Weronika Stawińska-Artecka https://orcid.org/0000-0002-1495-6615
Akademia Leona Koźmińskiego w Warszawie
e-mail: stawinska.weronika@gmail.com

Implementation of the principle *nullum crimen sine lege* for an administrative offence in the area of banking law in Poland and Germany[1]

Realizacja zasady *nullum crimen sine lege* za popełnione delikty administracyjne z zakresu prawa bankowego w Polsce i w Niemczech

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Abstract

The guiding principle of a penal law, of fundamental importance for human rights, is the principle of legalism – *nullum crimen sine lege*, which means that there is no criminal act without a precise definition of it in a legal act. When the principle in question is implemented, every person can be sure that they will be punished only for the conduct strictly specified in the legal act and within limits prescribed by law. The rule discussed above also applies to acts that constitute administrative offences. Compliance with this rule is essential in the model of liability for them because the anticipated fines are counted in millions of zlotys, as in the case of banking law, and the legislator continues to expand the catalogue of legal acts, in which this category of acts is introduced. In Poland and Germany, the liability model for administrative offenses is shaped differently, and in both countries, there is a visible increase in the number of regulations introducing this type of liability. The above shows a new challenge, the need to verify that the *nullum crimen sine lege* principle is guaranteed to the persons concerned.

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Keywords: *nullum crimen sine lege* principle, human rights, administrative offences, banking law, financial penalty

Streszczenie

Naczelną zasadą prawa penalnego o fundamentalnym znaczeniu dla praw człowieka jest zasada legalizmu – *nullum crimen sine lege*, która oznacza, że nie ma czynu zabronionego bez dokładnego określenia go w akcie prawnym. W sytuacji, gdy omawiana zasada jest realizowana, każdy człowiek może być pewien, że zostanie mu wymierzona kara tylko za zachowanie ściśle oznaczone w akcie prawnym oraz w granicach przewidzianych prawem. Omawianą zasadę stosuje się również do czynów stanowiących delikty administracyjne. W ich przypadku przestrzeganie przedmiotowej zasady jest szczególnie ważne, grożące kary pieniężne liczone są bowiem w milionach złotych, jak chociażby w przypadku prawa bankowego, a ustawodawca wciąż rozszerza katalog aktów prawnych, w których wprowadzana jest ta kategoria czynów. W Polsce i w Niemczech model odpowiedzialności za delikty administracyjne jest ukształtowany odmiennie, a w obu państwach widoczny jest wzrost liczby przepisów wprowadzających ten rodzaj odpowiedzialności. Powyższe uwidacznia nowe wyzwanie, aby dokonać weryfikacji, czy osobom zainteresowanym gwarantowana jest zasada *nullum crimen sine lege*.

Słowa kluczowe: zasada *nullum crimen sine lege*, prawa człowieka, delikty administracyjne, prawo bankowe, kara pieniężna

Introduction

The principle of *nullum crimen sine lege*, which means that there is no criminal act without specifying it in a legal act, is a guiding principle of criminal law of fundamental importance for human rights, as it provides protection to the individual against arbitrary imposition of sanctions by the state apparatus. It is one of the basic human rights and is derived directly from the principle of a democratic state of law[2]. From the perspective of human rights, it is also important that it finds its confirmation in legal regulations of international stature, such as Article 11 of the Universal Declaration of Human Rights[3], Article 7 of the European Convention on Human Rights[4], Article 15 of the International European Convention on Civil and Political Rights[5] or Article 49 of the Charter of Fundamental Rights[6]. In contrast,

[2] R. Mehl, *Das Verschleifungsverbot*, Duncker & Humblot, Berlin 2020, p. 16.

[3] Powszechna Deklaracja Praw Człowieka [Universal Declaration of Human Rights], Paryż 10.12.1948.

[4] Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności sporządzona w Rzymie dnia 4 listopada 1950 r. [Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950], zmieniona następnie Protokołami nr 3, 5 i 8 oraz uzupełniona Protokołem nr 2, Dz.U. 1993, nr 61, poz. 284.

[5] Międzynarodowy Pakt Praw Obywatelskich i Politycznych [International Covenant on Civil and Political Rights opened for signature in New York on December 19, 1966], Dz.U. 1977, nr 38, poz. 167.

[6] Karta Praw Podstawowych Unii Europejskiej [Charter of Fundamental Rights of the European Union], Dz.U. UE z 26.10.2012, 2012/C 326/02.

in the legal orders of Poland and Germany, it is also confirmed by constitutional norms, such as Article 42 of the Polish Constitution[7] or Article 103 (2) of the Basic Law – *Grund Gesetz*[8] and norms with the rank of law regulating the procedure in question.

The principle of *nullum crimen sine lege* by its scope extends not only to criminal law in the narrow sense, which applies to acts that constitute crimes, but, importantly for this study, also to criminal law in the broad sense, for which administrative torts are precisely qualified[9]. This is because the Constitutional Court (CT) has concluded that the principle applies to all laws that aim to subject a citizen to some form of punishment or sanction[10].

The category of behavior in question – administrative torts, which are on the borderline between criminal law and administrative law in Germany is listed under the name *Ordnungswidrigkeiten*. The rules of procedure in these cases are regulated in the Administrative Torts Act – *Gesetz über Ordnungswidrigkeiten* (OWiG)[11], and in Poland in the Code of Administrative Procedure Act (k.p.a.)[12].

They are a special, growing category of behavior prohibited by sectoral legislation and punishable by fines. The liability regime in question involves the imposition of fines on the offenders by the relevant public administration bodies[13]. An excellent example of this category of behavior and the liability regime in question are the fines imposed in Poland by the public administration body, the Financial Supervision Commission (FSC)[14], for behavior involving violations of regulations from the public finance sector, such as the Law on Public Offering and Conditions for Introducing Financial Instruments to Organized Trading and on Public Companies, including Articles 69 (1) p. 1 and 2[15]. In contrast, an example of conduct constituting an administrative tort under German banking law, for which the Federal Financial Services Authority *Die Bundesanstalt für Finanzdienstleistungsaufsicht* (BaFin) also imposes a fine, is Section 120 (15) of the Securities Trading

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[7] Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. [Constitution of the Republic of Poland of April 2, 1997], uchwalona przez Zgromadzenie Narodowe w dniu 2 kwietnia 1997 r., przyjęta przez Naród w referendum konstytucyjnym w dniu 25 maja 1997 r., podpisana przez Prezydenta Rzeczypospolitej Polskiej w dniu 16 lipca 1997 r., Dz.U. 1997, nr 78, poz. 483.

[8] Grundgesetz für die Bundesrepublik Deutschland in der im Bundesgesetzblatt Teil III, Gliederungsnummer 100-1, veröffentlichten bereinigten Fassung, das zuletzt durch Artikel 1 u. 2 Satz 2 des Gesetzes vom 29. September 2020 (BGBl. I S. 2048) geändert worden ist.

[9] Orzeczenie Trybunału Konstytucyjnego z dnia 26 września 1995 r. [Ruling of the Constitutional Court of September 26, 1995] Sygn. akt U 4/95, OTK 1995/1/4.

[10] Orzeczenie Trybunału Konstytucyjnego z dnia 1 marca 1994 r. [Ruling of the Constitutional Court of March 1, 1994] Sygn. akt U 7/93, OTK 1994/1/5.

[11] Gesetz über Ordnungswidrigkeiten vom 24 Mai 1968, Bundesgesetzblatt 1602.

[12] Ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego [Act of June 14, 1960, Code of Administrative Procedure], Dz.U. 1960, nr 30, poz. 168.

[13] W. Radecki, *Recenzja książki Heleny Praškovej "Zaklady odpovědnosti za spravni delikty (Podstawy odpowiedzialności za delikty administracyjne)"* [*Review of Helena Prašková's book "Zaklady odpovědnosti za spravni delikty (Fundamentals of the administrative tort liability)"*], C.H. Beck, Praha 2013, p. 158.

[14] Komierzyńska-Orlińska E., *Charakter prawny Komisji Nadzoru Finansowego* [*Legal nature of the Financial Supervision Commission*], „Opolskie Studia Administracyjno-Prawne" 2018, no. XVI/1(2), pp. 183–184.

[15] Ustawa z dnia 29 lipca 2005 r. o ofercie publicznej i warunkach wprowadzania instrumentów finansowych do zorganizowanego systemu obrotu oraz o spółkach publicznych [Act of July 29, 2005 on Public Offering and Conditions for Introduction of Financial Instruments to the organized trading system and on public companies], Dz.U. 2005, nr 184, poz. 1539.

Act, which is part of the Banking Law, according to which it is possible to impose a fine on any person committing an act of market manipulation who violates Regulation (EU) No. 596/2014 by acting intentionally or negligently by failing to properly complete a suspicious transaction report[16].

Monetary penalties imposed on parties often reach multi-million dollar rates and are being introduced in an increasing number of normative acts[17]. It is precisely in such circumstances that the persons concerned should be ensured the implementation of the principle of *nullum crimen sine lege*, so that they are punished only for such behavior as is prescribed by law. As mentioned above, this is of considerable importance in terms of respecting their human rights. This creates a new challenge – the need to verify whether the current regulations in Poland and Germany make the guarantee in question a reality.

The selection of countries whose legal orders are reviewed for compliance with the principle of *nullum crimen sine lege* is justified by the fact that in each of these countries the model of liability for administrative torts has been regulated differently. While a special OWiG law was promulgated for administrative torts in Germany as early as the 20th century, in Poland some of the provisions on fines were only introduced into the Code of Administrative Procedure as a result of the 2017 amendments. Further differences become apparent when one considers the mode of procedure in these cases. Although in both cases fines are levied by government authorities in the initial phase, the similarities end there. In the further course of proceedings, after an appeal is filed, in Germany the cases are heard by the general criminal courts, and in Poland by the administrative judicial division. With the above in mind, it should be said that the comparison in question is particularly warranted.

Nullum crimen sine lege principle

The principle of *nullum crimen sine lege* consists of four postulates: the order of definiteness of the law and the penalty for its violation, the prohibition of retroactivity of the law and the use of analogy[18].

In continental jurisprudence, the requirement is that the behavior in question is first listed in the law as prohibited, only then, already in the process of subsumption of the law can it be classified as a crime or administrative tort. This principle has been understood to protect against arbitrariness since the French Revolution. In addition, it is an emanation of the developed principle of trust in the activities of the state, when the citizen is assured that for his behavior in hindsight[19]. The principle of *nullum crimen sine lege* addition-

[16] Wertpapierhandelsgesetz In der Fassung der Bekanntmachung vom 09.09.1998 (BGBl. I S. 2708) zuletzt geändert durch Gesetz vom 09.07.2021 (BGBl. I S. 2570) m.W.v. 16.08.2021.

[17] D. Szumiło-Kulczycka, P. Czarnecki, P. Balcer, A. Leszczyńska, *Analiza obrazu normatywnego deliktów administracyjnych* [*Analysis of the Normative Image of Administrative Torts*], Instytut Wymiaru Sprawiedliwości, Warszawa 2016, p. 154.

[18] D. Klesczewski, *Ordnungswidrigkeitenrecht*, Vahlen, München 2016, p. 31.

[19] H.R. Reginbogin, C. Safferling, *The Nuremberg Trials: International Criminal Law Since 1945: 60th Anniversary International Conference*, De Gruyter, München 2006, p. 58.

ally means that the use of analogy is prohibited when determining liability[20]. From this principle is also derived the principle of the writtenness of the law, which is expressed in the paremma *nullum crimen sine lege* scripta and *nullum crimen sine lege certa*, which refers to the aspect of certainty and definiteness of the law[21].

With this in mind, in order to determine whether the principle of *nullum crimen sine lege* for committed administrative torts is in fact guaranteed to parties in Poland and Germany, it is necessary to check whether the legal regulations fulfill the following postulates:

– *nullum crimen sine lege scripta* and *certa*, which means that the criminal act should be defined unambiguously in the law,
– *nullum crimen sine lege stricte*, which means that there is a prohibition on the use of analogy and expansive interpretation to the detriment of the perpetrator in relation to prohibited acts,
– *nullum crimen sine lege praevia*, which means the prohibition of conviction for a criminal act that was committed before the law criminalizing the act came into force, i.e. the prohibition of retroactive law[22].

The imperative of definiteness and unambiguity of the criminal act

In Germany, the legal definition of an administrative tort is found in § 1(1) and § 8 of the GTC. It is an unlawful, culpable and punishable act that carries out the elements described in the law. In addition, it should be borne in mind that, according to Section 1(2) of the GTC, an act threatened with a monetary penalty will be an unlawful act if it realizes the elements according to Section 1, even if it is committed through no fault[23].

In Poland, despite the lack of a legal definition of an administrative tort on the basis of other provisions, including Article 189b of the Code of Administrative Procedure, it can be reconstructed that it is the behavior that violates the law by failing to fulfill an obligation or violating a prohibition incumbent on a given entity, for which a public administration body may impose a fine. This is a model of objective liability, which, however, in Article 189e of the Code of Civil Procedure, provides for the exclusion of punishment when the violation of the law occurred due to force majeure. Thus, force majeure should be viewed as a circumstance excluding culpability that prevents the offender from being fined.

In light of CT case law, in accordance with the principle of *nullum crimen sine lege*, an act in the form of an administrative tort should be described in the law as precisely as

[20] T. Noak, *Einführung ins Ordnungswidrigkeitenrecht – Teil 1 Ahndungsvoraussetzungen*, "Zeitschrift für das Juristische Studium" 2012, 2, p. 175.

[21] E. Nickel, *Die Problematik der unechten Unterlassungsdelikte im Hinblickauf den Grundsatz "nullumcrimen sine lege" (Art.103 Abs.2 GG): Einestraf- undverfassungsrechtliche Studie*, De Gruyter, Berlin 1972, p. 65.

[22] W. Mitsch, *Recht der Ordnungswidrigkeiten*, Springer, Potsdam 2013, p. 21.

[23] E. Göhler, F. Gürtler, H. Seitz, M. Bauer, A. Thoma, *Gesetz über Ordnungswidrigkeiten*, C.H. Beck, München 2021, p. 15.

possible[24]. This is to remove doubts about which behaviors are outside the criminal law's valuation, but also to help distinguish between the various behaviors prohibited by the law[25].

The features of an administrative tort are its objective and subjective characteristics[26]. While the former refers to changes in the external world, the latter describes the perpetrator's mental attitude toward the committed behavior. For this reason, the law introducing liability for administrative torts specifies the following:

1. A subject capable of committing it.
2. Whether it can be committed only by action or by omission.
3. The effect denominator must be precisely defined and be attributable to the perpetrator and the degree of danger to the legal good should be determined.
4. Subjective elements relating to the perpetrator's internal attitude towards the deed[27].

Ad 1. Some administrative torts can be committed by any person, then the provision criminalizing the behavior in question begins with the word *who – wer*. There are also those that can only be committed by particularly specific individuals who possess a particular trait or occupy a particular position, such as a board member. An excellent example is Section 405 (3b) of the AktG[28], that is, the Joint Stock Company Act, which specifies that an entity capable of committing an administrative tort is a member of the company's supervisory board[29].

Ad 2. Administrative torts can be committed from action, in which case it is necessary to undertake the required activity. On the other hand, in the case of those committed by omission, what is important is that a specific person has a legal special obligation that he or she fails to fulfill, which allows a person to be fined[30]. The source of the guarantor's special position and obligation may be the circumstance that they are an entrepreneur, obliged to ensure that there are no negative consequences in their enterprise, or obliged to notify certain data to supervisory authorities[31].

German doctrine makes an additional distinction between acts committed by omission into actual omission – *echten Unterlassungsdelikten* and unactual omission – *unechten Unterlassungsdelikten*. In the case of an actual omission – when it did not contribute to any damage – a fine can still be imposed. As an example, German academia cites the mandatory registration requirement, of which there is no fulfillment that allows the imposition of a fine, despite the fact that no objective harm has been caused by the omission of this duty. In contrast, in the case of an unfunded tort of omission, despite existing obligations, the guarantor has failed to prevent the occurrence of the effect. In such a case, the perpetrator is not punished for the omission itself, but for the circumstance that his

[24] Orzeczenie Trybunału Konstytucyjnego z dnia 26 września 1995 r. [Ruling of the Constitutional Court of September 26, 1995], op. cit.

[25] H. Satzger, W. Schluckebier, G. Widmaier, *Strafgesetzbuch Kommentar*, C.H. Beck, Köln 2014, p. 10.

[26] D. Szumiło-Kulczycka, P. Czarnecki, P. Balcer, A. Leszczyńska, op. cit., p. 124.

[27] W. Mitsch, op. cit., p. 27.

[28] Aktiengesetz vom 6. September 1965 (BGBl. I S. 1089), das zuletzt durch Artikel 1 des Gesetzes vom 12. Dezember 2019 (BGBl. I S. 2637) geändert worden ist.

[29] R. Dieter Theisen, C. Vesper, *Ordnungswidrigkeitenrecht*, Bernhardt, Witten 2010, p. 34.

[30] E. Göhler, F. Gürtler, H. Seitz, M. Bauer, A. Thoma, op. cit., p. 69.

[31] E. Kraatz, *Ordnungswidrigkeitenrecht*, Nomos, Baden-Baden 2020, p. 77.

omission led to an undesirable result that he should have prevented. While the tort of actual omission can be committed by anyone, the tort of non-actual omission can only be committed by a guarantor[32].

Ad 3. Some administrative torts are characterized by an effect characteristic.

In German, they are called *Erfolgsdelikte*. Then, in addition to the action, an effect is required, but it must also be examined whether the effect of the actor is attributable to him, that is, whether the action caused the effect. In other words, it is necessary to demonstrate the occurrence of a causal relationship – *Kausalzusammenhang*[33]. Therefore, it should be concluded that with administrative tort characterized by effect, the causal course is part of the nevus[34].

The law also differentiates administrative torts in terms of bringing a danger to a particular legal good. For this reason, a distinction is made between torts that violate a legal good and those that endanger a legal good[35]. With regard to the previous division by the criterion of effect, it should be pointed out that the administrative torts qualified by the effect criterion include the tort of concrete exposure – *konkreten Gefährdungsdelikten*. Then the effect is to create a specific state of emergency. In contrast, torts that pose an abstract threat to a legal good – *abstrakten Gefährdungsdelikten* – are not included in offenses of an effectual nature[36].

Ad 4. The elements of the subjective side of administrative torts revolve around the issue of intent – *der Vorsatz*. The perpetrator's intent must encompass all objective elements. In Germany, the doctrine introduces additional categories of intent, as the concept of intent under the GCC is not a unified concept, as it consists of two elements. First, the perpetrator must be aware of the realization of all the elements of the tort and, at the same time, want them to be realized. In this aspect, three types of intent are distinguished: *dolus directus* of the first degree, *dolus directus* of the second degree and *dolus eventualis*. With the adoption of *dolus directus* of the first degree – *Absicht* – the acting party aims directly at committing the tort. In the case of *dolus directus* of the second degree – *Wissentlichkeit* – the actor perceives the commission of a tort as a certain result of his action. In contrast, with intent in the form of *dolus eventualis – bedingten Vorsatz* – the perpetrator perceives the realization of the elements of the tort in question as possible, but abandons its commission. All of the forms of intent indicated above are equivalent, and therefore any of the forms is sufficient for the realization of the subjective element[37]. In addition, in the case of certain administrative torts, the existence of intent in the forms indicated above is not sufficient for the realization of the subjective elements. Sometimes the law, in order to realize the elements, requires that the act be committed for a particular purpose, such as extortion[38].

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[32] P. Schwacke, *Recht der Ordnungswidrigkeiten*, Deutscher Gemeindeverlag GmbH, Stuttgart 2006, p. 15.
[33] G. Rosenkötter, D. Louis, *Das Recht der Ordnungswidrigkeiten*, C.H. Beck, Stuttgart 2011, p. 53.
[34] W. Mitsch, op. cit., p. 35.
[35] G. Rosenkötter, op. cit., p. 53.
[36] W. Mitsch, op. cit., p. 34.
[37] E. Kraatz, op. cit., pp. 102–103.
[38] G. Rosenkötter, D. Louis, op. cit., pp. 50–51.

Continuing to consider the subjective side, it should be pointed out that, according to Section 10 of the GTC, only an intentional act can be punished as an administrative tort, unless the law explicitly threatens a fine for an unintentional act. In this regard, discussing the subject of the elements of the subjective side, let's examine the issue of inadvertence – *Fahrlässigkeit*, regulated in § 10 of the GTC. According to this paragraph, only an intentional act can be punished as an administrative tort, unless the law specifically provides for the punishment of an unintentional act. How important it is to distinguish between willfulness and unintentionality is shown in § 17(2) of the GTC, which stipulates that an unintentional act can only be punished by half the threatened fine. The principle of inadvertence is that the perpetrator acts unconsciously, that is, he does not even notice that he is behaving in a manner contrary to the rules of due diligence. Nevertheless, there are also such cases of inadvertence, when the perpetrator consciously brings a certain risk, the so-called intentional inadvertence – *die bewussten Fahrlässigkeit*. What distinguishes it from a perpetrator who acts intentionally is the fact that he does not accept the possible realization of the elements of the act, that is, he hopes that such a possibility will not be realized. Section 17(2) of the GTC is then applicable.

Unlawfulness

Another element in the structure of administrative torts that is subject to examination is the element of illegality – *Rechtswidrigkeit*. With regard to the earlier discussion of the elements, it should be noted that the mere realization of the elements means that the act was unlawful, and in this regard, no additional justification is required for the imposition of a fine[39].

Nevertheless, at this stage it is also analyzed whether the perpetrator had the right to behave in an unlawful manner. This happens when there are prerequisites that justify illegality – *Rechtfertigungsgründe*. In such a case, we are not dealing with an "act punishable by a fine" from §1 of the GTC or 189b of the Code of Civil Procedure. The doctrine also points to culpability as an element of the administrative tort, so as to give the party a chance to escape a high fine[40].

Only two cases, excluding unlawfulness, are regulated in the GCC: necessary defense – *die Notwehr* – of Section 15 of the GCC, and a state of superior necessity – *der rechtfertigende Notstand* – of Section 16 of the GCC. On the other hand, the Code of Administrative Procedure stipulates that a fine cannot be imposed when a violation of the law occurred due to force majeure. Necessary defense is a defense that is required to prevent danger to oneself or another person from an existing and unlawful attack. If the boundaries of necessary defense are exceeded due to bewilderment, fear or terror, the act will not be punished[41]. On the other hand, in the case of a state of emergency, anyone who commits an act in a situation of existing danger to life, health, freedom, honor,

[39] W. Mitsch, op. cit., p. 27.
[40] D. Szumiło-Kulczycka, P. Czarnecki, P. Balcer, A. Leszczyńska, op. cit., p. 123.
[41] E. Göhler, F. Gürtler, H. Seitz, M. Bauer, A. Thoma, op. cit., p. 132.

property or other legal good in order to avoid danger to himself or another person does not act unlawfully if, when considering the conflicting interests, in particular the legal good and the degree of danger, the protected legal good represents a higher value than the legal good sacrificed. However, this applies only if the action is an appropriate way to avoid the danger[42].

Referring, in turn, to the issue of the definiteness of the penalty, which also makes up the principle under discussion,[43] it should be pointed out that the requirement of definiteness of the penalty threatening an administrative tort means that the penalty must be precisely described in the legal act.[44] This rule is intended to prevent the practice of circumventing the law and imposing fines without a clearly defined statutory threat. Accordingly, the literature indicates that it is impossible to impose punishment even on the basis of common law – *Gewohnheitsrecht*[45].

In Poland, the amount of the fine (expressed as an amount or percentage) is included in sectoral laws at the same time as the description of each tort. In Germany, moreover, there is a general regulation in Section 17 of the GTC, according to which the fine is at least €5 and, unless otherwise provided by law, at most €1,000. In a situation where the law provides for a fine for both intentional and unintentional actions, without distinguishing the upper limit of the fine, then a fine may be imposed for unintentional actions that will not exceed half of the highest limit. In addition, in both countries, the directives for assessing fines stipulate that they should take into account the significance of the administrative tort and whether the act was charged against the offender. It also takes into account the financial situation of the offender, whether he tried to avoid the effect of the violation of the law, as well as previous punishment.

In the context of the requirement of sufficient definiteness of the threatened sanction, it is impossible not to mention the controversial regulation expressed in § 17(4) of the GTC, according to which the monetary penalty should exceed the economic benefit that the offender achieved as a result of committing the tort. This means that if the statutory maximum fine proves insufficient, it can be exceeded.

Likewise, in the Polish legal order, from the principle of a democratic state of law is derived the imperative of definiteness of punishment, which means that a fine can be imposed on a party only within the limits of the law. Thus, as the CT concluded, all elements of the penalty must be specified in the law itself[46].

Of course, due to the multiplicity of legal regulations providing for fines, as well as the framework of this study, it is not possible to review all administrative torts, even if only in the field of banking law in the broad sense, in terms of the implementation of the principle of *nullum crimen sine lege*. Nevertheless, knowledge of the aforementioned determinants

[42] Ibid., p. 134.
[43] E. Hilgendorf, H. Kudlich, B. Valerius, *Handbuches des Strafrechts*, C.H. Beck, Heidelberg 2020, p. 120.
[44] E. Göhler, F. Gürtler, H. Seitz, M. Bauer, A. Thoma, op. cit. p. 43.
[45] K. Gassner, S. Seith, *Ordnungswidrigkeitengesetz*, Nomos, Baden-Baden 2020, p. 57.
[46] Orzeczenie Trybunału Konstytucyjnego z dnia 26 września 1995 r. [Ruling of the Constitutional Court of September 26, 1995], op. cit.

that should be fulfilled by regulations sanctioning administrative torts makes it possible to verify individual regulations introducing fines for the torts in question.

By way of example, one can cite Article 228(1) of the Law on Investment Funds and Management of Alternative Investment Funds, which allows for the imposition of a certain monetary penalty in the event of a fund's violation of the law or failure to meet the conditions set forth in the authorization[47]. The provision identifies the tortfeasor, the authority with the power to impose a fine and the amount of the fine, and specifies that the tort may consist of acts as well as omissions. Similarly, Article 335(1) of the Act on the Bank Guarantee Fund, the deposit guarantee system and forced restructuring specifies in what situations and in what amount the Financial Supervision Commission may impose a financial penalty on an entity capable of committing it – for failure to notify the Commission of the fulfillment of the prerequisites for initiating forced restructuring.

In contrast, an excellent example of the definiteness of an administrative tort from the German legal order is Section 56(1a) of the German Banking Act *Kreditwesengesetz*[48], which allows a fine to be imposed on anyone who intentionally or recklessly violates the provisions of Regulation 1060/2009 of the European Parliament and of the Council of September 16, 2009 on credit rating agencies[49].

Prohibition of analogies

In the context of this part of the discussion, it should first be pointed out that analogy is used when there is a certain under-regulation in legal provisions that cannot be filled by any method of interpretation.

As already noted, the prohibition on using analogy to the detriment of the offender when interpreting norms introducing administrative torts derives from the general principle of *nullum crimen sine lege*. The *Gesetzlichkeitprinzip* principle of legalism is expressed precisely in the prohibition of the use of analogy, thus setting limits in the application of provisions of a penal nature. In other words, if analogy were possible in the field of criminal sciences, then no one would be sure that his behavior by analogy would not be classified as a criminal act. Such a situation would have to be evaluated strongly negatively, as it would not realize the principle of legal certainty, trust, and would harm human rights, guaranteed by international and national legal regulations[50].

From an analysis of the above-mentioned regulations, case law and doctrinal views, it is clear that it is not possible to impose an ailment in the form of a fine in the absence

[47] Ustawa z dnia 27 maja 2004 r. o funduszach inwestycyjnych i zarządzaniu alternatywnymi funduszami inwestycyjnymi [Act of May 27, 2004 on investment funds and management of alternative investment funds], Dz.U. 2004, nr 146, poz. 1546.

[48] Kreditwesengesetz in der Fassung der Bekanntmachung vom 9. September 1998 (BGBl. I S. 2776), das zuletzt durch Artikel 3 des Gesetzes vom 23. Mai 2022 (BGBl. I S. 754) geändert worden ist.

[49] Rozporządzenia Parlamentu Europejskiego i Rady 1060/2009 z dnia 16 września 2009 r. w sprawie agencji ratingowych [Regulation 1060/2009 of the European Parliament and of the Council of September 16, 2009 on credit rating agencies], Dz.U. UE z 17.11.2009, L 302/1.

[50] R. Mehl, op. cit., p. 75.

of a basis for doing so in generally applicable regulations. These are cases in which the provisions on the imposition of fines would apply to situations not covered by them. Accordingly, the application of the provisions on the imposition of fines or other ailments to merely similar facts is impermissible. The only permissible situation is the use of analogy in favor of the offender[51].

Prohibition of retroactive application of the law

Another consequence of the principle of *nullum crimen sine lege* is the prohibition of retroactive application of the law – *Rückwirkungsverbot*, which, in light of the case law of the Constitutional Court, is derived from Article 2 of the Polish Constitution and is an important component of the principle of citizens' trust in the state. The principle of non-retroactivity is not to legislate to apply new regulations to situations that existed before they came into force.

According to doctrine and case law, the prohibition applies to administrative torts[52].

In contrast, direct evidence of the implementation of this principle in Germany in the GTC are paragraphs 3 and 4. According to Section 3 of the GTC, an act can be punished as a tort only if the possibility of punishment was legally established before the act was committed.

In contrast, according to Section 4(1) of the GTC, the fine is determined by the law in effect at the time the act was committed. If the amount of the threatened fine is changed during the commission of the act, the law in effect at the time of the completion of the act will apply (§4(2)).

In addition, the issue of the law's duration should be addressed. With § 3 of the GTC, the democratic legitimacy of administrative torts is secured. As mentioned above, this prohibition stems from both Section 3 of the GTC and Article 103(2) of the *Grund Gesetz*, but its importance is further emphasized in Section 4(1) of the GTC. The time at which the tort was committed is defined by Section 6 of the GTC as the time of the action or the time of the unlawful omission, not the occurrence of the effect. Despite the prohibition on retroactive application of the law, which applies to substantive provisions,[53] it should be borne in mind that this does not contradict the fact that, in the event of a change in the threat of a fine, the law in effect at the end of the act should be applied, regardless of whether this represents an aggravation or mitigation of punishment in a particular case. This is because in the case of torts that take a long time to commit, the moment of commission is the moment the unlawful activity ends.[54]

[51] E. Göhler, F. Gürtler, H. Seitz, M. Bauer, A. Thoma, op. cit; art. 7a k.p.a.

[52] Wyrok Trybunału Konstytucyjnego z dnia 10 grudnia 2007 r. P 43/07 [Judgment of the Constitutional Court of December 10, 2007. P 43/07], OTK-A 2007/11/155.

[53] P. Schwacke, op. cit. p. 7.

[54] W. Mitsch, op. cit. p. 24.

Conclusion

The guarantee of *nullum crimen sine lege*, which also applies to administrative torts, in both Poland and Germany derives from norms of a constitutional nature. These norms stipulate that an act may be punishable only if its punishability was provided for by a normative act in force before its commission.[55] Thanks to the presence of the principle of *nullum crimen sine lege* in the basic laws, the principle in question is an exceptionally strong guarantee of human rights. The statutory provisions clarify the principle in question in each case, making the requirement of statutory definiteness of the elements stronger, which is an expression of the implementation of the principle in question. In addition, the article proves that in both legal orders, the condition for imposing a fine is the requirement that the act in question be defined as punishable at the time the offender commits it. In addition, it was pointed out that the doctrine in both countries derives the prohibition of analogy from the principle in question. The above is a clear confirmation that the examined guarantee is realized on the ground of proceedings for the imposition of fines on the parties, and is the evidence of the realization of human rights, as expressed in national and international legal regulations.

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