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ACA EUROPE

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Administrative Sanctions in European law

Ljubljana, 23–24 March 2017

Answers to questionnaire: Poland

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Administrative sanctions in European Law

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Questionnaire

*The topic that was selected for this Seminar, "**Administrative Sanctions in European Law**", aims to address both theoretical and practical questions regarding the application of administrative sanctions at the national level, by administrative authorities and judges.*

As the superposition of three different legal orders (ECHR, EU and national legal orders) may lead to potential tensions, and poses numerous questions, whenever national administrative authorities and courts deal with administrative sanctions, the Seminar will also focus on how, at the European level, the Courts have addressed the concern.

We will discuss the applicability of the European Convention of Human Rights (ECHR) and case law developed by the European Court of Human Rights (ECtHR) on Art. 6, as well as its definition of a "criminal charge". We will also analyze the jurisprudence of the Court of Justice of the European Union (CJEU), which also addresses the question as to whether certain administrative sanctions can be considered "criminal charges".

By definition, the ECtHR stipulates that criminal charges must satisfy certain criteria, irrespective of how they are classified at the national level: the latter is merely a starting point. Said criteria are outlined in the case Engel and Others v. the Netherlands, §§ 82-83:

***1.** Classification in domestic law:*

If domestic law classifies an offence as "criminal", then this will be decisive. Otherwise, the Court will look behind the national classification and examine the substantive reality of the procedure in question;

***2.** Nature of the offence:*

In evaluating the second criteria, which is considered to be more important (Jussila v. Finland [GC], § 38), the following factors can be taken into consideration:

- *whether the legal rule in question is directed solely at a specific group or is of a generally binding character (Bendenoun v. France, § 47);*

- *whether the proceedings are instituted by a public body with statutory powers of enforcement (Benham v. the United Kingdom, § 56);*
- *whether the legal rule has a punitive or deterrent purpose (Öztürk v. Germany, § 53; Bendenoun v. France, § 47);*
- *whether the imposition of any penalty is dependent upon a finding of guilt (Benham v. the United Kingdom, § 56);*
- *how comparable procedures are classified in other Council of Europe member States (Öztürk v. Germany, § 53).*

3. *Severity of the penalty that the person concerned risks incurring:*

The third criterion is determined by reference to the maximum potential penalty for which the relevant law provides (Campbell and Fell v. the United Kingdom, § 72; Demicoli v. Malta, § 34).

The second and third criteria for the applicability of Article 6 that are laid down in the case Engel and Others v. the Netherlands are alternative and not necessarily cumulative. It suffices that the offence in question can by its nature be regarded as "criminal" from the point of view of the ECHR, or that its sanction belongs in general to the "criminal" sphere - by its nature and degree of severity (Lutz v. Germany, § 55; Öztürk v. Germany, § 54). The fact that an offence is not punishable by imprisonment however is not in itself decisive, since the relative lack of seriousness of the penalty at stake cannot divest an offence of its inherently criminal character (ibid., § 53; Nicoleta Gheorghe v. Romania, § 26).

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The questionnaire we are asking you to complete, at a maximum of 12 pages, should reflect the main issues at stake at the national level, both from a practical and a judicial point of view. The questions were formulated in such a way as to allow you to address the issues and take into account the case law of the ECtHR and the CJEU. However, should there be relevant points that have not been captured by the questionnaire, please feel free to add a comment in ***Part IV****.*

If you have any questions regarding the questionnaire, please contact Mr. Rajko Knez at the following address: rajko.knez@um.si.

The completed questionnaire should be sent by ***Monday, February 6th, 2017*** *to the same e-mail address.*

Part I – The notion of administrative sanctions

I-Q1 *– Are the definitions of administrative sanctions (sanctions for minor offenses) and criminal sanctions precisely regulated at the national level? How is the notion of "administrative sanctions" defined in your administrative practice and case law? How does it differ from the notion of "criminal sanctions"? Is the principle of legality (i.e. the necessity of a legislative act, "no crime without law", etc.) of the incrimination applicable to administrative sanctions?*

Firstly, it needs to be highlighted that in the Polish legal system the definition of administrative sanctions (sanctions for minor offences) is not directly regulated at the national level, whereas the definitions of a crime (in general) and of criminal sanctions are precisely defined in the Polish Criminal Code.

The provisions of administrative law do not directly use the notion "administrative sanctions". Procedures before public authorities are regulated in the Code of Administrative Proceedings (the "CAP"). Therefore the current legislation contains no formal, statutory-based general rules concerning administrative sanctions (however, see Part IV).

The notion of "administrative sanction" is used in case law (jurisprudence) of Polish courts and by representatives of the legal doctrine. Legal provisions of different areas of substantial administrative law define administrative sanctions:

1) by notion, e.g. increased charges, administrative financial penalties, administrative pecuniary sanctions, financial penalties, sanction charges (fees), additional amounts, and additional tax obligations;
2) as a descriptive indication of the consequences of infringement of legal provisions of administrative law, e.g. deprivation, orders not to pursue certain activities, and limitation of use of granted rights.

Liability based on administrative law arises in situations of breach of duties of administrative law by an obligated entity. It is imposed under administrative law within administrative proceedings before state authorities. The sanctions depend on the type of infringed legal provision and are by nature a kind of penalty.

The relative intensity, especially in the case of financial penalties, is principally a reflection of the threat posed by the given violation of the relevant provisions of administrative law. The aim is to reflect the protection of specific public interests and the amount is principally adapted to the financial situation of the addressees and the intensity of the infringement of the public interests.

Administrative sanctions have been introduced in Poland in, inter alia, areas involving taxes, environmental protection, economic activity, construction law, heritage conservation and law with regard to foreigners. The aim of recent developments is the achieving of a higher level of decriminalized proceedings.

An example of this development is the recycling levy imposed on the respective economic operator for its failure to organize a system for the collection of all end-of-life vehicles by the Chief Inspector of Environmental Protection on the basis of Article 14 of the law of 20 January 2005 on the recycling of end-of-life vehicles. That law implements Directive 2000/53/EC of the European Parliament and of the Council of 18 September 2000 on end-of-life vehicles. In its resolution of 19 October 2015, case No. II OPS 1/15, the Supreme Administrative Court ruled that such a fee – a recycling levy by its nature and function – is in fact an administrative pecuniary sanction that primarily has not a fiscal function but instead aims to compel economic operators to fulfill their obligations stemming from environmental law concerning environment protection. Since such a charge (the recycling levy) is regarded as an administrative pecuniary sanction, to the imposing and assessing of it should be applied *mutatis mutandis* the legal standards developed for criminal proceedings laid down in Recommendation of the Committee of Ministers of the Council of Europe No. R (91) 1 of 13 February 1991.

The distinction between criminal and administrative liability is quite clear: a criminal penalty may only be imposed on a natural person who by their wrongful conduct fulfils the constitutive elements of a crime; while an administrative sanction may be imposed both on a natural person and a legal person, and it can be applied in a more ‘automatic’ manner. Administrative liability aims to provide a fast and efficient instrument of deterrence against violations of law.

Obviously, the principle of legality is applicable to administrative sanctions; Polish law does not allow in this respect any discretion of actions or practices of the organs of public authorities (Art. 7 of the Constitution of the Republic of Poland stipulates that “The organs of public authority shall function on the basis of, and within the limits of, the law”).

What distinction does your national legal system make between administrative sanctions and other administrative measures to restore compliance with the law? (e.g.: the closure of an exploitation of a waste management facility that was operating without a license v. an administrative fine?)

The Polish legal system makes a distinction between administrative sanctions and other administrative measures to restore compliance with applicable law; e.g. with regard to road transport in addition to administrative fines there other administrative sanctions are also used,

including those related to the loss of rights (inter alia, withdrawal of authorization to pursue the occupation of road transport operator and withdrawal of licences).

Ancillary questions:

With respect to the above question, does your administrative practice and jurisprudence follow ECHR case law (Cases Engel, 5101/71, 5354/72, 5102/71, 5370/72, [1976] ECHR 3, 5100/71, (1976), Jussila, 73053/01, Grande Stevens, 18640/10, 18647/19, 18663/10 in 18698/10)? Do you also apply the approach of the CJEU (for instance in the case Schindler Holding, T-138/07)? Are the ECtHR and CJEU jurisprudence (including EU Charter on Fundamental Rights) applied at the same time?

Do you have examples in practice or case law where the jurisprudence of the EU law is found to be compatible with jurisprudence of the ECtHR (for instance, cases C-210/00 Käserei Champignon Hofmeister GmbH or C-489/10, Łukasz Marcin Bonda). Do the teachings of the CJEU, and in particular its definition of administrative and criminal sanctions, fit within the framework of ECtHR decisions?

Is there any statutory-based solution given in this respect by the national legislator or by the administrative authorities?

The Supreme Administrative Court of Poland, as well as the Constitutional Tribunal and the Supreme Court, take into consideration ECtHR case law. In its judgment of 5 December 2012 (case No. II OSK 2377/12) the Supreme Administrative Court emphasized the need to take into account the jurisprudence of the ECHR and its views on Art. 6 of the European Convention on Human Rights. According to the SAC, the judicial verification of the legality of an administrative decision imposing an administrative sanction should correspond to the requirements similar to those that apply to criminal proceedings. In the light of well-established case law, in the case of administrative sanctions, despite their specific features, some rules on responsibility for acts prohibited under penalty, developed within the area of criminal law, must be applied. They guarantee and ensure an adequate level of protection of the rights of the entity/individual against whom the administrative proceedings concerning the imposing of an administrative penalty (sanction) is carried out (see, for example, the SAC's judgments of 30 May 2004 (case No. GSK 31/04) and 30 September 2009 (case No. II GSK 492/09)).

The SAC has also mentioned the importance of Art. 6 of the Convention and of the jurisprudence of the CJEU and the ECtHR (including the Engel case, 5100/71, of 8 June 1976) in numerous judgments, e.g. its judgment of 5 December 2012 (case No. II OSK 2377/12), its judgment of 8 January 2013 (case No. II OSK 2374/12), its judgment of 2 August 2016 (case No. I OSK 2714/15), its judgment of 9 September 2015 (case No. II FSK 1937/13) and its judgment of 9 June 2016 (case No. II OSK 2463/14). Also, the case law of the Supreme Court has stressed the importance of the procedural guarantees derived from Art. 6 of ECHR and the jurisprudence of the ECtHR in cases concerning the imposing of administrative sanctions (e.g. resolution of the Supreme Court of 10 April 1992, case No. I PIP 9/92).

The administrative courts have never referred in their jurisprudence to the CJEU Schindler Holding case, T-138/07.

Ancillary question:

Due to a lack of general regulations on administrative sanctions (the imposing, assessing and cumulative concurrence of criminal and administrative sanctions) in the Code of Administrative Proceedings and in the Tax Ordinance Act, the answer to your ancillary question "*Is there any statutory-based solution given in this respect by the national legislator or by the administrative authorities?"* must be negative.

Ancillary question:

How is the EU law requirement -according to which sanctions need to have a deterrent effect- applicable?

In its jurisprudence the SAC emphasizes (inter alia in cases concerning veterinary and phytosanitary law (e.g. its judgment of 4 November 2016, case No. II OSK 211/15) and in excise duty cases (e.g. its judgment of 17 August 2016, case No. I GSK 876/14) that imposed administrative sanctions should also have a deterrent effect.

I-Q2 - *Are procedural requirements regarding administrative sanctions equally or similarly regulated in the case of criminal sanctions (how far-reaching is the principle of legality, what is the role of the principle of proportionality)?*

As has been mentioned above, in the Polish legal system there is no legal definition of administrative sanctions.

The Constitutional Tribunal has dealt with the issue of administrative sanctions, in particular with the relationship between administrative and criminal sanctions. The Tribunal has examined primarily the constitutionality of the legal basis for imposing administrative sanctions, particularly taking into account the principle of the democratic rule of law, the principle of proportionality and the principle of procedural justice.

In its judgment of 22 September 2009, case No. SK 3/08, the Tribunal indicated that although with respect to administrative sanctions the standards determined by Art. 42 of the Constitution (the rights of a person against whom a criminal proceeding has been brought) are not directly applicable, other constitutional standards of the democratic rule of law remain in force. The 'automatism' of imposing administrative sanctions is not equal to fully discretionary decisions of public authorities.

In its judgment of 7 July 2009, case No. K 13/08, the Tribunal pointed out that the application of the principles set by Art. 42 of the Constitution is obligatory only in regard to purely criminal sanctions, as it seems impossible to expand that constitutional provision to all procedures where any measures or sanctions are provided. However, even not applying Art. 42 of the Constitution to a certain kind of sanctions does not mean unrestricted freedom for the legislator. All constitutional requirements have to be observed.

As has been explained in the answer to question I-Q1, the principle of legality is applicable to administrative sanctions; Polish law does not permit in this respect any discretion of actions or practices of public authority (Art. 7 of the Constitution). Also, the principle of proportionality – one of the general principles of the European Union, understood as the proportionality of the sanction to the infringement – is of significant importance. This principle in the Polish legal system also stems from Art. 31.3. of the Polish Constitution.

The notion and the character of administrative sanctions, and their scope of application, are only regulated by the above-mentioned Recommendation of the Council of Europe No. R (91) 1. The provisions of this Recommendation establish the general model and standards for such proceedings (e.g. the principle of *nulla poena sine lege*, proceedings being within a reasonable time and the burden of proof being on the public authorities). Although the Recommendation has no formal binding force (within the meaning of the Polish Constitution and its provisions on the system of sources of universally binding law: Chapter III, Art. 87–94), the Supreme Administrative Court in its jurisprudence (see: the resolution of the SAC of 19 October 2015, case No. II OPS 1/15 – resolution on the recycling levy imposed on the respective economic operator for its failure to organize a system for the collection of all end-of-life vehicles) has held that in cases of the imposing of sanction charges (fees) by public authorities, to the imposing and assessing thereof should be applied *mutatis mutandis* the legal standards laid down in Recommendation No. R (91) 1.

Ancillary questions:

With respect to the above question, does your national law offer any regulatory solutions and what is the role of direct applicability of the jurisprudence of the ECtHR and the CJEU?

In their case law concerning administrative sanctions cases the Constitutional Tribunal and the Supreme Administrative Court referred rather to legal standards derived from Art. 6 of the ECHR and ECtHR jurisprudence rather than to CJEU case law.

What are the administrative procedural requirements that are the closest to the ones applicable to criminal sanctions (e.g.: mandatory representation or assistance by an attorney (Cf. "Salduz-doctrine" Salduz v. Turkey, 36391/02), legal help, procedural time limits (including "reasonable time"), the possibility of requiring an oral hearing, burden of proof, competence of courts, legal remedies, application of the principles of reasonability, equality, presumption of innocence, prescription/prohibition of retroactivity, the principle of « retroactivity in mitius », the prohibition of self-incrimination, the principle of the right to appeal, etc.)?

As has been indicated above, the current Polish legislation does not provide any general rules on the imposing and assessing of administrative sanctions and procedural requirements that are the closest to the ones applicable to criminal sanctions, in part due to the legal model of administrative non-fault based liability. As indicated above, it is the domain of the jurisprudence of the highest courts to weaken the objective legal nature of the administrative liability of the offender (the infringer) and also include the application of procedural guarantees closest to the ones applicable to criminal sanctions in the case of the imposing of an administrative sanction.

However, administrative sanctions are imposed within administrative proceedings. The Code of Administrative Proceedings includes following general principles applied in general to administrative proceeding before public authorities: 1) the principle of legality; 2) the principle of taking into account the public interest and the just interest of citizens *ex officio*; 3) the principle of objective truth; 4) the principle of deepening the trust of citizens in public authorities; 5) the principle of furnishing the parties and other participants with information; 6) the principle of active participation (hearing) of the parties in the proceedings; 7) the principle of convincing the parties (explaining the grounds for rulings); 8) the principle of prompt and simple proceedings; 9) the principle of amicable resolution of matters; 10) the principle of written proceedings; 11) the principle of two-instance proceedings; 12) the principle of durability of final administrative decisions; and 13) the principle of court review of the legality of an administrative decision.

I-Q3 – *Have unwanted consequences ever accrued from the decision of the ECtHR (e.g.: Grande Stevens, No. 18640/10, 18647/19, 18663/10 in 18698/10) (such as decreasing the effectiveness of separated regimes – administrative and criminal- because the administrative sanction, which has the characteristic of criminal sanction, prevents criminal procedure; in line with the principle ne bis in idem)?*

The issue of the border between the criminal and administrative liability may be, in certain circumstances, quite deceiving. However, it cannot be said that a significant decreasing of the effectiveness of separated regimes (administrative/criminal) has ever taken place. The Supreme Administrative Court of Poland has never referred to the Grande Stevens case, No. 18640/10, 18647/19, 18663/10 and 18698/10.

Ancillary questions:

How is the principle ne bis in idem understood in your legal system, taking into account CJEU interpretation (case C-617/10, Fransson) and ECtHR interpretation of Art. 4 of Protocol No. 7 (ECHR

(GC) Zolotoukhine/Russia, No. 14939/03)?

Criminal and administrative liability should be considered from the point of view of the *ne bis in idem* principle. The status of *res judicata* is of great importance in criminal proceedings, but, at the same time, a final judgment in a criminal case is not an obstacle to imposing, for example, an administrative sanction regarding the same case. On the other hand, it is proposed for the *ne bis in idem* principle to also be in force when a person has already been punished by a not strictly criminal judgment but when the sanction is of comparable burden.

In a case concerning the imposing of a financial penalty by environmental authorities on an operator for undeclared outbound waste shipment (see the judgment of the SAC of 27 May 2015, case No. II OSK 2619/13) the Court referred to the judgement of the ECtHR of April 2015 in the Kapetanios and Others v. Greece case (Applications No. 3453/12, 42941/12 and 9028/13), in which the ECtHR ruled that the imposing of a financial penalty by an administrative court after an acquittal in criminal proceedings by a criminal court is a breach of the principle of the presumption of innocence and the right to not be tried or punished twice for the same offence. The SAC, basing its stance on the grounds of the ECtHR judgment, indicated that for an assessment of whether the *ne bis in idem* principle has been breached, the crucial is if there were pending two parallel proceedings in case of the same applicant – criminal (punishable by deprivation of liberty) and administrative (a pecuniary punishment) – and if the same offence was the subject of both proceedings, committed under same circumstances and at the same time.

Are national courts faced with cases where individuals, subject of administrative sanctions, would like to exclude criminal sanctions and criminal procedures (including in other EU Member states) in order to avoid dual trial? Does your system accept double penalty for non-nationals? (e.g.: criminal punishment for a criminal offense and administrative expulsion at the end of (or during) the sentence (accompanied with a residence ban)?

The administrative courts have not been faced directly with the cases mentioned in your question. However, it results from the case law of administrative courts in asylum law cases that in the case of a foreigner who has committed a crime and has been punished and sentenced his/her expulsion at the end of the sentence and the imposing of a residence ban is not automatic but instead is subject to the discretion of the authority competent in asylum cases, e.g. under the Act of 12 December 2013 on foreigners (e.g. the judgment of the SAC of 8 April 2009, case No. II OSK 624/08).

One should also note another type of sanction within the area of the application of the Act on Foreigners. Pursuant to Art. 100 of the Act on Foreigners, a foreigner will be refused a temporary stay permit inter alia if in the proceedings for a temporary stay permit: a) he/she filed an application containing untrue personal data or false information or enclosed documents containing such data or information; or b) he/she gave false testimony or concealed the truth, or falsified or tampered with a document in order to use it as an authentic one, or actually used such a document as an authentic one (Art. 100, para. 1, point 5 of the Act on Foreigners). In this case the issuing of an unfavorable decision (i.e. a refusal) on granting a temporary stay permit is a sanction imposed by the respective authority conducting proceedings for “disloyalty during proceedings” and for misleading the authority with regard to the facts and circumstances knowledge; however, the issuing of a refusal must refer to circumstances relevant for legalization of stay (see the judgment of the SAC of 16 May 2008, case No. II OSK 399/07). Nevertheless, the unfavorable decision should not be issued ‘automatically’ but must refer to data that is relevant, important and crucial for the outcome of the proceedings (see the judgment of the SAC of 8 April 2009, case No. II OSK 636/08).

Is it possible, in your legal system, that an individual be sanctioned with both - the administrative and the criminal sanction, and if so, does the criminal sanction take into account the administrative one (i.e. is the administrative sanction considered a part of the criminal sanction)? What role does the EU Charter of Fundamental Rights and the ECHR principle ne bis in idem *play in this respect?*

The nature of the proceeding which results in the imposing of an administrative sanction doubling a criminal sanction must be determined not only by the type of the sanction but also by the function that both liability regimes perform. For qualifying a case as criminal one within the meaning of Art. 6.1. of the ECHR it is not crucial whether the case is considered as criminal by the provisions of national law. The important elements are, in fact, the type of the act concerned and the type of the sanction provided.

Part II – The system of authorities competent to impose administrative sanctions

II-Q1 *– Is your legal system "unified" or "dual" when it comes to authorities competent to impose administrative sanctions? More specifically: Are the administrative authorities that are competent to adopt administrative sanctions only responsible for their enforcement? Or is it a system where administrative bodies are competent for both the enforcement and the regulation of certain areas of law? (e.g.: in areas like competition or financial transactions, are the authorities that are competent for the regulation of these areas also competent to adopt administrative sanctions in case the rules are not respected?) Or is it a third, mixed, system in which both solutions coexist? And finally, at enforcement level, can the official who discovers an infringement impose an administrative sanction?*

As mentioned above, in Poland there is currently no general regulation (law) on imposing administrative sanctions (for example in the Code of Administrative Proceedings). Administrative sanctions, and the imposing thereof, are regulated by separate, special laws concerning different areas of public administrative (substantive) law.

The authority (body) competent with regard to the imposing of administrative sanctions is determined by a special law (an act of parliament / statute). But the authorities that are competent for the "regulation" of a particular area of law and for the imposing of sanctions must not be automatically the authorities responsible for the enforcement of sanctions imposed.

Usually the binding laws provide that enforcement (execution) of fines takes place according to the provisions on enforcement proceeding. The general act governing that is the Act of 17 June 1966 on enforcement proceedings in administration. Pursuant to Art. 19, para. 1 the competent authority in the case of the enforcement of imposed financial penalties is the Head of the Tax Office (the authority of first instance). However, the executive administrative authority competent for the enforcement of financial charges could also be other authorities in the scope set forth in separate laws (Art. 19, para. 8).

Pursuant to Art. 20, para. 1 the competent authorities in the case of the enforcement of imposed nonfinancial penalties are the head of the voivodship, the authorities of a territorial self-government and other authorities of government administration in the voivodship, as well as central governmental authorities.

Finally, at the enforcement level the official who discovers an infringement cannot impose an administrative sanction, only the public administration authority can impose administrative sanctions.

II-Q2 *– Does your legal system allow for only one, or several levels of jurisdiction in procedures regarding administrative sanctions? What role is given to the national courts (and to the highest administrative court if it is competent to decide issues of fact and not only issues of law, like a court of cassation) when deciding on administrative sanctions? Do courts only have a supervisory role (i.e. a judicial review, a competence to annul) or are they also competent to reform or adopt (alone) the administrative sanctions?*

In the Polish legal system a party may bring an appeal against a decision of a public administration authority which imposed an administrative sanction to the public administration authority of second instance. After having the appeal heard by the public administration authority of higher instance, the party may lodge a complaint regarding the imposed sanction to an administrative court (a voivodship administrative court and then the Supreme Administrative Court, which is a cassation court). According to Art. 1 § 1 of the Act of 25 July 2002, the Law on the System of Administrative Courts, "Administrative courts shall administer justice through reviewing the activity of public administration (…)", while according to § 2 of the aforementioned article, "The review referred to in § 1 shall be performed from the point of view of conformity with law, unless otherwise provided by statute". Therefore, the national courts have a strictly supervisory role and no power to change or adopt (alone) administrative sanctions.

II-Q3 *– Is the court's judicial review of administrative sanctions based solely on the legality of the decision, or also on factual questions/circumstances? If there is certain discretion given to the administrative authorities? Can the courts review the discretion exercised by the administrative authorities too? (See CJEU C-510/11 P, Kone and others v. Commission, as well as Menarini, No. 43509/08 of the ECtHR).*

As has been explained above, the role of administrative courts is to review the activity of public administration from the point of view of conformity with law. This means that judicial review of administrative sanctions is based solely on the legality of the given administrative decision. Even in cases where certain discretion is given to public administration authorities, the courts only have the power to review their activity from the point of view of conformity with law. They do not review the discretion exercised by the administrative authorities. The discretion which may be given to public administration authorities derives from the provisions of substantive law.

Polish administrative courts have never referred either to the above-mentioned judgment of the European Court of Justice (C-510/11) or to the Menarini case of the European Court of Human Rights.

Part III – Specific questions

III-Q1 *- What kind of liability is provided by your national legal system for administrative sanctions: fault-based liability or strict liability? Does your legal system require a fault of the individual as a condition for the administrative sanction (See: CJEU C-210/00 Käserei Champignon Hofmeister GmbH)?*

The current national legislation for administrative sanctions provides strict liability and is not based in fault-based liability that requires a fault on the part of an individual as a condition

for an administrative sanction (see Part IV).

Nevertheless, the current concept of strict liability within the area of administrative sanctions has been criticized, both by the representatives of the legal doctrine and the case law of the Supreme Administrative Court.

The SAC tried in its jurisprudence to weaken the 'automatism' in the applying of sanctions by public authorities and the strict (non-fault-based) character of liability towards the fault-based concept of liability and administrative sanctions (e.g. the judgment of the SAC of 1 June 2010, case No. II OSK 871/09). In that case an entity exploiting the environment was required to pay increased fees due to the lack of a permit to emit gases or dusts to the air defined in the Environmental Protection Law of 27 April 2001. The lack of that permit was a consequence of the excessive duration of proceedings pending before the authority competent to issue such a permit. The SAC established that the entity was not responsible for the lack of the required permit.

III-Q2 *– Is it the nature of the administrative act relevant for its judicial review? Is it possible that a judicial review is impeded by the nature of the decision leading to the administrative sanction (when, for example, the act is not considered an administrative act)?*

There can be a situation in which judicial review would be impeded by the nature of a decision leading to an administrative sanction. If an act is not considered to be an administrative act, it does not fall within the jurisdiction of an administrative court.

A review of the activity of public administration by administrative courts will include adjudicating (as regards individuals and similar entities) on complaints against: 1) administrative decisions; 2) orders made in administrative proceedings which are subject to interlocutory appeal or those concluding the proceeding, as well as orders resolving the case on its merits; 3) orders made in enforcement proceedings and proceedings to secure claims which are subject to interlocutory appeal; 4) acts or actions, other than the acts or actions referred above, falling within the scope of public administration and relating to the rights or obligations arising from the provisions of law; and 5) written interpretations of the provisions of tax law made in individual cases, tax law securing opinions and refusal to issue securing opinions.

Administrative courts have no competence in: 1) matters ensuing from organizational superiority or subordination in relationships between public administration authorities; 2) matters ensuing from official submission of subordinates to superiors; 3) matters relating to refusal to appoint to an office or to designate to perform a function in public administration authorities, unless such obligation of appointment or designation ensues from the provision of law; 4) matters relating to visas issued by consuls, except for visas issued to a foreigner who is a family member of a national of the European Union member state, a family member of a national of a member state of the European Free Trade Association or a party to European Economic Area Agreement or a family member of a national of the Swiss Confederation, within the meaning of Article 2 (4) of the Act of 14 July 2006 on the entry into, residence in and exit from the Republic of Poland of nationals of the European Union Member States and their family members (Journal of Laws No. 144, item 1043); and 5) matters relating to local border traffic permits issued by consuls.

It should be stressed that the administrative courts interpret the prerequisites (laid down in Art. 3, § 2 of the law on proceedings before administrative courts) in favour of individuals and review the substantive content of the challenged act and are not bound by the formal character of the contested act.

III-Q3 *- What kind of non-financial (non-pecuniary) sanctions are known in your legal system (for instance, the prohibition to pursue one's business or certain professional activities, the deprivation of the*

ownership, the duty perform certain works, etc.)? More specifically, in matters of urban planning, can an order to restore the site to its original state lead to the demolition of a construction? (case of ECtHR Hamer/Belgium, No. 21861/03).

The Polish legal system has in addition to financial (pecuniary) administrative sanctions other types of administrative sanctions: sanctions of deprivation or restriction of opportunities or privileges (concessions, authorizations and consents).

In Polish law, in matters of urban planning an order to restore a site to its original state can lead to the demolition of a construction. The competent authority will, by way of a decision, order the demolition of the building/object, or a part thereof, which is under construction and has been built without the required building permit or without the required notification of the construction of a building (Art. 48 of the Act of 7 July 1994, the Building Law). The authority can even impose on the developer an administrative sanction in a form of the duty of *restitutio in integrum*, i.e. restitution of property, particularly in the case of local historical monuments, even the reconstruction of the original state of the building/object (sanction based on Art. 45, para. 1 of the Act of 23 July 2003 on the protection and care of historical monuments – see, for example, the judgment of the SAC of 24 January 2017, case No. II OSK 1090/15).

Ancillary questions:

When provided, do non-financial sanctions have to be in causal relation to the (administrative) offence?

Yes, non-financial sanctions have to be in causal relation to the (administrative) offence, but because of the lack of a general regulation on imposing and assessing administrative sanctions every substantial law that provides administrative sanctions formally has its own regulations of that matter (e.g. the Act of 6 September 2001, the Pharmaceutical Law)**.**

Can the sanctions, which are administrative sanctions in their nature, be used in the private law sphere (e.g.: a person not respecting the duty of the alimony: could he/she be sanctioned with the deprivation of his/her car)?

Administrative sanctions as such can not be used in the private law sphere. Although sanctions in the form of pecuniary sanctions (financial penalty) are also applied in civil law (in contract law, e.g. a contractual penalty paid for non-fulfillment of a contractual obligation or for withdrawal from the transaction).

In your legal system, can administrative sanctions encroach upon ownership rights (Art. 1 of the first protocol ECHR – for instance, freezing of assets, substantive financial penalties, etc.)?

Generally speaking, every pecuniary administrative sanction (financial penalty) can encroach somehow upon ownership rights. The current legislation within the area of substantial administrative law does not provide any sanction in the form of freezing of assets.

III-Q4

III-Q4 *– Are there cases in your national system where the organization of the authorities competent to adopt administrative sanctions is based on EU law requirements? This question could, for instance, refer to the leniency program that exists in EU competition law, which allows for the severity of the*

administrative sanction to depend on the party's ability and willingness to produce evidence, and requires a system where the same authority that hears the case also adopts the sanctions.

The administrative proceedings before the President of the Office of Competition and Consumer Protection in anti-trust and competition cases (the Act of 16 February 2007 on Competition and Consumer Protection) and before the President of the Office of Electronic Communications with regard to telecommunications cases (the Act of 16 July 2004, the Telecommunications Law) or with regard to cases involving postal matters (the Act of 23 November 2012, the Postal Law) is based on EU law requirements (inter alia the leniency program).

III-Q5 *– Have your national administrative authorities, or even courts, been faced with the request to apply the jurisprudence of the CJEU and to reopen/change already final administrative decisions on administrative sanctions? Do national rules of administrative procedure (or even rules on court reviews) allow such re-openings of cases?*

The administrative courts have not been faced with a request to apply the jurisprudence of the CJEU and to reopen/change already final administrative decisions on administrative sanctions (or final court judgements on legality of the decisions on imposing of administrative sanctions); anyway, such cases settled by administrative authorities have not been the subject of judicial review before administrative courts.

Do national rules of administrative procedure (or even rules on court reviews) allow such re-openings of cases?

In the case of general administrative proceedings the reopening of administrative proceedings is regulated in Art. 145–152 of the CAP.

Pursuant to Art. 145a, § 1 of the CAP it is also possible to demand the reopening of proceedings if the Constitutional Tribunal has adjudged that a normative act is contrary to the Constitution, to an international agreement or to the act on the basis of which the decision was issued. In such case the time limit within which one must submit a motion for the reopening of the proceedings is one month from the date of the judgment of the Constitutional Tribunal coming into force. The content of the above mentioned provisions results in the fact that the incompatibility of a legal regulation constituting the legal basis for a final administrative act (decision) with EU law can be the basis for the reopening of administrative proceedings only if it was previously declared unconstitutional by a judgment of the Constitutional Tribunal. In the literature on the subject it is often doubted whether this regulation can, basing on the principle of analogy, refer to the effects of the judgments of the CJEU.

The second way to revoke a final administrative act if it proves contrary to EU law is offered by Art. 154, § 1 of the CAP (pursuant to this regulation a final decision by virtue of which none of the parties has obtained a right can be at any time revoked or changed by the body of public administration by which it was issued, or by a body of higher degree, if that is justified by the public interest or by the justified interest of a party).

Another legal means that enables the elimination from legal circulation of administrative decisions and judgments encumbered by the most flagrant material or legal defects is the declaration of the invalidity of the decision (Art. 156, § 1 of the CAP). This solution can be applied in order to eliminate final decisions which are contrary to EU law if such incompatibility is evaluated as gross violation of the law.

In the case of administrative fiscal proceedings the Tax Ordinance Act does not, as a rule, limit the possibilities of reopening proceedings before administrative fiscal bodies. One of the premises to reopen administrative proceedings is the incompatibility of the original tax (fiscal)

decision with EU law in the meaning used by the CJEU (according to Art. 240, § 1, point 11, "in cases settled by a final decision, the proceeding shall be resumed, if (…) a judgment of the European Court of Justice influences the issued decision").

In the case of administrative court proceedings, final judgments of administrative courts can be revoked due to reasons specified in Art. 172 and 270–274 of the Law on Proceedings before Administrative Courts; however, the reopening of court proceedings can take place only upon the motion of a party. The prerequisite, if the jurisprudence of the CJEU could fall within the scope of its application, is provided in Art. 272, § 3, "The reopening of proceedings may also be demanded where such need results from the decision of an international body acting on grounds of international agreement ratified by the Republic of Poland. (…)". The provision was introduced in 2010 and was influenced by Rec. (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights. The provision, according to opinion of legal doctrine, could also cover CJEU judgments.

It should also be mentioned that in 2010 the Law on Proceedings before Administrative Courts was amended and the legislator, influenced by CJEU case law (C-224/01 Köbler and C-173/03 Traghetti del Mediterraneo SpA), introduced the legal institute of challenging final judgments of administrative courts – a motion for the declaration of a legally binding judicial decision as being unlawful (Article 285a). Such a motion must not be lodged against judicial decisions of the SAC, with the exception of where the unlawfulness of a judgment results from a flagrant breach of the rules of European Union law. Cases based on this provision are rather rare (the SAC has declared its own judgments unlawful and incompatible with EU law in only one case: the judgment of 19 December 2013, case No. II GNP 2/13 (the judgment of 20 March 2013, case No. II GSK 207/12, was declared unlawful).

III-Q6 *– Is it possible for the administrative authorities and offenders to negotiate on an administrative sanction (in order to reach a deal), similar to "plea bargaining" in certain criminal procedures? If so, is this a general rule or is it only possible in specific cases? In case a deal is reached, what is its status when a court reviews the case? What is the position and role of the court in such cases?*

Under current Polish substantial law concerning administrative sanctions there is no legal way to negotiate with regard to an administrative sanction (in order to reach a deal) similar to plea bargaining in certain criminal procedures. In the case of the imposing and assessing of financial penalties it is the competence and will of the relevant authority to decide on the amount of the penalty (if that is legal possible), taking into account the party's ability and willingness to, for example, bring an end the infringement (e.g. in Telecommunications or Postal Law).

Part IV
Additional information (if needed)

In this section, you can add any information on the topic of administrative sanctions in your national legal system that you deem appropriate and that hasn't already been covered in this questionnaire.

It must be mentioned that the information presented above concerning the lack of general rules of imposing administrative sanctions reflects the actual state of law as in January 2017.

The Polish Government submitted on 29 December 2016 a draft law on the amendment of the Code of Administrative Proceedings (Sejm paper No. 1183). The draft law is part of the legislative Programme of the Ministry of Economic Development "100 changes for firms – a facilitation package for business entities". According to statements by the government the draft law should come in force on 1 July 2017.

The drafted legal provisions meet the requirements of Polish legal praxis (representatives of legal doctrine) and the findings made by administrative judiciary in its case law.

General rules concerning the imposing and assessing of financial penalties are to be introduced to the Code of Administrative Proceedings for the first time since its entry into force in 1961 and are the first legal regulations of such a type in Polish administrative law.

The drafted Art. 189a–189k (Division IVa) of the CAP will cover:

1) the legal definition of administrative financial penalty and the scope of the application of new legal provisions (Division IVa) – according to the rule "*lex specialis derogat legi generali*" the general regulations of the CAP will only be applied if the provisions of special laws do not cover the relevant aspect of imposing and assessing a penalty;
2) the rules concerning the submission and evaluation of evidence and the burden of proof;
3) the *lex mitior retro agit* rule;
4) directives regarding the assessment of financial penalties;
5) the prerequisites regarding the non-imposing of financial penalties;
6) the limitation period for imposing and collecting imposed penalties;
7) the rule of fault-based liability for administrative law infringements;
8) the granting of breaks in the execution of imposed penalties.