DOI: 10.17573/cepar.2018.1.9 *1.01 Original scientific article*

New Approaches to the Right to be Heard in Relation to the Application of Alternatives to Administrative Sanctions[1]

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ABSTRACT

The right to be heard is one of the key instruments that ensure adequate protection of the participants´ rights during the proceedings before the administrative authority. This requirement is especially important in administrative offences proceedings due to fact that administrative bodies may issue also very serious sanctions and it is important to enable the offenders to influence the outcome of proceedings. Therefore may participants raise their objections, opinions, suggestions. The authors also focus on issues related to the possibility of alternative approaches to administrative sanctions and related issues concerning ensuring adequate position of offender. These questions have not yet attracted doctrinal attention. Article analyses the currently accepted new legislation on administrative offences proceeding, with overlaps resulting from the Council of Europe documents and including basic comparison with the processing on administrative offences in Germany and Poland. In addition, to the basic analysis of the new legislation benefits, the authors pay attention to the new instrument of "legal settlement" that allows administrative authorities to approve agreement between offender and injured party about committed administrative offence and the associated remedy. The new institute is worthy researching, particularly because it is one of the first attempts to adopt alternative approaches to administrative offences proceedings and brings new challenges for administrative authorities. This new institute is compared with the legislation in Germany and Poland. Also methods of analysis of legal requirements of legal documents of Council of Europe and national legislation, normative analysis, literature review and deduction were used in this connection. Authors reached a rather interesting conclusion that the approaches to ADR in administra-

1 *This article resulted from the research project within the Czech Science Foundation (GAČR) No.GA13-30730S* Measures of protection of rights in public administration, their system and effectiveness.

tive offences proceedings are in all three examined different while the article deals more closely with these differences.

Keywords: right to be heard, administrative offences, administrative offences proceedings, alternative dispute resolution

JEL: K23

1 Introduction

The article focuses on procedural aspects of dealing with the administrative offences where administrative authorities or courts exercise sanctioning powers against addressees of law who have committed an offence which is not serious enough to reach the same degree of seriousness as criminal offences. Authors deal with current Czech regulation of the offence proceedings in the area of entitlements and obligations arising from the right to be heard which have a direct relation to the right of defence not only from the Czech point of view, but look also at the regulation in Germany and Poland.[2] The authors therefore ask whether national legislations of all three countries differ fundamentally from each other and whether is here represented the process of Europeanization.

The mentioned right of defence is usually understood as the sum of all legal entitlements of a person against whom proceedings on any criminal charge are held to defend him/herself against the charge, reduce or refute his/her liability, make the respective authority establish all facts supporting his/her defence, and make the authority discharge him/her without sanction or impose less stricter sanction on him/her where possible.

The right to be heard and the obligations arising from it are regularly included in the broader framework of the right of defence and they are not new for administrative authorities or courts as they are a long-term part of the Council of Europe documents and already have a certain tradition in the Czech law.

The paper also takes into account a broader perspective of the right to be heard in administrative offence proceedings namely the traditional systems

2 The Czech Republic, Germany and Poland were selected to comparison on purpose because administrative offences are penalised in three main types of administrative offence proceedings. In the Czech Republic the matter is in the hands of, above all, administrative authorities; in Germany part of the proceeding is carried out directly by courts; finally, in Poland it is almost exclusively carried out by courts. The authors are convinced that the right to be heard is not influenced by the institution that conducts the proceeding (an administrative authority or an independent court). In other words, the participant can voice a complaint to the same extent at an administrative authority as well as at an independent court. This is further borne out by the fact that both administrative authorities and courts can receive such complaints and the right to be heard is acknowledged at proceedings held by either of them (as granted by Article 6 of the ECHR). Actually, this conclusion can find support in the ECtHR judgement in case Öztürk v. Germany of 21/2/1984, application No. 8544/79, which requires that minimum procedural standards be guaranteed in proceedings on administrative offences (including the right to be heard) as well as in the related ECtHR judgement rendered on 3/2/2005, application No. 46626/99 (Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania), specifying the entitlements following from the right to be heard in more detail.

of public administration where consensual approaches within the realm of administrative sanctioning were frequently deemed inapplicable. The current legislation enables the person accused of an offence to be more active in the proceedings and, under certain circumstances, to influence the outcome of the proceedings, or rather the decision to impose or not to impose an administrative sanction, beyond the usual scope of the right of defence, or rather the usual scope of the right to be heard. The authors also ask if the formalized processes are appropriate for dealing with administrative offences, and whether there is a tendency to promote more alternative approaches to dealing with administrative offences and to what extent they differ from each other in all three countries.

Such a measure was recently introduced in Czech law by the possibility to conclude a "settlement" agreement between a person accused of an administrative offence, on the one hand, and the aggrieved party, on the other hand; however, the authors believe that this measure exceeds the above scope of the right of defence, and thus of the right to be heard, because the administrative offence is, in fact, dealt with by the person accused of the administrative offence and by the person harmed by it (aggrieved party). The role of the administrative authority dealing with an administrative offence has been reduced and it cannot be described even as a mediatory role.

The authors focus more closely on this concept, which is new in terms of administrative sanction, while identifying the features of similar measures in several concepts introduced in the past. At the same time, they reflect on the systematic nature, availability and procedural framework of those new measures from the viewpoint of European standards regarding the right to be heard.

The authors realize that the necessary prerequisite for the application of these alternative solutions is the sufficient openness and transparency of such a proceedings towards the participant, as well as the increased flexibility of the administrative authority. Focus was also placed on the efficiency of the legislative measures in question, or rather on the conditions for fulfilment of their intended purpose in practice. The methods of analysis of legal requirements of legal documents of Council of Europe and national legislation, normative analysis, literature review, deduction and partial comparison with German and Polish legislation were used in this connection.

2 The Right to Be Heard in Legal Documents of the Council of Europe

If found guilty of an offence, the offender faces negative consequences—a sanction meted out by the administrative decision. It is thus desirable that the offender's rights are fully acknowledged at hearings before administrative authorities (courts). These rights should enable them to influence the outcome of the proceeding by means of voicing opinions, bringing complaints, etc. Naturally, the right to be heard serves this very purpose.[3]

3 See also Endicott, 2011, p. 115.

Its importance within the system of administrative sanctioning is stressed by the attention paid to it by the soft law of the Council of Europe. Resolution (77)31 of the Committee of Ministers of the Council of Europe considers the right to be heard one of the crucial principles of the protection of individuals and their rights when they become part of the administrative procedure.[4] The principle is further upheld by Recommendation of the Committee of Ministers of the Council of Europe (91) 1, which deals with the issues of administrative sanctions and explicitly states the obligation to give a participant the opportunity to be heard (Principle 6, par. 1, section iv).[5]

The right to be heard is also stated in Article 14 of the Recommendation of the Committee of Ministers (2007) 7 on good administration. This article mentions the right to be heard (not only) with regard to the matter of the proceeding. This is a key aspect of the right to be heard[6] since it enables the participant to be heard and to express his own opinions and bring evidence at the primary proceeding[7] (and not necessarily as late as at the appellate proceeding). The right to be heard should be reflected in the decision, especially in the reasoning of the decision. Both the decision and its reasoning should follow upon the previous procedure of the administrative authority and the reasoning should include information about how the participant's right to be heard was observed during the proceeding.

The importance of the right to be heard is also underlined by its inclusion in the handbook called The administration and you - A handbook, issued by the Council of Europe. It says here that in order to maintain justice between a participant and the administrative authority it is crucial that the participant is given the opportunity to be heard, i.e. to highlight any relevant facts, to deliver arguments and to supply evidence.[8] The right to be heard was also addressed by the Research Network on EU Administrative Law (ReNEUAL), which has included the right to be heard in Model Rules on EU Administrative Procedure.[9] Proceedings of administrative offences are not regulated only by the soft law of the Council of Europe though, there are also requirements found in Article 6 of ECHR.

4 In respect of any administrative act of such nature as is likely to affect adversely his rights, liberties or interests, the person concerned may put forward facts and arguments and, in appropriate cases, call evidence which will be taken into account by the administrative authority.

5 He shall have opportunity to be heard before any decision is taken.

6 Košičiarová, 2012, p. 98, also Svoboda, 2007, p. 302.

7 The situation is different in the case of requests; here the participant exercises the right to a certain extent by the very act of submitting the request.

8 The administration and you - Principles of administrative law concerning the relations between administrative authorities and private persons A handbook [online]. Strasbourg: Council of Europe, 1980, pp. 342 – 343.

9 III-23 Right to be heard by persons adversely affected
(1) Every party has the right to be heard by a public authority before a decision, which would affect him or her adversely, is taken.

3 The Right to be Heard in Article 6 of the ECHR

It is rather disputable whether the requirements in Article 6, par. 1 of the ECHR can be applied to administrative proceedings, or rather to what kind of administrative proceedings.[10] R. Pomahač stresses the importance of the document with regard to procedural aspects and the right for a fair trial.[11] J. Kmec holds the opinion that Article 6, par. 1 is applicable in administrative proceedings dealing with matters of 'criminal' and 'civil' law.[12] S. Nöhmer believes that Article 6, par. 1 is not applicable to the majority of administrative proceedings; nonetheless, he admits that it may be applied providing the nature of the proceeding allows it and providing the extent does not exceed the character of an administrative proceeding[13] It seems that an administrative proceedings dealing with offences are a case in point. Finally, U. Stelkens is convinced that administrative proceedings do not generally allow the application of Article 6, par. 1 requirements.[14]

Although the theory is not uniform with regard to the application of Article 6 of the Convention, the positive exception between administrative proceedings is administrative offences proceedings, where the application of Article 6 of the Convention is confirmed and Article 6 of the Convention is applicable to a reasonable extent in its entirety. [15] When dealing with administrative offences, it is generally accepted that the "above-standard" enshrined in paragraphs 2 and 3 is ensured in the proceedings, as administrative offences fulfil the so-called Engel Criteria. [16] This conclusion is confirmed by the case law of the European Court of Human Rights[17] and the Czech legal practice. [18] The right to be heard is therefore part of the right for a fair trial, which is borne out not only in academic literature, but also in the practice of the ECtHR.[19] The application of the procedural guarantees of the Convention in the administrative procedure is undoubtedly linked to the fundamental risks of judicialization of the entire administrative procedure, which can ultimately lead to overburdening of the administrative authorities. It is therefore necessary to ensure that procedural institutes are not abused, for example, with the intention of avoiding sanctions.

10 During proceedings at a court these doubts do not appear.

11 Hendrych et al., 2016, p. 748.

12 The author concerned provides an exhaustive analysis in Kmec et al., 2012, pp. 580 – 600, to which we refer in detail.

13 Nöhmer,2013, p. 29

14 Stelkens, Bonk, Sachs, 2014, p. 73.

15 Judgment of the ECRH of 2/9/1998, application no. 26138/95 (*Lauko v. Slovakia*).

16 The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence and the third is the degree of severity of the penalty that the person concerned risks incurring.

17 „The general character of the rule and the purpose of the penalty, being both deterrent and punitive, is sufficient to show that the offence in question was, in terms of Article 6 of the Convention, criminal in nature" Case *Öztürk vs. Germany.*

18 Czech Supreme Administrive Court case no. 4 As 2/2005 – 62.

19 Grabenwarter and Holoubek, 2014, p. 268. The right to be heard does not warrant the right for a fair sentence, i.e. such a sentence that is in favour of the participant, but it should make sure the proceeding is fair. See also Molek, 2012, p. 205, Kmec et al., 2012, p. 755. From the practice of the ECtHR see for example Judgment of 3/2/2005, complaint no. 46626//99 (*Partidul comunistilor (nepeceristi) and Ungureanu v. Romania*).

In this context, the authors believe that it is necessary to emphasise the need for an appropriate legislative framework of sanctions that may be imposed by administrative authorities which complies with the principle of subsidiary of repression, or rather enables the imposition of another (less strict) sanction, where possible (e.g. less harmful offences committed by negligence).

4 Administrative Offence – A Brief Overview

It now seems apposite to provide a brief overview of what constitutes an administrative offence. The overview is based on legal regulations of the three countries in question.

In the Czech Republic administrative offences are mainly misdemeanours, which are defined by Act no. 250/2016 Coll., Art. 5 as 'unlawful acts labelled as misdemeanours in the system of law which accomplish the necessary elements stipulated by law, if they are not a crime'. In Germany administrative (minor) offences are the so-called 'Ordnungswidrigkeiten', which are defined in Act on Ordnungswidrigkeiten, Art. 1, par. 1 as unlawful conduct stipulated by law and punishable by a fine. Finally, in Poland a misdemeanour is such a socially dangerous act that is forbidden by law at the time of commission under the threat of arrest, restriction of the freedom of movement, a fine of up to PLN 5000 or an admonition.

The notion of administrative offence does have certain common elements in the three countries discussed in this paper. Generally speaking, it may be asserted that administrative offences are unlawful acts which are defined by law and which are punishable by enforceable public law sanctions. Furthermore, it is unlawful conduct that is not serious enough to constitute a crime.[20]

5 Czech Republic – The Current Situation

Administrative authorities in the Czech Republic have traditionally had a large-scale sanctioning power. Legal regulations contain no fewer than 7300 objective elements of administrative offences[21] which administrative authorities are called upon to deal with.

This considerably large scope of duties has been endowed with various kinds of imperfections, also with imperfections in the area of the right to be heard. The process of its (i.e. the right to be heard) firm presence in legal regulations and legal practice was far from easy because the authorities often had to do with previous legislation, which was imperfect (insofar as it failed to reflect the particularities of administrative sanctioning) and which also was more or less affected by the practice of, above all, the Supreme Administrative Court. The imperfect legislation led, among other things, to an approved use of anal-

20 The authors purposefully disregard disciplinary offences (i.e. offences characterised by a specific public-law civil-service relation between the state and its employees) as well as procedural offences (i.e. offences connected with a breach of obligation to perform procedural duties during administrative (court) proceedings. (compare e.g. Prášková, 2013, pp. 148–151).

21 Explanatory memorandum to Act no. 250/2016 Coll. on liability for offences.

ogy with criminal law including its procedural aspects. The unfortunate situation placed considerable (sometimes rather creative) demands on the authorities and it essentially meant that the position of the persons concerned (i.e. the accused people) was insufficiently stable and predictable. A case in point is the problem of concentration in proceedings according to Article 82, par. 4 of the Rules of Administrative Procedure[22], which makes it clear that the intent of the legislator is to introduce concentration into administrative proceedings; the intent was, however, interpreted by the case law as invalid for proceedings of administrative offences.[23] In this particular example, one may talk about a positive influence of the case law, because a new act does away with this imperfection, directly drawing on the given judgment in the explanatory memorandum.[24]

It is worth pointing out here that the new legislation is heavily based on the former practice of the Supreme Administrative Court and of the ECtHR in other aspects, too. On numerous occasions the legislator explicitly states that the main reason for the acceptance of a provision is the case law. Moreover, the legislator maintains that Engel criteria can be applied to administrative offences (which was not the case before), which creates the demand to ensure the participants the rights to which they are entitled to.

A quick look into legal regulations that are applied by administrative authorities (courts in Poland) when dealing with administrative offences reveals that all the three countries enable the participants to voice complaints, submit proposals and offer evidence and facts with a view to influencing the outcome of the proceeding. The given provisions are essentially little different[25] since they come from a common basis: the soft law of the Council of Europe

22 'New facts and new evidence requests stated in the appeal or during the appellate proceeding will be taken into consideration only if they could not have been offered before. If participants protest that they were not allowed to do or say something in the first instance proceeding, this must be done along with the appeal.'

23 According to Judgment of 7/4/no. 5 As 7/2011 – 48, „provision of Article 82 par. 4 of Rules of Administrative Procedure attempts to balance the rights of participants that are stipulated in Article 36, par. 1; namely the right to offer evidence and state facts during the entire proceeding until the decision is reached, and the right to proceed without unnecessary delays (...) If the administrative authority is required to determine all the decisive facts in favour or not of the person who is about to be sanctioned without a proposal (naturally without a proposal from the person to be sanctioned), the administrative authority cannot accept requests for further evidence based on Article 82, par. 4 of Rules of Administrative Procedure. The provision of Article 82 par. 4 of Rules of Administrative Procedure does not apply to proceedings in which there is a sanction imposed by the public authority.

24 According to Article 97, par. 1 of the new act on liability for offences 'the accused person can offer new facts and evidence in the appeal or during the appellate proceeding'.

25 Article 36/1–3 Rules of Administrative Procedure (1) Unless otherwise provided by law, participants may propose evidence and file other proposals throughout proceedings until the decision is issued; the administrative authority may declare by resolution the time until when participants may file proposals. (2) Participants may express their opinion in proceedings. If they request it, the administrative authority shall provide them information about the proceedings, unless otherwise provided by law. (3) Unless otherwise provided by law, participants must be given an opportunity to comment on the background materials for the decision before the decision in the matter is issued; this shall not apply to a petitioner whose petition was fully granted or to a participant who waived their right to comment on the background materials for the decision.
According to Article 66/1 *Verwaltungsverfahrengesetz* In formal administrative proceedings the participants shall be afforded the opportunity of making a statement before a decision is taken.

and Article 6 of the ECHR. The right to be heard is thus strongly affected by common principles of administrative sanctioning[26] applicable within the area of European law and its content is formed by the process of Europeanisation, or rather it can be perceived as an aspect of the process.

The new act on liability for offences does not always make matters easier though. On the contrary, in some cases it offers a too complicated process of dealing with administrative offences[27], which inevitably slows down the effectiveness of administrative sanctioning, which should be informal and simple, especially given the fact that the matters dealt with are usually of little danger to society. To illustrate the aforementioned demanding procedural solution on an example, reference can be made to the conditions for holding an oral hearing, which – in contrast to the former regulation – is no longer a mandatory part of full proceedings on an administrative offence; however, in terms of the requirements for a fair trial regarding administrative sanction, the conditions for the application of this significant procedural concept are rather unclear, which is undesirable, to say the least. This, once again, may trigger the "rescue" role of judicial review, which will probably (have to) create the desired state in terms of predictability of the procedural steps to be taken by administrative authorities, together with a clear framework for the exercise of the rights by the parties.

Based on the above example – along with certain other provisions of the law which will be addressed below in connection with the regulation of "settlement" – the authors believe that, as discussed below, it would be better to deal with administrative offences in a simple, or rather less formalised, procedure that should be generally available, especially for specified types and/or cases of less harmful administrative offences, and that should meet the requirements for a fair trial in administrative sanction.

According to Article 367/1 of the Polish Code of Criminal Procedure The President allows the parties to be heard as to any matter subject to the outcome.

26 As follows from the interpretation of the right to be heard in the regulations of the Council of Europe.

27 Article 82 Oral hearing Act no. 250/2016 Coll. on liability for offences
(1) The administrative authority may order an oral hearing.
(2) The administrative authority orders an oral hearing at the offender's request if it is unavoidable for the acknowledgement of his rights; otherwise, the proposal is rejected with a statement revealed to the offender only. The offender must be made aware of his right for an oral hearing. The administrative authority orders an oral hearing even without the offender's request if it is necessary for the a fair assessment of the situation. The first instance administrative authority orders an oral hearing without the offender's request if the offender is a juvenile. Under the new legislation administrative authorities thus face a difficult task of assessing whether oral hearings are necessary in the light of protection of the offender's rights. Even though the legislator clearly intended to speed proceedings up and to make life easier for administrative authorities, we believe that it is extremely difficult to justify the lack of need for an oral hearing. The administrative authority will therefore have to take into consideration even hypothetical arguments that the offender may think of (that the offender may have put forward had a hearing been ordered). With ordering a hearing is also linked the question of a deadline by which the offender may ask for an oral hearing, because the act does not state this and one may assume that in real life this will be a very frequently used type of obstruction.

6 Subsidiary Nature of Administrative Sanction vs. Right to Be Heard

In the authors' opinion, the right to be heard is one of the main instruments that allow participants of a proceeding to become an active part of it, i.e. with a power to influence the outcome and be active during the proceeding. In other words, it enables the participants to make their proposals and opinions be taken into account and influence the final outcome. Yet, a typical proceeding is still characterised by the feelings of superiority of administrative authorities or courts and a high degree of formalisation and impersonality of the whole process.

Such a procedural approach undoubtedly allows adequate sanction of administrative offences, but at the same time it does not prevent the participants from feeling passive in the proceeding.

In substantive terms, this is also a question of application of the principle of subsidiarity of administrative sanction.

Besides the public interest, modern public administration also respects the rights and legitimate interests of the persons concerned with which it shall interfere ..."*only under the conditions stipulated by the law and to the extent necessary"*,[28] as follows from the general principles of administrative law, and also from the principles of good governance, which are concentrated in the basic principles of activities of administrative authorities presented in the Czech Code of Administrative Procedure (Sections 2 to 8).

The general principles mentioned above dominate the public administration in general and, therefore, also apply to administrative sanction. Nevertheless, administrative sanctioning is also based on specific principles, both substantive and procedural, which were included, more or less, in the new Act on liability for administrative offences.

In addition to the specific principles described above, administrative sanction is also subject to the general *principle of subsidiarity of repression under the (administrative) law*, which is supplemented, in specific cases, with the *principle of proportionality* and the *principle of individualised* administrative sanction.

As far as the procedural principles are concerned, one should also mention the broader *right of defence*, which entails several subsidiary procedural rights. However, this principle is designed for the relationship between the accused, on the one hand, and the authority invoking his/her liability for an offence[29], on the other hand, and serves to address both the question of guilt and the question of sanction. However, alternative approaches to sanction also pose a new challenge – they can change the role of administrative authorities from entities strictly imposing sanction to mediators, and may also require, *inter alia,* that relationships be addressed between the offender and the person who incurred harm due to the offender's offence, where there is

28 § 2 para. 3 Rules of Administrative Procedure.
29 Prášková, 2017, p. 30 – 31.

such aggrieved party; these alternative approaches should be appropriately incorporated into the general provisions concerning the right to be heard. The above should enable to exercise, appropriately and fairly, the extended (or rather modified) role of administrative authorities, while respecting all relevant principles (including protection of the public interest and equality).

The aim of the above principles is to set conditions for administrative sanctions and their subsequent enforcement. The requirement of subsidiarity of repression under administrative law thus needs to be respected both in the legislation setting the sanctions (i.e. by the legislator) and in the area of law enforcement; however, as far as the latter area is concerned, said principle may only apply to the extent specified by the law, governed also by other principles, especially by the principle of *equality* and the *principle of legitimate expectation*.

One should not forget that imposing sanctions is not the main task of the public administration; this is only an – ultimate – measure for achieving the objectives of the administration and public tasks. Sanction should only be subsidiary, i.e. only imposed where the respective objective cannot be (sufficiently) achieved by any other means. [30]

In the current situation where criminal law itself employs diversions and certain alternative measures, similar measures should, all the more so, be used in the area of administrative law, which should not be lagging behind in this respect, i.e. in connection with enforcement of liability under administrative law. In other words, subsidiary of repression in administrative sanction should apply to the widest possible extent.

7 Fully Formalised Process: The Best Way to Be Heard?

The general requirement should also apply in administrative sanction: the *principle of efficiency* should be applicable both to procedural steps of administrative authorities and to measures adopted by them, as determined by the regulatory framework.

In overall assessment of the efficiency of administrative sanction, it is also necessary to take account of substantive and procedural aspects of administrative offences, and set a suitable procedural framework in this respect. For example, it is worth examining whether full (fully-fledged) administrative procedure is appropriate to deal with all types of administrative offences, or rather in terms of all types of sanction imposed, or whether there might be any more straightforward procedural measures or accelerated proceedings available, where appropriate.

In this connection, particular attention should be paid to a ***warning***, as one of possible administrative sanctions. Its primary role is prevention and education; it brings only "moral injury". When imposing a warning... "*the administrative authority shall notify the offender of the possible consequences of the unlawful conduct under the law if (s)he commits any such conduct in the future*". In

30 Hendrych et al., 2016, p. 297.

itself, a warning itself is only slightly repressive; its repressive character can be seen in a moral injury possibly incurred as a result of this sanction by certain offenders, especially in that they undergo proceedings of criminal nature, including charges brought against him/her[31].

It might be worthwhile to consider the efficiency of said solution, especially when examining the balance between the outcome (i.e. the effect on the offender) and procedural difficulty (unless a warning is imposed in a summary procedure – i.e. in the form of an order imposed on site).

The above considerations were inspired especially by the "notification", or rather "cautionary" function of a warning as specified above, which could either be separated in certain cases (especially with respect to offences caused by negligence when various notification or reporting obligations were violated), or rather shifted to the preliminary stage or to summary proceedings preceding full proceedings on an administrative offence. This measure would necessarily require careful assessment of the suitability of such a procedural departure in certain areas of public administration, taking into account the public interests pursued.

It might then be appropriate to link a ***notice*** of a defective state with a ***remedial measure***, while setting a deadline to remedy the defective state; this strengthens the active role of the accused in the preliminary stage.

Similar measures are presented in an unsystematic, or rather a selective manner, merely in certain specialised laws, where the respective conditions and procedures differ.[32] However, they definitely constitute an interesting stimulus for considerations and analyses regarding the future reform of administrative sanction in terms of its contents.

We believe that strictly formalised approaches may not always be effective enough as the admission of a participant as an equal partner in the proceeding may help to achieve the goal of dealing with and sanctioning the offence committed. The goal, however, is not only to sanction, but also to educate, amend and prevent further offences. We are firmly convinced that especially minor offences call for reactions which are not primarily sanctioning; instead, preventive-educational measures with emphasis on compensating the damage are deemed desirable. This can be achieved, for instance, if alternative approaches are invoked. The above follows even from Recommendation Rec(2001)9 of the Council of Europe Committee of Ministers on alternatives to litigation between administrative authorities and private parties. The widespread use of alternative means of resolving administrative disputes can bring administrative authorities closer to the public. The principal advantages of alternative means of resolving administrative disputes may be, depending on the case, simpler and more flexible procedures, allowing for a speedier and less expensive resolution, friendly settlement, expert dispute resolution, resolving of disputes according

31 This usually applies in the case of administrative offences against public order, civil cohabitation and property law.

32 For example, in the area of social security, in the Experts and Interpreters Act or in the Radio and Television Broadcasting Act.

to equitable principles and not just according to strict legal rules, and greater discretion. The regulation of alternative means should ensure that parties receive appropriate information about the possible use of alternative means and guarantee fair proceedings allowing in particular for the respect of the rights of the parties and the principle of equality. Alternative means to resolve disputes are thus nothing new in Europe; rather, from the viewpoint maintained in Recommendation Rec(2001)9 of the Council of Europe Committee of Ministers, they are considered a suitable procedure. It is thus quite surprising that, although it follows from the above that the statutory requirements following from the right to be heard are, as a result of the process of Europeanisation, almost identical in the countries compared, no such conclusion can be made with respect to alternative means of hearing administrative offences, in spite of the existence of the corresponding Council of Europe regulations. This is even more surprising in view of the fact that the possibility to apply alternative means to resolve a case are not unknown in criminal law of all the three countries.

8 Alternative Approaches in the Czech Republic

To promote consensual methods of dealing with offences, similar considerations could or should include assessment of the possibility of *greater involvement of the offender* in the corrective or reparatory role of sanction, i.e. his/her role (the significance of his/her approach to the committed offence and its consequences) should be strengthened, which should also be reflected in the procedural aspects of such measure. In principle, this would mean an expansion of the general "right to be heard" with respect to the offence – by expressing his/her opinion, the accused could significantly influence the outcome of the proceedings, and thus exclude or limit the punitive role of sanction. [33]The new act on liability for offences also saw the introduction of a hitherto unknown principle of compensation agreement, which is de facto (if the legal requirements are met) a compulsory agreement between the person accused of an offence and the victim. In this connection, the legislator drew inspiration from the provisions of the Code of Criminal Procedure, which also stipulates the possibility to conclude a settlement agreement between the accused, on the one hand, and the aggrieved party, on the other hand.[34]

This agreement must be approved by the administrative authority, and there are four conditions to be met: 1/ the agreement is in accordance with the public interest and it is sufficient with regard to the nature and seriousness of the offence as well as with regard to the extent to which the public interest was endangered, the offender and their personal situation; [35] 2/ the offender must of their own free will state that they committed the deed which is being

33 In the Czech Republic, there was a possibility in the earlier period to refrain from sanctioning if the proceeding itself led to correction of offender, or there was also the possibility of resolving minor administrative offences on the spot with so-called "agreement". Both of these solutions were based on the application of an indefinite legal concept, respectively on discretion of the administrative authority, and their application remained unclear for the entire duration of the previous law.

34 § 309 criminal proceedings act.

35 It is necessary to examine the outlined aspects in a comprehensive and interdependent way and subsequently to evaluate them in the reasoning of the decision approving the settlement

dealt with; [36] 3/ the offender has compensated the victim for the damage or has returned the unjust enrichment to the victim. The agreement stipulates the amount of compensation, the method chosen for it, alternatively, it also stipulates the amount of unjust enrichment; 4/ the offender has paid a certain sum into the account of the administrative authority. This sum, the amount of which as well as the recipient of which are determined by the authority, is accepted for a charitable cause.

An incentive for the agreement comes from the offender[37], who asks the administrative authority to determine the amount to be paid for a charitable cause as well as the recipient of the sum. [38] The administrative authority informs the offender of the recipient and of the sum to be paid and it then invites the offender to reach an agreement with the victim. Such an agreement must contain, above all, the extent of the damage caused by the offence or the amount of unjust enrichment gained by the offence. The agreement must also state the method of compensation; alternatively it contains other mutual rights and liabilities between the participants. This agreement, including all the legal requirements linked with it, is then checked by the administrative authority; if all the legal conditions are met, the agreement is approved.[39] The statement in which the offender admits their guilt is necessary if the agreement is to be accepted as a proceeding of the given offence.

The administrative authority is required to hear both the offender and the victim during the proceeding to determine the method and other circumstances of the compensation agreement. Therefore, it is necessary to order an oral hearing, which is thus logically a mandatory part of the entire process of adoption of the settlement agreement.The offender is also to receive a notice of the legal consequences of the compensation agreement. The administrative authority approves of the agreement by means of a decision which does not include a statement of guilt on the part of the offender; there are thus no further repercussions that typically follow standard decisions (e.g. an entry in the criminal record). Even though the administrative authority does not proclaim the offender guilty, the decision about the compensation agreement blocks any other potential proceedings. If and when the compensation agreement comes into force, the proceeding is finished. If the administrative authority concludes that the conditions for approval of the agreement are not met, a resolution should be issued under which the administrative authority explains the reasons for the non-approval of the agreement.[40]

(Ondrušová, 2017, p. 593).

36 In the event that the agreement is not approved, this statement can not be taken as evidence. This statement can not therefore be construed as guilty (viz judgement od the Czech supreme court 30/10/2008, no. 1 Skno 10/2008).

37 H. Prášková points out that the administrative authority does not actively conclude the agreement and it is not clear from the wording of the law how the agreement will be concluded (Prášková, 2017, p. 378).

38 To some extent, the question arises as to whether there is an advantage for offenders who have a certain amount of financial resources and also if there is or not the possibility of redeeming justice. The given amount of money can also have a corruption potential.

39 Thus if the offender reaches an agreement with the victim and other legal conditions are met as well, reaching the agreement can be required by the offender

40 Kučerová, 2017, p. 539.

We think that this method adequately maintains the balance between protecting the rights of the participant and the victim as well as the public interest, insofar as the administrative authority ensures that the approved agreement fulfils the letter of the law. Admittedly, the downside of the method which prevents its more frequent use is that it can only be applied in cases where the offence inflicts damage on a specific person.

In terms of intangible damage, or harm to honour, the Act on Certain Administrative offences again provides for a specific *amicable solution in the case of an administrative offence of harm to honour*, where the first initiative is to be taken by the administrative authority (it shall attempt "*.... to reconcile the accused with the person whose honour has been harmed.").* However, unlike the former regulation, this is no longer "settlement" in the form of mutual agreement, nor is such reconciliation approved by a decision taken by the administrative authority; the "reconciliation" is now a ground for discontinuing the proceedings by a resolution. It is thus a specific form of "diversion", and also an example of an alternative solution where the administrative authority plays the role of a mediator. However, for the time being, this procedure is taken only very rarely.

We also believe that the legislator could entertain the idea of introducing such a method that opens the door for an agreement on guilt and sanction, which is a method that exists in Czech criminal law. This method does not take into consideration the existence of a specific person harmed by someone's acts, thereby increasing the potential to be used more often. There would essentially be a contractual relation between the accused person and the state. In many administrative offences such an informal approach could result in more efficient correction of offenders while also serving the role of a preventive measure in the future. . Indeed, it should not be neglected that the concepts of diversion have considerable significance in terms of improving the reparatory and preventive functions of administrative offence proceedings, as a tool for regulating undesirable conduct of the addressees of public administration.

9. Alternative Approaches in Germany and Poland

The German law does not know the settlement agreement when dealing with administrative offences. Nevertheless, there is a procedure whose primary objective is to act as an alternative and which can be considered as an alternative to a "classical" administrative procedure. This is the so-called Verwarnungsverfahren, whereby an administrative authority may issue so-called warnings in the event of a minor administrative offence.[41] According to H.J. Lutz, in proceedings on a "warning", the authority also examines – along with the substantive elements of the given offence – whether there really are grounds for initiating sanction proceedings or whether other methods

41 § 66 odst. 1 Ordnungswidrigkeitengesetz: In cases of negligible regulatory offences the administrative authority may caution the person concerned and impose a cautionary fine from five to fifty-five Euros. It may administer a caution without imposing a cautionary fine.

of resolving the matter would suffice. A warning is suitable in borderline cases in terms of (non-)existence of the material aspects of the offence where the administrative authority determines that it is already appropriate for the State to intervene. The principle of subsidiarity of repression in the form of administrative sanction thus plays an important role in this respect. This specific procedure is, in substance, partially a procedure with an alternative to sanction and partially an alternative procedure as such. Indeed, a warning may be given orally, e.g. when the offender faces police officers during the procedure on site,[42] but may also be a result of standard administrative proceedings, which need to follow a certain (sometimes overly complicated, in view of the nature of the case) set procedure. It should be noted that under Article 66 (4) of Ordnungswidrigkeitengesetz, if a warning is issued, this constitutes an obstacle of *res judicata*, and a fine can thus no longer be imposed for the given conduct. In this respect, J. H. Lutz points out certain questions associated with the possible legitimate expectation that a warning issued by an administrative authority should generally constitute a precedent *pro futuro*, where similar cases (even involving the same offender) should again be dealt with by issuing a warning. Although the wording of the law does not provide a specific solution in this respect, the mentioned author finds it permissible (in our opinion, correctly in view of preventing possible recurrence) to also impose a fine for an identical act in certain situations (in case of its recurrence).

Unlike German law, Polish law does recognise a method that is to a certain degree similar to the Czech compensation agreement.[43] In Poland, the court approves an agreement between the offender and the prosecutor if it is proved beyond doubt that the offence was committed by the offender. Likewise, it is essential that the prosecutor is convinced that the compensation agreement attains the goal of the proceeding, and that the offender accepts the agreement. If the agreement is to come into force, the offender must not reject it within a period of time set by the court. The final judgment sealing the agreement is issue preclusion and has the same consequences as a judgement of conviction.

10 Comparison Analysis

Unlike Czech law, the system in Poland does not insist on an explicit way of compensation present in the agreement, but such a trend can be expected. An advantage of the Polish method is the possibility of accepting the agreement even in cases without there being specific person that suffered the damage; this is possible since the contractual relation exists between the offender and the state. Another difference (which seems to be rather a disad-

42 As a matter of fact, warning plays the most important role in these cases, according to H.J. Lutz – Senge et al., 2014, p. 670.

43 In Poland there exists a possibility for mediation in the preparatory phase (see Article, par. 9 of the rules of administrative procedure). In reality, this method has not been accepted (in the years of 2015 and 2016 there was only one case where mediation was used); this is probably because mediation is offered at the expense of the participant. The amendment of 1/6/2017 of the rules of administrative procedure partially transfers the financial burden onto the administrative authority, hence it is hoped that mediation is going to be applied more often.

vantage) is the fact that the offender is not forced to pay a certain amount of money for a charitable cause, which appears to be a beneficial educational aspect of compensation agreements. Yet another downside of the system in Poland is the judgment stating the guilt of the offender with the negative consequences attendant upon it.

Generally speaking, we may assert that the method of compensation agreement is beneficial mainly because the agreement is made in an informal setting. The administrative authority (or the prosecutor) confidentially informs the offender of what they are accused of, what the consequences may be and how the problem can be solved. Such an approach is favourable for the offender and it is also undoubtedly more effective as far as the application of state authority is concerned. Moreover, it contains some educational and preventive aspects that may be beneficial for the offender. In the Czech system of law the compensation agreement precludes negative effects linked with the statement of guilt (which is not made at all; unlike in Polish law). The German regulation is quite surprisingly rather limited in terms of alternative approaches to administrative sanctioning, although some possibilities of a less formalized solution also exist here.

11 The Perspective of Alternative Approaches to Administrative Offence Proceedings with Emphasis to the Czech Republic – Conclusion

The authors have confirmed the hypothesis that the regulations on administrative offences proceedings are very similar in all three countries discussed in this paper, but it is noteworthy that while in formal (traditional) proceedings the approach towards the offender is remarkably similar, these countries differ significantly in their alternative approaches (which may ensure the accused person a more active way to be heard). As the three countries opt for a different approaches (methods), it is not possible to consider this situation (solutions) as a part of the Europeanisation process.

It would surely be very interesting to compare and analyse also other the systems of other members of the Council of Europe so that more light would be shed on the effectiveness of alternative approaches in administrative sanctioning. Such an analysis could also help to make some recommendations, which admittedly may not be viewed as completely necessary from the point of view of the participants and their rights (the rights are acknowledged anyway, albeit sometimes in a rather awkward way). These recommendations could, however, make administrative sanctioning more effective and they could also prevent some other activities connected with unlawful conduct: recidivism, the convict's feelings of frustration, etc. and they are important also in the point of view of the principle of subsidiarity of the sanction.

One cannot turn a blind eye to possible obstacles that the introduction of alternative approaches in administrative offence proceedings is connected with. First and foremost, alternative approaches require a high level of ex-

pertise on the part of administrative officers: an area which, frankly, seems to leave a lot be desired.

The novelty and complexity of the new legislation along with some of its imperfections will probably result in the necessity to seek inspiration in and draw analogies with the realm of criminal law, further supported by the case law of administrative courts. This will happen at a more advanced and a more specific level than before, thereby placing more demand on the legal competence, which a number of administrative officers appear to lack. This will apparently create a more sophisticated means of defence for offenders or their attorneys. It is debatable whether this is the right direction for the application of the right to be heard.

In this respect, Poland is at an advantage because administrative offences are dealt with by courts, thus compensation agreements are drawn up by prosecutors with obvious legal qualifications. This is hardly the norm in the Czech Republic despite the fact that the act on administrative offences maintains that from 2022 onward persons dealing with such offences will be required to possess legal qualifications. Owing to some hints and the current state of public administration one can assume that there will be some delay before this regulation comes into force.

Another obstacle that alternative approaches may face is the heavy workload that administrative officers need to handle. As a consequence, they may end up sticking to the good old ways (i.e. the tried-and-tested traditional methods) and reject any novelties they are unfamiliar with.

A more general obstacle can appear in the present political and social climate in the Czech Republic, which does not seem to support any deviations from the previously accepted norms. In other words, compensation agreements may leave the impression that instead of a strict sanction, the offender gets away with a secret document that only 'covers' the guilt and protects the offender.

In spite of the disadvantages outlined above, we assert that alternative approaches are suitable for dealing with minor administrative offences and we believe that in the future they will acquire the adequate amount of attention.

Future intentions related to a reform of administrative sanction should also be logically aimed at improved communication between administrative authorities and the parties to the proceedings, especially the accused (the offender), and at finding less invasive solutions which better correspond to the principle of subsidiarity of sanction, thus also including amicable resolution of disputes.[44]

44 "*... preventing regular hearing of and decision in the given case.*" - Section 5 of the Code of Administrative Procedure.

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