

The Nature of Responsibility of an Undertaking in Antitrust Proceedings and the Concept of ‘Criminal Charge’ in the Jurisprudence of the European Court of Human Rights

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Abstract

The present article aims to answer the question whether an undertaking’s responsibility (sometimes also referred to as liability) in an antitrust proceeding held by the President of the Office of Competition and Consumer Protection (the Polish National Competition Authority) is of a criminal nature. The notion of ‘criminal charge’ is rather extensively construed in the jurisprudence of European Court of Human Rights, which has formulated the criteria for criminal responsibility. Taking these criteria into account, the author postulates that the severe character of pecuniary sanctions imposed in Polish antitrust proceedings is an argument for

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the criminal character of the proceedings. Thus the guarantees of Article 6 of the European Convention on Human Rights should be applicable to Polish antitrust proceedings.

Résumé

Le présent article a pour objectif de répondre à la question de savoir si dans une procédure de concurrence devant le Président de l'Office polonais de protection de la concurrence et des consommateurs, la responsabilité d'un entrepreneur est de nature à porter une « accusation dans une affaire pénale ». Cette notion a été créée par la jurisprudence de la Cour européenne des droits de l'homme, dans laquelle sont énumérés les critères d'une telle évaluation de la responsabilité. À force de les considérer, l'auteur du présent article conclut que le lien entre la violation des règles du droit de la concurrence d'une part et les conséquences sous forme de peines pécuniaires de l'autre, parle en faveur de la nature pénale de cette responsabilité. Cela conduit à la nécessité de respecter, dans la procédure de concurrence, les garanties que requiert en matière pénale l'art. 6 de la Convention européenne des droits de l'homme.

Classifications and key words: criminal charge; criminal penalty; human rights; responsibility in antitrust proceedings; nature of the responsibility

I. Introduction

This article aims to assess the nature of an undertaking's responsibility in antitrust proceedings held in front of the President of the Office of Competition and Consumer Protection (the Polish National Competition Authority, hereafter alternately referred to as the UOKIK President or Competition Authority) by contrasting it with the notion of 'criminal charge' in the jurisprudence of the European Court of Human Rights (hereafter, ECtHR or Court). First, the criteria for treating a charge as criminal is analyzed. Subsequently each of these criteria is applied to an undertaking's responsibility in Polish antitrust proceedings. Next the implications and consequences of qualifying a concrete responsibility as a criminal responsibility is examined. Beforehand however, some preliminary remarks provide an overview of the topic.

When one considers the nature of a particular kind of responsibility several issues need to be clarified. One is the qualification contained in the legislation. Another is the qualification that could have or should have been given by the legislators. In the first instance we analyze the nature of this responsibility as

it was designated by the legislators. The legislators had the choice between three different kinds of responsibility: criminal, civil and administrative. The qualification of the responsibility clearly stems from the branch of law that the legal act is enshrined in¹.

Considerations concerning the second issue – the basis for qualifying a responsibility as criminal, civil or administrative – are of a different nature. In this case one does not describe the decision taken by the legislators, but rather assesses its basis and formulates different postulates towards the legislation. This described distinction seems self-evident, however it needs to be underscored for the further analysis contained in this article. It should also be emphasized that this distinction is mirrored in the criteria developed by the ECtHR for assessing if ‘charge’ in a particular case analyzed by the Court is of a criminal nature.

In analyzing the nature of a responsibility, one first has to define the criteria of assessment. Foremost however the question ‘what is a responsibility’ needs to be answered. In the Polish legal doctrine one of the most popular definitions was formulated by W. Lang, who asserted that responsibility is a principle whereby an entity, if found liable, bears the consequences provided for by law for events or states of affairs which are subject to negative normative qualifications in a particular legal order². Therefore, the elements composing the structure of responsibility are: a responsible entity; events or states of affairs which are subject to a negative normative qualification; a principle which is the basis for attributing responsibility; and a sanction – a negative consequence for the responsible entity³. Distinguishing between each of these elements is important to an analysis of specific types or examples of responsibility. Having said that, attempts to classify various types of responsibility, sometimes also referred to as ‘liability’, according to the categories leads paradoxically to the conclusion that the classifications are not always distinct. This stems in part from the blurring of traditional differences between different types of liability⁴. One has to admit however that the boundaries were never very clear⁵.

It is also necessary to keep in mind that, in considering the nature of a specific type or example of liability and formulating conclusions about its

¹ W. Radecki, *Odpowiedzialność w prawie ochrony środowiska*, Warszawa 2002, p. 64.

² W. Lang, ‘Struktura odpowiedzialności prawnej’ (1968) 31 *Zeszyty Naukowe Uniwersytetu im. Mikołaja Kopernika* 12.

³ See W. Radecki, *Odpowiedzialność...*, pp. 60–61

⁴ See, *inter alia*: B. Szumiło-Kulczycka, *Prawo administracyjno-karne*, Kraków 2004, pp. 72–74.

⁵ This is illustrated by a debate that took place concerning the doctrine of Polish criminal law with the entry into force of the Act of 17 June 1966 on making some petty crimes offences in criminal-administrative jurisdiction (Journal of Laws 1966 No. 23, item 149). Cf. J. Skupiński, *Model polskiego prawa o wykroczeniach*, Wrocław 1974, p. 20.

desired shape, the results of the analysis may vary depending on which of these elements in the construction of the liability is treated as dominant. Its specific shape will determine the shape of the other elements in the structure and, in the end, the nature of the responsibility examined. For example, if the legislators decide that the consequence for a breach of a rule requiring or prohibiting particular conduct is to be imprisonment, this decision determines the shape of other elements of the structure of responsibility.

In Poland, the Constitutional Tribunal has on a number of occasions analyzed the issue whether a particular sanction, formally implemented as an administrative sanction, could be treated as a criminal sanction based on the autonomous meaning stemming from the Constitution. In many of its judgments the criteria for treating a sanction as criminal was its repressiveness⁶. In situations where the Constitutional Tribunal only identified a preventive nature in the sanction, it considered it unnecessary to apply the guarantees contained in Articles 2 and 31(2) of the Constitution. These guarantees consist of an obligation to identify guilt as a condition for liability, an individualization of the penalty, and the establishment of warranty and review mechanisms.

The Constitutional Tribunal has not, however, taken an uniform position on this issue. In a number of judgments the Tribunal adopted the position that the repressive or repressive-preventive nature of the sanction does not exclude an assessment that it is of an administrative nature⁷. In addition to the lack of uniformity in the criteria for distinguishing between administrative and criminal sanctions – in particular the importance of a finding that a sanction is punitive in nature – the Constitutional Tribunal also has not developed a uniform position on the method of identification of such features of sanctions in concrete cases⁸. Therefore, taking into account the importance of the European Convention on Human Rights (hereafter, ECHR), the object of this article is to examine the nature of an undertaking's responsibility in Polish antitrust proceedings, considered in light of the jurisprudence of the ECtHR.

⁶ See, *inter alia*: judgment of the Constitutional Tribunal of 08 December 1998, K 41/97 (1998) 7 *Orzecznictwo Trybunału Konstytucyjnego* item 117; judgment of the Constitutional Tribunal of 19 March 2007, K 47/05 (2007) 3 *Orzecznictwo Trybunału Konstytucyjnego-A* item 27; judgment of the Constitutional Tribunal of 12 May 2009, P 66/07 (2009) 5 *Orzecznictwo Trybunału Konstytucyjnego-A* item 65.

⁷ See, *inter alia*: judgment of the Constitutional Tribunal of 14 June 2004, SK 21/03 (2004) 6 *Orzecznictwo Trybunału Konstytucyjnego-A* item 56; judgment of the Constitutional Tribunal of 7 July 2009, K 13/08 (2009) 7 *Orzecznictwo Trybunału Konstytucyjnego-A* item 105; judgment of the Constitutional Tribunal of 22 September 2009, SK 3/08 (2009) 8 *Orzecznictwo Trybunału Konstytucyjnego-A* item 125.

⁸ See judgment of the Constitutional Tribunal of 15 January 2007, P 19/06 (2007) 1 *Orzecznictwo Trybunału Konstytucyjnego-A* item 2; judgment of the Constitutional Tribunal of 14 October 2009, Kp 4/09 (2009) 9 *Orzecznictwo Trybunału Konstytucyjnego-A* item 134.

II. Three criteria for treating a charge as criminal and their interrelation

The criteria decisive for classifying a responsibility as criminal were set forth in the ECtHR judgments dealing with infringements of Article 6(1) ECHR. This Article provides guarantees that have to be protected in civil and criminal matters. The level of protection is higher when ‘criminal charges’ are being adjudicated. The ECtHR distinguishes between matters belonging to the ‘core of criminal law’ and those that are not strictly criminal. The question whether the responsibility of undertakings stemming from decisions of the UOKiK President might be of a civil character is beyond the scope of this text.

As regards the criteria which are taken into account when determining whether a person was ‘charged with a criminal offence’ for the purposes of Article 6 of the Convention, the first is the classification of the offence under domestic law⁹. If the offence is classified as criminal under domestic national law, there is no doubt that the guarantees provided by Article 6 of the Convention should be applied. Thus for the purposes of this article only cases which are not formally classified as ‘criminal’ are analyzed.

The formal classification of an infringement proceeding as not being a matter of criminal law is not decisive however, and does not exclude it being determined to be of a ‘criminal character’. The ECtHR has emphasized in its jurisprudence that such a restrictive interpretation of Article 6 of the Convention would not be consonant with the object and the purpose of the Article¹⁰.

When, according to domestic law, a regulation providing for the imposition of certain punishments or sanctions is not classified as a matter of criminal law, the Court will concentrate on the nature of the offence and the nature and degree of severity of the penalty. These three criteria: the statutory classification of the case under national law, the nature of the (criminal) offence, and the type and severity of the penalties under the law are enumerated in the ECtHR judgment in the case of *Engel and Others v the Netherlands*¹¹. The Court has referred to these criteria repeatedly in later judgments, therefore they must be regarded as well-established¹².

⁹ See ECtHR judgment of 8 June 1976, *Engel and others v Netherlands*, appl. no. 5100/71, paras. 80–82.

¹⁰ See ECtHR judgment of 26 October 1984 *De Cubber v Belgium*, appl. no. 9186/80, para. 30.

¹¹ See ECtHR judgment of 8 June 1976 *Engel and others v Netherlands*, appl. no. 5100/71, paras. 80–82.

¹² See ECtHR judgment of 23 July 2002 *Janosevic v Sweden*, appl. no. 34619/97, para. 67; ECtHR judgment of 21 February 1981 *Öztürk v Germany*, appl. no. 8544/79, paras. 48–50; ECtHR judgment of 24 February 1994 *Bendenoun v France*, appl. no. 12547/86, para. 45.

Elaboration of the criteria governing an assessment of the criminal nature of a particular responsibility raises the further question about their relationship. An especially important relationship exists between the criteria: nature of the offence and the type and severity of the penalty imposed for its commission. In the judgment of the Court of 21 February 1984, *Öztürk v Germany*¹³, the ECtHR expressly stated that the Convention does not restrict the national legislators in their formulation of various categories of criminal offences and defining the boundaries between them. Such formulations are not, however, decisive for the purposes of application of the Convention. Otherwise, its application would depend on the will of states, which could, through a formal classification of a specific action, try to avoid its obligation to comply with the standards contained in Articles 6 and 7 of the Convention. Therefore, the Court has ruled that the concept of ‘criminal charge’ has an autonomous meaning under the Convention. Inasmuch as fulfillment of the first condition of the classification, i.e. when a case is formally criminal under the domestic law, makes the remaining criteria irrelevant, the question arises: what is the relation between the criteria of the nature of the act/offence and the type and severity of the penalty imposed for its commission?

According to the jurisprudence of the Court, both of them are considered sufficient for an assessment that the offence is a ‘criminal charge’¹⁴. It needs to be noted that evaluation of the criterion ‘the type and degree of severity of the penalty’ has an influence not only on the evaluation of the ‘nature of the offence,’ but also on evaluation of the legislators’ aim. Thus the Court has emphasized there are such close links between these criteria that they should be examined together¹⁵.

Whether, however, the criteria are cumulative or alternative is unclear. For example, in the judgment of 24 February 1994, in the case *Bendenoun v France*¹⁶, the ECtHR postulated that neither of the criteria alone was decisive, but that taken together, they constitute the test to assess the criminal character of a case. On the other hand, in the judgment of 23 July 2002, in the case *Janosevic v Sweden*¹⁷, the Court held that these criteria are alternative and mutually exclusive. To recognize a ‘criminal charge’ it may be sufficient to rely on one of them. However, if the analysis based on separate criteria does

¹³ Appl. no. 8544/79, para. 54.

¹⁴ ECtHR judgment of 8 June 1976 *Engel and others v Netherlands*, paras. 80-82; ECtHR judgment of 21 February 1981 *Öztürk v Germany*, para. 54.

¹⁵ See ECtHR judgment of 23 July 2002 *Janosevic v Sweden*, appl. no. 34619/97, para. 67; ECtHR judgment of 23 July 2002 *Västberga Taxi AB and Vulic v Sweden*, appl. no. 36985/97, paras. 78-79; ECtHR judgment of 1 February 2005 *Ziliberg v Moldova*, appl. no. 61821/00, para. 31.

¹⁶ Appl. no. 12547/86, para. 61.

¹⁷ Appl. no. 34619/97, para. 67.

not lead to a clear conclusion in the matter, it is well-established that the assessment should be based on their combination.

In this article, the subject of the assessment using the set of the criteria presented above concerns the responsibility of undertakings in antitrust proceedings. It should be noted at the outset that the vast majority of the judgments of the ECtHR do not concern such proceedings. This does not preclude using the judgments as a basis for assessing the nature of liability in antitrust proceedings before the Polish competition authority, but it does require caution in formulating conclusions. Nonetheless the criteria set forth above for assessing a liability as a ‘criminal charge’ are generally well-established in the jurisprudence of the ECtHR. They have been confirmed in cases relating strictly to antitrust proceedings¹⁸, as well as in cases of liability of a similar nature, such as accountability before the French banking commission in the *Dubus S.A. v France* judgment of 11 June 2009¹⁹.

III. Formal qualification by the legislators

1. Undertaking’ responsibility in antitrust proceedings as an administrative responsibility

We now turn to our analysis of the criteria for assessment of the criminal character of the responsibility of undertakings in Polish antitrust law. As has been already been pointed out, the first criteria that should be taken into account is the formal qualification of the offence/act under consideration. The liability of an undertaking in Polish antitrust proceedings is formally designated by Polish law as a responsibility of an administrative nature. According to Polish domestic law, criminal responsibility encompasses liability for those crimes and petty offences that are set forth in the Criminal Code and the Code for Petty Offences. With regard to provisions concerning acts which fall outside these codes, their potential criminal character is connected with the type of penalty provided for in the governing provision, and the way of formulating the provision.

¹⁸ See ECtHR judgment of 27 February 1992 *Societe Stenuit*, appl. no. 11598/85 (see ECtHR decision of 11 July 1989); ECtHR judgment of 14 October 2003 *Lilly v France*, appl. no. 53892/00, paras. 22–26; ECtHR decision of 3 June 2004 *Nestee St. Petersburg and others v Russia*, appl. no. 69042/01; ECtHR judgment of 27 September 2011, *Menarini Diagnostics v Italy*, appl. no. 43509/08, paras. 38–45.

¹⁹ ECtHR judgment of 11 June 2009, *Dubus S.A. v France*, appl. no. 5242/04, para. 45.

Thus an assessment of the character of the responsibility in Polish antitrust proceedings from the perspective of the first criterion is not difficult²⁰. According to the Polish Act of 16 February 2007 on Competition and Consumer Protection²¹ (hereafter, the Act), antitrust proceedings are: the anti-monopoly proceedings concerning competition-restricting practices (Title VI, Chapter 2 of the Act) and the anti-monopoly proceedings concerning concentration (Title VI, Chapter 3 of the Act). The responsibility formulated in the Act is formally designated as a responsibility of an administrative nature. This conclusion also follows from the type of authority which is granted to issue a binding decision about such liability. The UOKiK President is competent to impose sanctions on the basis of the Act exclusively²².

The penalties for violation are imposed via an administrative decision, and according to the Article 83 of the Act, matters not regulated by the Act shall be subject to the provisions of the Code of Administrative Procedure. It might be noted that as regards evidentiary matters in proceedings before the UOKiK President, their scope is not regulated in the Act. Therefore Articles 227–315 of the Code of Civil Procedure are applied in evidentiary matters. It also should be mentioned that according to Article 105c(4) of the Act, the provisions of the Criminal Procedure Code relating to searches shall be applied in all matters not provided for in the Act. The applicability of these provisions does not, however, change the formally administrative character of the proceedings under Polish law. The formal administrative nature of the proceedings is also not changed by the fact that the decision taken in the anti-monopoly proceedings before the UOKiK President shall be subject to an appeal to the Court of Consumer and Competition Protection. The proceeding before this Court takes place on the basis of the Code of Civil Procedure²³.

The ultimate conclusion about the nature of the responsibility adjudicated also derives from the character of the authority issuing the decision in a case, the form of the decision, and the kind of procedure applied in proceedings before the authority. In the literature concerning administrative law doctrine and the nature of administrative responsibility one can encounter the

²⁰ M. Bernatt, 'Prawo do rzetelnego procesu w sprawach ochrony konkurencji i regulacji rynku (na tle art. 6 EKPC)' (2012) 1 *Państwo i Prawo* 55.

²¹ Journal of Laws 2007 No. 50, item 331, as amended.

²² M. Błachucki, S. Józwiak, 'Sankcje strukturalne w prawie antymonopolowym jako sankcje administracyjnoprawne', [in:] M. Stahl, R. Lewicka, M. Lewicki (eds.), *Sankcje administracyjne*, Warszawa 2011, p. 450.

²³ M. Szydło, *Nadużywanie pozycji dominującej w prawie ochrony konkurencji*, Warszawa 2010, pp. 269-270; M. Błachucki, *System postępowania antymonopolowego w sprawach kontroli koncentracji przedsiębiorców*, Warszawa 2012 (forthcoming, Chapter 4, Section 1.3).

statement that this is an ‘unclear’ concept²⁴. W. Radecki has even noted a tendency to avoid analysis of the concept and to focus instead on the concept of administrative sanction²⁵. J. Boć emphasized that the basic criterion for assigning administrative responsibility seems to be a negative one. By this he means that what does not belong to the scope of civil, criminal or employee liability is designated as an administrative responsibility²⁶. Bearing in mind that the notion of an ‘administrative matter’ is broader than the notion of ‘administrative responsibility’, it has to be underlined that the doctrine very rarely analyzes the administrative nature of a matter. There is even a statement in the doctrine that there is no sphere of matters that are administrative by their very nature²⁷.

2. Decision on responsibility versus decision concerning administrative matters

Not every decision taken by the UOKiK President in antitrust proceedings has the effect of determining the liability of the addressee of the decision. The aforementioned elements concerning the structure of liability have to be proved in order to conclude that the UOKiK is dealing, in a particular instance, with a question of responsibility. Two of the elements are of key importance in distinguishing decisions which have the effect of determining an administrative responsibility from those which result from purely administrative concerns (management). These are: events or states of affairs which are subject to a negative normative qualification; and the imposition of a sanction, i.e. a negative consequence, upon a responsible entity.

Consequently, decisions which have the effect of determining responsibility are those issued by the UOKiK President in anti-monopoly proceedings concerning competition-restrictive practices. This applies to decisions issued in connection with violations of Article 6 of the Act on the prohibition of competition-restrictive agreements, as well as violations of Article 9 of the Act prohibiting abuse of dominant position. In other words, violation of these provisions means that the undertaking’s conduct is contrary to the law, i.e., is

²⁴ W. Radecki, *Odpowiedzialność...*, p. 72; M. Wincenciak, *Sankcje w prawie administracyjnym i procedura ich wymierzania*, Warszawa 2008, pp. 88–93.

²⁵ A broader interest in the issue of ‘administrative responsibility’ can be noted in environmental protection law. Cf W. Radecki, *Odpowiedzialność...*, p. 72; M. Wincenciak, *Sankcje w prawie administracyjnym...*, pp. 88–93; K. Kwaśnicka, *Odpowiedzialność administracyjna w prawie ochrony środowiska*, Warszawa 2011, pp. 48–49.

²⁶ J. Boć [in:]: J. Boć, K. Nowacki, E. Samborska-Boć, *Ochrona środowiska*, Wrocław 2000, p. 323.

²⁷ Z. Kmiecik, *Skuteczność regulacji administracyjnoprawnej*, Łódź 1994, p. 50.

deemed to be an event which is subject to negative normative qualification. If, during anti-monopoly proceedings concerning competition-restricting practices, the UOKiK President affirms that an undertaking's conduct violated the aforementioned provisions, or Articles 101 or 102 of the Treaty on the Functioning of European Union, he or she issues a decision assessing the practice as one restricting competition and ordering the undertaking to refrain from it (Article 10 of the Act). In addition it should be noted that the UOKiK President can also issue a decision assessing the practice as one restricting competition and declaring it discontinued [Article 11(2) of the Act], and a decision imposing an obligation to exercise the commitments undertaken [Article 12(1) of the Act]. The UOKiK President may also impose a fine upon an undertaking [Article 106(1)(1) and (2) of the Act}. The amount of the fine cannot exceed 10% of revenue earned in the fiscal year preceding the year of imposition of a penalty.

Regarding decisions in anti-monopoly proceedings concerning concentration, the UOKiK President can issue, by way of decision, a consent to implement a concentration (Article 18 of the Act), a consent conditioned upon the fulfillment of certain conditions [Article 19(1) of the Act], or a prohibition of the implementation of a concentration because competition in the market will be significantly impeded [Article 20(1) of the Act]. Besides, the UOKiK President may issue, during the proceedings, decisions ordering: division of the merged undertaking under conditions defined in the decision; disposal of the entirety or part of the undertaking's assets; disposal of stocks or shares ensuring control over another undertaking or undertakings, or dissolution of a company over which undertakings have joint control [Article 21(2) and (4) of the Act]. Similarly as in the anti-monopoly proceedings concerning competition-restrictive practices, the UOKiK President may issue a decision imposing a financial penalty for making the merger without their consent, up to 10% of revenue earned in the fiscal year preceding the year of the imposition of the penalty [Article 106(1)(3) of the Act].

As the object of interest in this article concerns the criteria for treating antitrust responsibility as criminal responsibility within the meaning of ECtHR jurisprudence, we need to analyze whether, in a concrete case whereby a decision is issued, the UOKiK President is imposing such responsibility²⁸. Taking into account the aforementioned elements of the responsibility, it is clear that the decisions issued under Art. 18-20 of the Act are not decisions imposing responsibility. In the cases of consent, conditional consent, or prohibition of concentration, there is no negative normative qualification of any behavior. In

²⁸ For an assessment which cases belong to civil cases, cf. the various positions expressed in: M. Bernatt, 'Prawo do rzetelnego procesu...', p. 59, M. Błachucki, *System postępowania...*, (Chapter 4, Section 1.4).

other words, a case where an undertaking applies for a consent to implement a concentration does not constitute a situation whereby a particular behavior is contrary to a norm that contains an order or a prohibition. Consequently, no burden is placed on the undertaking because of an infringement of such a norm²⁹. The decisions on consent or prohibition of concentration are decisions on the process of administration (management), and not decisions on liability³⁰.

All other previously-mentioned decisions issued in concentration cases are, however, decisions attributing responsibility for infringing a prohibition or an order requiring particular behavior. Therefore they need to be further analyzed.

The sanctions provided in Article 21(2) in connection with Article 21(4) of the Act are the consequences of infringing Article 13 of the Act, imposing an obligation to notify the UOKiK of an intention of concentration by fulfilling the conditions set out in this provision, and to duly inform the UOKiK of all the facts necessary for it to issue a decision on the proposed concentration. Similarly a sanction in the form of a pecuniary fine as provided in Article 106(1)(3) of the Act is a consequence of infringing the requirement to notify the UOKiK President of an intention to engage in a concentration.

In addition, the legislators have also provided for the possibility that the UOKiK President may impose, by way of a decision, a fine for not complying with the decision, orders, or court judgments specified in Article 107 of the Act³¹, or for failing to fulfill obligations that an undertaking has agreed to as a party to a proceeding [Article 106(2) of the Act]. However, this does not mean that an undertaking's responsibility is legally imposed in the above-cited instances. In order to simplify further analysis, those cases of responsibility would be called 'secondary responsibility', whereas the examples given in the first instance constitute 'primary responsibility'³². And only this responsibility is an object of our further reflection in this text³³.

²⁹ See the considerations of W. Radecki on the nature of decisions imposing fees for using the environment, increased fees and administrative penalties in environmental law. W. Radecki, *Odpowiedzialność...*, pp. 61–62.

³⁰ Cf. M. Błachucki, S. Józwiak, 'Sankcje strukturalne...', p. 450; A. Michór, *Odpowiedzialność administracyjna w obrocie instrumentami finansowymi*, Warszawa 2009, pp. 39–40.

³¹ In the case of non-compliance with the decision referred to in Article 21(1) or (4), the UOKiK President may, by way of a decision, accomplish a division of the undertaking (Article 99 of the Act).

³² Here I make use of the terminology proposed by M. Błachucki. The author applies these notions to the concentration cases, but they can be applied to anti-monopoly proceedings and more narrowly to anti-monopoly responsibility. Cf. M. Błachucki, *System postępowania...*, (Chapter 4 Section 1.1).

³³ For example, Article 108 of the Act provides for imposing responsibility on a person holding a managerial post or being a member of the managing board of the undertaking.

IV. Criminal nature of the offence

1. Generally applicable norm

Since we have shown that, from a formal point of view, antitrust responsibility under Polish law is an administrative responsibility, the other ECtHR criteria need to be analyzed. As far as the nature of the offence is concerned, it stems from the jurisprudence that this offence needs to be of a ‘criminal’ nature. This criteria however is unusually difficult to grasp and define³⁴. There are hypotheses that it boils down to an assessment if the offence is, by its nature, ‘criminally’ prohibited³⁵.

The ECtHR has distinguished two elements of analysis in connection with the criminal nature of the offence. The first is the scope of addressees of the norm, and the second is the aim of the norm. As far as the addressees of the norm are concerned, the ECtHR has ruled that that a criminal norm imposing a particular burden cannot be addressed only to a limited group of entities³⁶. Thus disciplinary proceedings concerning a particular professional group are not considered of a criminal nature. ECHR commentators, however, have criticized this criteria for assessing the criminal nature of the offence, stating that there are several kinds of offences which are of an individual character, which implies that they can be committed by individuals belonging only to a particular group of persons³⁷. But it needs to be stated that such cases of individual offences are usually formally qualified as criminal matters and thus no need for analyzing their criminal nature occurs. Therefore a statement that they could be committed only by a closed (limited) group of persons does not deprive them of their criminal character as they are so classified under law.

It seems however that this criteria should be understood in a different manner than that used in interpreting generally applicable norms in national law. This stems from the ECtHR’s jurisprudence that, in its analysis of the general character of a norm, it refers not only to the scope of addressees concerned but also to the criteria whether an offence infringes upon a common good³⁸.

Using this criteria for assessing the aforementioned examples of responsibility in anti-monopoly proceedings, one needs to mention the ECtHR judgment specifically involving antimonopoly proceedings. In its judgment of

³⁴ ECtHR judgment of 23 November 2006, *Jussila v Finland*, appl. no. 73053/01, para. 38.

³⁵ ECtHR judgment of 23 July 2002, *Janosevic v Sweden*, appl. no. 34619/97, paras. 67–68.

³⁶ ECtHR judgment of 22 May 1990, *Weber v Switzerland*, appl. no. 11034/84, para. 33.

³⁷ P. Hofmański, A. Wróbel [in:] L. Garlicki (ed.), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności*, vol. I, Warszawa 2010, pp. 282–283.

³⁸ ECtHR judgment of 22 May 1990, *Weber v. Switzerland*, appl.no. 11034/84, para. 33.

Menarini Diagnostic v Italy, the ECtHR underlined that the aim of the antitrust law provisions concerned was the protection of freedom of competition. The monitoring (surveillance) of behaviors infringing upon this value serves the general public interest, and its protection belongs usually to criminal law³⁹. The criteria of the general applicability of norms, the infringement of which creates criminal responsibility, has been interpreted by the ECtHR in relation to the nature of the values protected by those norms. Since competition is a value protected in the name of the public interest, the norms prohibiting behaviors that infringe upon that value should be perceived as ‘generally applicable’. Thus, the prohibition of agreements that infringe competition (Article 6 of the Polish Act), the prohibition of abuse of a dominant position (Article 9 of the Act), and the obligation to notify of an intention of concentration (Article 13 of the Act) are norms of such a general character.

While analyzing this criteria, it is instructive to refer to the ECtHR decision of 3 June 2004 in the case *Neste St. Petersburg and others v Russia*⁴⁰. The ECtHR stated in that case that the responsibility in front of the Russian competition authority was not of a criminal character, and thus Article 6 of the Convention was not applicable. In that case the Russian competition authority ordered a confiscation of profits stemming from infringement of the Russian Competition Act. This Act does not provide the possibility of imposing pecuniary sanctions on infringing undertakings, therefore this particular case is often omitted in the legal analyses concerning antitrust responsibility⁴¹. One has to agree with the general conclusion of this decision. It is however worth mentioning that in this case the second criteria – namely the nature of the offence – was also analyzed by ECtHR.

The undertakings involved raised the argument that the aim of antitrust proceedings was the protection of a general interest, which constitutes a typical characteristic of criminal law. But the ECtHR underlined in response to this argument that the provisions of the Act under consideration – the Competition Law in Russia – are applicable only to competition on the commodity markets. Therefore the Act was deemed to have only a limited, not general, application.

The ECtHR stated as well that freedom of competition is a relative value and infringements upon it are ‘not inherently wrong in themselves’. This

³⁹ ECtHR judgment of 27 September 2011, *Menarini Diagnostics v Italy*, appl. no. 43509/08, para. 40; ECtHR judgment of 27 February 1992, *Societe Stenuit v France*, appl. no. 11598/85 (see ECtHR decision of 11 July 1989).

⁴⁰ Appl. no. 69042/01.

⁴¹ Cf. D. Slater, S. Thomas, D. Waelbroeck, ‘Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?’ (2008) 4 *The Global Competition Law Centre Working Papers Series* 17, available at <http://www.gclc.coleurop.be>; M. Bernatt, ‘Prawo do rzetelnego procesu...’, p. 57.

constituted an argument against the criminal character of the responsibility. The arguments used by ECtHR in this case were controversial however, and not only because it didn't consider the fact that the antitrust law serves a public interest; they were also problematic because one can argue that at least some of the behaviors involved constituted an infringement belonging to the 'malum per se' category. Certainly some practices restricting competition may belong to such a category⁴².

Notwithstanding the above, one has to agree with some of the other arguments used in the decision, which referred to the character of responsibility for behaviors categorized above as 'secondary' anti-monopoly matters, and to the character of the sanction imposed on the undertaking. The ECtHR stated that behaviors consisting of 'obstructing the authorities' investigation' do not belong to 'substantive' antimonopoly responsibility⁴³. Even if the ECtHR had stated that the free competition should be protected in the public interest, this assessment would not change the fact that this case concerned behaviors belonging to the "secondary" rung of antimonopoly responsibility. Therefore, as has been pointed out earlier, the criminal character of the pecuniary penalties imposed by the UOKiK President for non-execution of his or her decisions, orders or judgments as stated in Article 107 of the Act, or for infringing upon the obligations of participants of proceedings, are not imposed as derelictions of responsibility stemming from generally applicable norms as they are understood by the ECtHR.

2. The aim of the norm

The second criteria distinguished in the ECtHR jurisprudence is the 'aim of the norm'. This should be understood as the aim of the burden imposed by it. If the aim of the sanction is repression or prevention linked with repression⁴⁴, this would testify to the criminal character of an offence. An example of such a case might be the 'additional charges' imposed by fiscal authorities in tax cases for wrongly referring to the tax base or the custom base⁴⁵. The ECtHR

⁴² See M. Król-Bogomilska, *Kary pieniężne...*, p. 39.

⁴³ This corresponds to the objections raised in Polish doctrine. While analysing the character of such pecuniary fines, M. Król-Bogomilska noticed their relationship with fines being a measure of administrative execution; cf M. Król-Bogomilska, *Kary pieniężne...*, p. 58.

⁴⁴ ECtHR judgment of 24 February 1994, *Bendenoun v France*, para. 47; ECtHR judgment of 21 February 1984, *Özurk v Germany*, para. 53; ECtHR judgment of 2 September 1998, *Lauko v Slovakia*, appl. no. 26138/95, para. 58.

⁴⁵ ECtHR judgment of 24 February 1994, *Bendenoun v France*, paras. 45–47; ECtHR judgment of 29 August 1997, *A.P., M.P. i T.P. v Switzerland*, appl. no. 19958/92, para. 39.

has similarly treated sanctions for traffic offences⁴⁶, and pecuniary fines for participating in an illegal demonstration⁴⁷. If the aim of the measure is prevention only and there is no element of repression, the ECtHR does not treat such a matter as criminal in nature⁴⁸.

If the sanctions imposed by the UOKiK President are analyzed from this perspective, the following sanctions should be perceived as preventive: assessment of a practice as restricting competition and an order to refrain from it or declaration of its discontinuation, or sanctions consisting of obliging the undertaking to exercise or refrain from certain commitments. The aim of such sanctions consists in restoring the state of legality and preventing the repetition of the practices concerned. It must be underlined that this preventive aim is fulfilled without a 'repression element.' Subjectively such sanctions might be perceived as limiting the freedom of action of an undertaking, but apart from restituting a state of events in accordance with the law, they do not place any additional burden on the undertaking concerned.

One has to similarly assess sanctions ordering the division of an undertaking or the disposal of the entirety or part of the assets of an undertaking, disposal of the control over the undertaking or undertakings, or the dissolution of a company over which the undertakings have joint control [Article 21(2) and (4) of the Act]. These actions serve to reestablish the state of competition and to leverage the negative effects of its distortion⁴⁹.

The reasoning of the ECtHR in *Neste St. Petersburg v Russia* should be recalled here. The ECtHR stated in that case that the character of the sanction imposed on the undertaking was not criminal inasmuch as the sanction consisted of confiscation of profits stemming from the infringement of antitrust law. The aim of the sanction was prevention and restoration of the state of affairs to the *status quo ante*.

Sanctions consisting of pecuniary fines based on the provisions contained in Article 106(1)-(3) of the Act should be assessed differently. The aim of these sanctions is not compensation for damages caused by behaviors found to infringe the norms of competition law. The claims of entities harmed by those offences are not remedied from this source⁵⁰. The fines serve to impose such a financial burden on an undertaking that would prevent it, as well as other

⁴⁶ ECtHR judgment of 23 October 1995, *Schmautzer v. Austria*, appl. no. 15523/89, paras. 26–28; ECtHR judgment of 2 September 1998, *Kadubec v Slovakia*, appl. no. 27061/95, paras. 46–47, 50–53; ECtHR judgment of 23 September 1998, *Malige v. France*, appl. no. 27812/95, para. 34, 39.

⁴⁷ ECtHR judgment of 29 April 1988, *Belilos v Switzerland*, appl. no. 10328/83, para. 62.

⁴⁸ Such conclusion could *a contrario* be drawn from the ECtHR judgment of 21 February 1984, *Öztürk v Germany*, para. 53; ECtHR judgment of 2 September 1998 *Lauko v Slovakia*, appl. no. 26138/95, para. 58.

⁴⁹ M. Błachucki, S. Józwiak, 'Sankcje strukturalne...', p. 452.

⁵⁰ M. Bernatt, 'Prawo do rzetelnego procesu...', p. 56.

undertakings, from infringing Articles 6, 9 and 13 of the Act. As the sanction imposed for such offences has both a preventive and repressive function⁵¹, such offences should be deemed to be of a criminal character.

It has to be underlined that when assessing the nature of an offence, the ECtHR does not consider its gravity. This is reflected in the fact that some offences are qualified as criminal even though, from the social point of view and taking into account the value of the public good protected, they are of a 'minor' character. Thus the legislators qualify such acts as 'petty offences'⁵². Similarly, offences consisting of minor order infringements where no negative moral appraisal occurs may be treated by the ECtHR as criminal matters because of the purpose of the sanction imposed⁵³.

The principle, upon which responsibility is imposed, is also not taken into consideration by the ECtHR. In the decisions of ECtHR this element of the structure of responsibility is not determinative in assessing the nature of a particular case as to whether it constitutes a responsibility⁵⁴. The fact that the responsibility is of an objective character does not preclude treating it as a criminal responsibility.

V. Type and severity of penalties

The third criteria for distinguishing a criminal matter is the type and severity of the penalty established by a specific regulation. It should be noted that both the type and the severity of a penalty are relevant. If the penalty involves a imminent deprivation of liberty, this fact alone is sufficient to qualify an offence as criminal. The word 'imminent' is important however, and in the *Engel v Netherlands* judgment⁵⁵ the ECtHR stated that in exceptional

⁵¹ See M. Król-Bogomilska, *Kary pieniężne...*, pp. 184–195; M. Bernatt, 'Prawo do rzetelnego procesu...', p. 56; D. Miąsik, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 1597, cf. A. Andreangelli, *EU Competition Enforcement and Human Rights*, Cheltenham, Northampton 2008, p. 26.

⁵² ECtHR judgment of 25 August 1987, *Lutz v Germany*, appl. no. 9912/82, para. 55; ECtHR judgments of 23 October 1995: *Schmautzer v Austria*, appl. no. 15523/89, para. 26; *Pfarmeier v Austria*, appl. no. 16841/90, para. 31; *Pramstaller v Austria*, appl. no. 16713/90, para. 30; *Umlauf v Austria*, appl. No. 15527/89, para. 29; ECtHR judgment of 2 September 1998, *Kadubec v Slovakia*, appl. No. 27061/95, paras. 46–48, 50–53; ECtHR judgment of 9 October 2003, *Ezeh and Connors v United Kingdom*, appl. No. 39665/98, 40086/98, para. 104.

⁵³ See P. Burzyński, *Ustawowe określenie sankcji karnej*, Warszawa 2008, pp. 52–53.

⁵⁴ Cf ECtHR judgment of 7 October 1988, *Salabiaku v France*, appl. no. 10519/83, paras. 27–28; ECtHR judgment of 23 July 2002, *Janosevic v Sweden*, appl. no. 34619/97, paras. 68, 101.

⁵⁵ ECtHR judgment of 8 June 1976, *Engel v Netherlands*, appl. no. 5100/71, para. 82.

circumstances the time and the manner of executing this penalty might constitute an argument against its criminal character.

As for pecuniary fines, there is no way of establishing a severity level of this sanction *in abstracto* as a test for qualifying a matter as criminal (which would imply the automatic application of the procedural guarantees stemming from Article 6 ECHR). In addition, it has to be noted that for the ECtHR it is the severity of the regulation and not its practical application in a concrete case that matters⁵⁶. In some judgments, a pecuniary fine exceeding 2500 euro was assessed as insufficient for qualifying a matter as criminal⁵⁷, while in others a pecuniary fine corresponding to 400 euro was, in the ECtHR's judgment, sufficient to trigger the application of the procedural guarantees set forth in Article 6 of the Convention⁵⁸.

As for other types of sanctions, the ECtHR has assessed their actual severity. For example, in the *Malige v France* judgment of 23 September 1998 it treated the deprivation of a driving license as so severe that the matter was considered to be criminal⁵⁹. In giving the reasons for its judgment, the ECtHR referred to the fact that the use of a car is so general and prevalent that the deprivation of this right testifies to the severity of the sanction. On the other hand, the deprivation of electoral rights for a year⁶⁰ or the deprivation of a license to sell alcohol⁶¹ were not considered severe enough to constitute criminal sanctions. This shows that the assessment made by the ECtHR concerning the degree of severity of a penalty makes reference to the surrounding conditions in which the penalty is carried out.

In attempting to transfer these reflections to the character of sanctions imposed on undertakings as a result of antitrust proceedings, one has to stress that both types of sanctions – criminal and non-criminal – might be burdensome for an undertaking. Even if a sanction is aimed at the restoration of the lawful state of affairs, it nonetheless constitutes an obligation for an undertaking to refrain from certain practices or to introduce certain changes in the undertaking's structure. Nonetheless if the Act on the protection of competition and consumers provided only for this type of sanctions, the

⁵⁶ ECtHR judgment of 27 February 1992, *Societe Stenuit v France*, appl. no. 11598/85 (see ECtHR decision of 11 July 1989).

⁵⁷ ECtHR judgment of 24 September 1997, *Garyfallou Aebe v Greece*, appl. no. 18996/91, para. 34.

⁵⁸ ECtHR judgment of 22 May 1990, *Weber v. Switzerland*, appl. no. 11034/84, para. 34; ECtHR judgment of 22 February 1996, *Putz v Austria*, appl. no. 18892/91, para. 37, in which a pecuniary fine exceeding 1500 euro was not considered sufficient to classify the matter as criminal.

⁵⁹ ECtHR judgment of 23 September 1998, *Malige v France*, appl. no. 27812/95, para. 39.

⁶⁰ ECtHR judgment of 21 October 1997, *Pierre-Bloch v France*, appl. no. 24194/94, para. 58.

⁶¹ ECtHR judgment of 7 July 1989, *Tre Traktörer Aktiebolag v Sweden*, appl. no. 10873/84, para. 46.

antitrust responsibility would not be considered criminal. They cannot be considered sanctions with a high degree of severity if their consequence consists in no other additional burden than the restitution of the lawful state of affairs. However if the Act provided for a sanction consisting of the prohibition of a certain activity, then despite its preventive function its level of severity would testify to its criminal character.

The analysis of the pecuniary fines provided for in Article 106(1)(1)-(3) of the Act leads to different conclusions. The reasons for this lie in the variations in the character and extent of these sanctions. According to Article 106, the UOKiK President might impose upon an undertaking a maximum pecuniary fine of 10% of the revenue earned in the accounting year preceding the year within which the fine is imposed. This testifies to a high degree of severity, even if one takes into account the fact the fines are imposed on undertakings. The setting of the maximum level of the fine in such a way that it refers to an undertaking's total revenue also means that the legislator has not set an absolute maximum ceiling for such a fine. This is an argument for perceiving the fine as very severe⁶².

The cardinal importance of pecuniary sanctions as instruments serving to protect competition and consumers is underlined in the legal doctrine⁶³. Because they are so burdensome, the threat of their occurrence is a strong preventive instrument in anti-monopoly law⁶⁴. Taking all this in consideration, one has to agree with the ECtHR that the level of fines imposed in antitrust proceedings would also be an argument for treating this type of responsibility as criminal⁶⁵.

VI. Conclusions

What are the consequences of considering the responsibility imposed on undertakings in antitrust proceedings as a criminal responsibility? The ECtHR does not follow a formal rule that a matter must belong to a particular branch of law in order for the protections of Article 6 to apply, because its task is to review whether any regulation is in conformance with or contrary to the

⁶² See M. Bernatt, 'Prawo do rzetelnego procesu...', p. 57; K. Kowalik-Bańczyk, *The issue of the protection of fundamental rights in EU competition proceedings*, z. 39, Centrum Europejskie Natolin, Warszawa 2010, p. 26.

⁶³ A. Stawicki, [in:] A. Stawicki, E. Stawicki (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2011, p. 1161.

⁶⁴ A. Stawicki, [in:] *Ustawa...*, p. 1161.

⁶⁵ ECtHR judgment of 27 September 2011, *Menarini Diagnostics v Italy*, appl. no. 43509/08, paras. 41–42.

standards set forth in Article 6 of the Convention. The States, Parties to the Convention, cannot by the formal qualification of a particular case avoid their obligation to protect the guarantees stemming from the Convention.

It is useful here to recall the ECtHR judgment in *Malige v France*, where the Court found that the sanction imposed by administrative organs was of a repressive nature⁶⁶. According to the ECtHR, France had not however infringed Article 6 of the Convention inasmuch as, in the process of judicial review of cases involving the deprivation of driving licenses, the guarantees of a fair trial in criminal matters were assured. On the other hand, in the case *Belilos v Switzerland*⁶⁷, concerning a fine for participation in an illegal demonstration, the ECtHR found that such a sanction was of a criminal character. In the meantime it underlined that the practice of letting administrative organs decide cases on sanctions for minor offences is allowable, if there is a possibility of judicial review that guarantees that the provisions of Article 6 of the Convention are complied with.

In order to define the guarantees that have to be protected in antitrust proceedings one has to refer to the ECtHR jurisprudence concerning cases that do not belong to the 'core of criminal law'. In such cases the level of protection can be lower⁶⁸. Such a qualification of antitrust proceedings and its consequences for the protections attendant in antitrust procedures can give rise to considerable doubts⁶⁹. It raises the question of the scope of application of the guarantees contained in Article 6 of the Convention to such proceedings. Following the indications given in the *Menarini Diagnostic v Italy* judgment⁷⁰ it does not mean that any State would be relieved from its obligation to protect the guarantees required in criminal matters. However, it can significantly influence their application. It means, *inter alia*, that the sanction may be imposed by an administrative organ, provided that this decision is subject to a full judicial review.⁷¹ In antitrust proceedings all procedural guarantees for criminal matters contained in Article 6 of the Convention should be safeguarded⁷².

To conclude, the analysis of the nature of undertaking's responsibility in antitrust proceedings in light of the 'criminal charge' criteria established by the ECtHR jurisprudence leads to the conclusion that one cannot apply these

⁶⁶ ECtHR judgment of 23 September 1998, appl. no. 27812/95, para. 50.

⁶⁷ ECtHR judgment of 29 April 1988, *Belilos v. Switzerland*, appl. no. 10328/83, para. 68.

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

⁶⁹ See M. Bernatt, 'Prawo do rzetelnego procesu...', pp. 60–62.

⁷⁰ ECtHR judgment of 27 September 2011, appl. no. 43509/08, para. 62.

⁷¹ ECtHR judgment of 27 September 2011, appl. no. 43509/08, para. 59.

⁷² M. Bernatt, 'Prawo do rzetelnego procesu...', p. 61–62. See also: M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*, Warszawa 2011, pp. 70–74.

criteria to those decisions of the UOKiK President that do not attribute any responsibility to an undertaking, i.e. decisions on consent, refusal of consent, or prohibition of a concentration. Decisions imposing sanctions for an undertaking's behavior for breaching orders or prohibitions should be divided into those that concern 'primary' and 'secondary' antitrust responsibility. The second category does not possess a criminal character as it does not consist of responsibility for 'generally prohibited' behaviors within the meaning of ECtHR jurisprudence. As for other examples of responsibility – when they are linked with the imposition of pecuniary fines for antitrust infringements as set forth in Article 106(1)(1)-(3) of the Act – the undertaking's responsibility should be considered a criminal responsibility.

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