the Section 3(3) to (6), Section 5(3), Section 6, Section 11(2) and Section 13b(2), the District authority may impose a fine on a legal person of up to EUR 7 000. When imposing a fine and deciding on its amount, the gravity, manner of conduct and duration of the unlawful situation shall be taken into account.

Here I need to mention also the fact, that some infringements and administrative offences governed by the Act No 1/2014 Coll. on the organization of public sports events and amending certain acts also have relevance in the area of legal protection of state symbols.

4 EXISTING SHORTCOMINGS AND PROPOSED AMENDMENTS

In relation to processed issues, I identified some shortcomings of the legislation:

1. As the first problem, I see the unclear distinction between the criminal offence of disorderly conduct and the infringement under Section 42(1)(a) of the Infringements Act, as regards the objective aspect relating to „defamation" (criminal offence) or „derogation" (infringement) of state symbols. There is no major semantic difference between these two words in Slovak, only a rather subtle hint suggesting that a more serious act will be required to fulfill the merits of the criminal offence. This corresponds to the general relationship between criminal offences and infringements.

As already mentioned twice, the distinction between misdemeanours (as a subcathegory of crimes) and infringements is expressed in the Criminal Code by the substantive corrective (Paragraph 10(2) of the Criminal Code). Thus, the relationship between

[10] HAMUĽÁKOVÁ, Z. Správne delikty právnických osôb – vybrané inštitúty a problémy. Bratislava: Wolters Kluwer, 2017, p. 55.

the two offences in question is not dysfunctional and the ne bis in idem principle should therefore not be infringed. The unclear relationship between the merits of the criminal offence and of the infringement however presents a problem. It casts doubt on compliance with the requirement of legal certainty and with the requirements arising from the principle of nullum crimen sine lege certa.[11]

I briefly considered, that maybe de le ferenda the infringement under Section 42(1)(a) of the Infringements Act could require intentional fault only in the event of damage or abuse of a state symbol, and, in case of derogation, it would be expressly provided, that the act must be negligent. The goal would be to achieve, that this type of action, with a sufficient degree of social danger, is clearly punishable only as a criminal offence. However, the problem with this approach would be, that if the court was to judge the deliberate conduct to be of such minor gravity, that it would not pass the test of the material corrective, such intentional conduct would not be punishable as any offence, even though a similar negligent act would be punishable. This solution would therefore create injustice: negligent conduct could be penalised and intentional action in some cases not.

It seems, the only way out is to maintain the status quo and to leave finding the boundary between the aforementioned public offences for the judicial decisions — with all the risks involved.

2. The second issue I have identified concerns only the Criminal Code.

I am of the opinion that the status quo, when criminal law protection is provided to state symbols by means of the crime of disorderly conduct, is not appropriate.

First of all, the social values that are generally protected by the different sub-types of the crime of disorderly conduct are public order and decency and morality in public space. But the dignity of state symbols should be seen as a value per se. This value goes beyond the values of public order or morality / decency (by examining court decisions regarding the crime of disorderly conduct, I found that the vast majority are cases of physical assaults in teh public). State symbols are a symbolic expression of the existence and sovereignty of the state and thus represent one of the highest values from the point of view of the legal order. This specific value should have a specific protection under criminal law. I therefore propose to create a new criminal offence, with the very dignity of a state symbol as the protected object.

Another reason to separate the criminal protection of state symbols from the crime of disorderly conduct and to create a new criminal offence, is that, under the present rules, the same criminal law protection is provided to the Slovak state symbol and to foreign state symbols. In my opinion, the state should protect its own symbols more than foreign symbols.

I suggest a solution: an amendment to the Criminal Code should create a new criminal offence – „defamation of the State symbols of the Slovak Republic". This crime would be committed by a person, who would, publicly or in a place accessible to the public, defamate a State symbol of the Slovak Republic. Intentional fault would be required. The penalty rate would remain unchanged compared to the current situation.

Criminal protection for foreign state symbols would continue to be provided as a part of the disorderly conduct crime. Its constituent elements would be modified by inserting the words 'of a foreign State' in Section 364(1)(b) of the Criminal Code after the words 'state symbol'.

[11] HORVAT, M. Nullum crimen sine lege certa - opomínaný princíp správneho trestania? In Princípy trestania a správne delikty. Trnava: Trnavská univerzita, Právnická fakulta, 2016, p. 79 – 88.

5 SYMBOLS OF SELF-GOVERNING REGIONS, TOWNS AND MUNICIPALITIES AND THEIR PENAL PROTECTION

The general regulation of the municipal symbols is contained in the provisions of Section 1b of the Act No 369/1990 Coll. on Municipal Establishment. According to the law, the symbols of a municipality are the coat of arms of the municipality, the flag of the municipality, the seal of the municipality and possibly also the anthem of the municipality. Parts of the municipality also have the right to own symbols. The provisions of this Act on the use of municipal symbols apply equally to local districts of the cities Bratislava and Košice. Towns are legally a sub-category of municipalities in the Slovak Republic, thus, they are also covered by the provisions on municipalities. There are some special provisions for the symbols of towns in the Act on Municipal Establishment (in Section 24). Slovak law has a special regulation on symbols in Act No 377/1990 Coll. on the capital of the Slovak Republic, Bratislava and in the Act No 401/1990 Coll. on the City of Košice, however, for the purposes of the paper, it is superfluous to discuss them in detail.

The regulation of the symbols of self-governing regions in the Act No 302/2001 Coll. on the self-government of higher territorial units (Act on self-governing regions) is very succinct — only the sixth subparagraph of Section 1, according to which a self-governing region has its symbols, which it may use in the exercise of self-government; the symbols of the self-governing region are the coat of arms, the flag and the seal or, possibly also the anthem.

Symbols of territorial self-government are not expressly considered to be an object of the disorderly conduct criminal offence under Section 364(1)(b) of the Criminal Code. However, such an offence could nevertheless be committed by acts which would defame a symbol of territorial self-government, provided that those acts would fulfil the general constituent elements of the criminal offence of disorderly conduct — that is to say, acts by which someone commits, in words or physically, publicly or in a place accessible to the public, gross indecency or disorder, which is directed against the symbol of a town, municipality or a self-governing region. On the other hand, the general constituent elements of the disorderly conduct criminal offence expressed in Paragraph 364(1) may be perceived as problematic from the point of view of the application — or maybe rather violation (?) — of the principle nullum crimen sine lege certa.

In the case of the infringement under Section 42(1)(a) of the Infringements Act the situation is different. This infringement may be committed also in the form of intentional damage, misuse or derogation of an other symbol protected by a generally binding legal act. A symbol of territorial self-government is such „other protected symbol". Thus, the said infringement also protects the symbols of the territorial self-government.

6 CONCLUSIONS

The paper presented a brief outline of the state symbols, municipal symbols and symbols of self-governing regions in the Slovak Republic.

The criminal protection of state symbols is covered by the provision of Section 364(1)(b) of the Criminal Code (crime of disorderly conduct). Another type of public law offence, which can be committed in the context of violating the protection of state symbols, is the infringement pursuant to Section 42(1)(a) of the Infringements Act.

The dividing line between these two offences concerns several aspects, which are briefly discussed in the paper. The somewhat unclear distinction between the criminal offence of disorderly conduct and the infringement under Section 42(1)(a) of the

Infringements Act concerns those parts of the objective aspect of the facts of each respective offence, that relate to „defamation" or „derogation" of state symbols. There is only a „mild shade" of difference.

The distinction between criminal offences, namely misdemeanours, and infringements, is defined in the Criminal Code by means of the substantive corrective. Thus, the relationship between the two offences in question is not dysfunctional. The ne bis in idem principle should not be infringed. The problem, however, is, that the somewhat unclear relationship between the merits of the criminal offence and of the infringement can cast doubt on compliance with the requirement of legal certainty and with the requirements arising from the principle of nullum crimen sine lege certa.

I considered a possible solution in this paper aimed at the partial reduction of the infringement to cases of negligence. However, the problem with this solution is, that if the court was to consider, that the defamation / derogation of the state symbol does not give rise to a sufficient degree of social hazard, such intentional conduct would not be punishable as any offence, even though a similar negligent act would be punishable. This solution would therefore be unjust.

Due to the existence of the substantive corrective it can never be ruled out, that the court may assess the degree of social danger of a specific conduct as so low, that it will not classify the act as a misdemeanor. Thus, the only solution appears to be to maintain the status quo and to leave finding the boundary between the respective criminal offence and the respective infringement for the judiciary.

The second issue I discussed in the paper concerned the proposal to single out the criminal protection of Slovak state symbols from the crime of disorderly conduct. In case of criminal law protection of state symbols, the protected social value should be viewed as quite significantly different from public order. Moreover, it does not seem appropriate or dignified if defamation of a state symbol is subsumed under the same criminal offence as the ordinary cases of acts of public disorder. In my opinion it is also not correct if the law provides the same level of criminal protection for Slovak state symbols and foreign state symbols. That is why I have proposed to create a new criminal offence - the defamation of a state symbol of the Slovak Republic. This crime would be committed by a person who would, publicly or in a place accessible to the public, defamate a state symbol of the Slovak Republic. Intentional fault would be required, while the penalty rate would remain unchanged compared to the current situation.

The State symbols Act also regulates another category of administrative offences – so called hybrid offences. These can only be committed by legal persons.

Finally, the chapter also briefly discusses the symbols of municipalities and self-governing regions and their penal protection.

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