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Jurisdiction in financial criminal cases by non-judicial bodies in the Austrian criminal law, with comparative remarks

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SUMMARY
The subject of the article is the presence of extrajudicial bodies established to administer justice in contemporary Austrian criminal law. The article analyzes the guarantees of independence of members of these bodies and the assumptions of the criminal procedure applied in the proceedings before them. It also draws attention to the presence of similar institutions in the Polish financial criminal law, which was in force until 1999.

Key words: financial criminal law, Austrian financial criminal act, extrajudicial adjudicating body, guarantees of independence

The Montesquieu's triple division of powers is the standard of the European rule of law in the 21st century. Apart from the legislative and executive bodies, its element is a judiciary that is independent of the two previous ones and is exercised by independent courts. This model assumes, among others, exclusive jurisdiction of the courts in criminal cases. It is commonly believed that the imposition of one of the penalties provided in the act on a citizen cannot be made by other bodies than those dedicated to jurisdictional purposes, and that they are also the only ones entitled to decide on the question of depriving a citizen of liberty or property. From this perspective, it may seem strange that in one of the countries located in Central Europe, which is a member of the Council of Europe and the European Union, there is a model of conducting criminal proceedings and imposing penalties,

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including imprisonment, which dates back almost two centuries, and assumes in this respect the competences of non-judicial bodies. This state is Austria, and the area of law subject to this atypical regulation is financial criminal law[1].

According to article 82 of the Austrian Constitution "the federal law is the source of the jurisdiction, and judgements and decisions are pronounced and drawn up in the name of the republic"[2].

This provision does not require the administration of justice by the courts; it merely emphasizes that the functions in this respect may be performed by a body empowered by federal law, and not based on acts adopted by one of the nine lands. Of course, such bodies are, above all, common courts (military judiciary, according to Article 84 of the Constitution, may function only in times of war). Nevertheless, Art. 87a expressly states, that a federal law may entrust the power to administer justice in clearly defined areas of law to extrajudicial federal officials. The same provision reserves such a possibility only to the first-instance proceedings and clearly emphasizes that such officials may, within the scope of their competence, accept orders only from judges appointed under the law.

A similar solution could not currently function under Polish legislation. This is prevented by Art. 175 of the present Polish Constitution, reserving the administration of justice to the competence of the Supreme Court and common, administrative and military courts. Things were a bit different under the rule of constitution of the Polish People's Republic of 1952[3], which Art. 56 provided the possibility of adjudication by non – judicial bodies in cases of criminal misdemeanors. Characteristically, the constitution did not mention financial bodies adjudicating in cases of financial crimes and misdemeanors. In the systemic conditions of the time, however, this did not constitute an obstacle to their actual existence – they were mentioned in subsequent financial penal acts, including the last of them, passed in 1971[4].

Doubts regarding the status of the authorities conducting the proceedings arise in relation to the authorities legitimated to adjudicate in cases of financial crimes. It is in this respect that the Austrian legislator has provided for wide jurisdictional competences of bodies which, according to Austrian and European law, are not staffed by judges. Until recently, the role of these financial bodies was played by forty separate financial offices (whose network corresponds in principle to the administrative division into districts) and nine customs offices (one for each federal

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1 R. Leitner, R. Brandl, R. Kert. *Handbuch Finanzstrafrecht*, Vienna 2017, p.5.

2 Bundes – Verfassungsgesetz, StGBl. Nr. 5/1945.

3 Konstytucja Polskiej Rzeczypospolitej Ludowej, Dz. U. z 1953 r., Nr 33, poz. 232 ze zm.

4 Ustawa karna skarbowa z 26 października 1971, Dz. U. 28, poz. 260 ze zm.

state). The recent reform has seriously simplified this system. Financial offices were replaced by the single Austrian Financial Office and the Financial Office for Large Companies; in proceedings initiated before January 1, 2021, the financial offices were replaced by the Office for Combating Fraud [5].

Significantly, § 53 of the Austrian Financial Criminal Act (FStG)[6] assumes the presumption, that the authority competent to administer justice is an administrative authority. It states, in the sixth section, that financial crimes, not expressly confined to the jurisdiction of the court, fall within the competence of the financial authorities. The content of the Financial Criminal Act contains references to prohibited activities which remain within the exclusive jurisdiction of the court. These are in particular described in § 53 section 1a cases of tax fraud related to cross-border transactions leading to a reduction in VAT. It is understandable as combating such behavior requires international cooperation between jurisdictional bodies, which in practice of other states are purely judicial. A non – judicial financial authority would not be able to meet the requirements of such cooperation due to its very nature[7].

The exclusive jurisdiction of the court also applies to prohibited activities described in the provisions of the Financial Criminal Act, but by the decision of the legislator himself, they were excluded from the category of financial crimes and are prosecuted on general principles. This category includes the support for a financial offense described in § 248 FStG (fencing), a false accusation of a financial offense (but not a misdemeanor) indicated in the next paragraph, and the conduct described in § 250 and 251 consisting in breach of financial secrecy. A specific situation is described in § 224, according to which the court has sole competence to conduct a trial pending as a result of granting a request to reopen proceedings, even if it potentially falls within the competence of a financial authority[8]. However, a judgment issued in such proceedings entails the consequences of the penalty imposed by a financial authority, and not a final conviction by a court.

The court never performs jurisdiction in terms of financial misdemeanors, as well as in cases of committing a prohibited act in a state of insobriety or intoxication, by the perpetrator, mentioned in § 52 of the FStG. According to the provisions of § 53 section 1 and 2 FStG, the court is competent to punish the perpetrator of a financial offense only if it was committed intentionally and the amount of the fine exceeds 100 000 euro, or if it is the sum of these amounts in the case of

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5 E. Köck , M. Kalcher, S. Judmaier, M. Schmitt. *Finanzstrafgesetz Band I1.* Vienna 2021, p. 221 – 223.

6 Finanzstrafgesetz, BGBl. Nr. 129/1958.

7 F. Reger, H. Nordmeyer, A. Hacker, Y. Kuroki. *Finanzstrafgesetz. Band I.* Vienna 2016, p.8 – 13.

8 F. Reger, H. Nordmeyer, A. Hacker, Y. Kuroki.op.cit., p. 1433 – 1434.

several financial crimes committed simultaneously, all of which are subject to the substantive jurisdiction of the same authority [9]. Only financial crimes that have not yet been legally judged may be the subject of such simultaneous judgement[10].

The notion of the amount of fine should be understood as the amount referred to by the legislator in the provision of a specific regulation of the Act. It may be the amount of the reduced tax or customs duty, the value of goods marketed in violation of monopoly regulations (e.g. tobacco products), etc. when the sum of the impending fine may be indicated e.g. as three times the sum of reduction. The border value of 100 000 euro is replaced by half the amount for behavior such as smuggling and evasion of import or export levies, receiving goods or items made or obtained with the use of smuggled goods, customs fraud or reduction of import or export levies. According to section 4 of § 53 FStG, if the court is competent to punish the perpetrators of the financial crimes mentioned above, it is also competent to deal with other financial crimes that coincide with them, if all these crimes fall within the substantive jurisdiction of the same financial criminal authority [11].

On the other hand, the jurisdiction of the court in terms of punishing the perpetrator of financial crimes also determine its jurisdiction over persons cooperating with the perpetrator. However, if, in accordance with that provision, one of them is convicted solely for a financial offense for which he would otherwise be punished by a financial authority, this verdict does not result in a conviction, but only a penalty imposed by the financial authority, which should be stated in the judgment. If, in turn, someone commits, in the same conduct, a prohibited act placed under the jurisdiction of a court and under the competence of a financial authority, each adjudicates in terms of guilt and punishment regardless of the other. Both judgments should be considered in the execution of the imposed fine and imprisonment.

In the provisions of the Polish Criminal Financial Act of 1971, the competences of the courts were basically limited to adjudicating in cases involving financial crimes punishable by imprisonment or restriction of freedom. Financial adjudicating bodies, which were financial and customs offices, were competent to issue judgments in cases of financial crimes threatened with only a fine, as well as financial misdemeanors. Characteristically, in contrast to the Austrian solutions, under which the judgment of the second instance is issued by the Federal Financial Court, in Poland such competences were entrusted in the financial administration bodies – financial chambers and the president of the Central Customs Office. However,

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[9] R. Leitner, O. Plückhahn. R. Brandl *Finanzstrafrecht kompakt.* Vienna 2020, p. 115 – 116.

[10] S. Seiler, T. Seiler. *Finanzstrafgesetz. Kommentar.* Vienna 2011, p. 211-214.

[11] E. Köck , M. Kalcher, S. Judmaier, M. Schmitt. *op.cit*. p. 189 – 191.

there was a possibility of judicial review of the decision as a result of applying a request to refer the case to court proceedings. What is quite peculiar – the court examining this application was a first-instance body.

The procedure pending before the Austrian financial authority is quite specific[12]. The most important differences include, for example, the principle of complaints, which is dominant in standard Austrian criminal proceedings. According to it, proceedings before the court may be initiated only at the request of the prosecutor. The court may not begin proceedings on its own initiative. The main task of a prosecutor is to bring an indictment and support it in court. He is, in principle, the state attorney; the exception is constituted by the private and subsidiary indictment, supported in principle by the aggrieved party. Criminal proceedings may not be conducted against their will. After the hearing, the court must formally rule on the allegation formulated in the indictment, the scope of which is bound by it. The situation is completely different in the proceedings before the financial authority, in which institution initiating and conducting the preparatory proceedings is also the authority that administers the penalty. The adjudicating bodies are not bound by the scope of the charge and may extend the proceedings in the jurisdictional phase to further conduct of the accused, disclosure of which has already occurred during the procedure, regardless of the position of the public prosecutor. These divergent rules apply at every stage of the process. The prosecutor hosts pre-trial proceedings in cases falling under the jurisdiction of the court. In this case, the court acts only incidentally, applying preventive measures or taking some evidence. In turn, the financial authority conducts the proceedings at every stage, with the exclusion of any other authorities. As a rule, the provisions of the Austrian Criminal Procedure Act (StPO) apply to the proceedings pending before the courts, while the Financial Criminal Act specifies in paragraphs 195 to 245 FStG only a certain scope of separate regulations, a consequence of the specifics of financial crimes. In the case of financial bodies, on the other hand, we deal with the application of specific provisions of the Financial Criminal Act (paragraphs 56 to 194e), with some references leading to both criminal and civil procedure. Despite regulations separate in nature, the proceedings before the financial authority are conducted in accordance with the principles known from the general criminal procedure, but based on specialized provisions.

They include, in particular, the principle of legalism, regulated in a very clear manner in § 57 section 1 FStG. According to it, all criminal acts exposed by financial authorities are to be prosecuted ex officio. In case of doubt, it is necessary

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[12] F. K. Vogl, *Die rechtlichen Wirkungen des Finanzstrafverfahrens,* Vienna 2020, p. 4-7.

to initiate criminal proceedings in financial case, so that all circumstances of the offense can be clarified [13].

An exception in this regard is the rule of opportunism set out in § 25 FStG, according to which the financial authority should refrain from initiating or conducting proceedings in financial criminal cases and from imposing a penalty if the perpetrator's guilt is insignificant and the crime is at most of little consequence. However, he must warn the perpetrator, if necessary, to protect him from further financial crimes.

The right to defense manifests itself in proceedings before a financial authority in two aspects – material and formal. The first of them consists of, among others, the obligation of the public prosecutor to inform the accused of the nature and cause of the accusation against him. This results in the obligation to indicate both the circumstances underlying the allegation and their legal assessment. If the financial authority changes the originally expressed allegation to the detriment of the accused during the proceedings, he should also be informed about it.[14].

The accused has the right to sufficient time to prepare his defense. This also includes the rights to inspect the file (§ 79 FStG), to present evidence (§ 114 section 2 FStG)[15] and to the presence and participation in the taking of evidence (§ 114 section 3 FStG) [16].

In formal terms, the right to defense is manifested in the fact that the accused has the right to defend himself or receive the help of a court defense attorney of his choice (§ 77) [17].

Contrary to court proceedings, the Financial Criminal Act does not specify the cases of the so-called compulsory defense. However, an accused in need still has the option of request a public defense attorney (§ 58 section 2 FStG). The accused has the right to a hearing within a reasonable time (§ 57 section 6 FStG). Contrary to tax proceedings, however, the Act does not specify the date of ending of the criminal proceedings. Formally, therefore, an action against excessive length of proceedings is not admissible, as opposed to proceedings in which a court has jurisdiction. In such a case, the preparatory proceedings should be completed within three years, and the court may extend this period once by another two years[18].

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13 E. Köck , M. Kalcher, S. Judmaier, M. Schmitt. *op.cit*. p. 62.

14 *ibidem*

15 F. Reger, H. Nordmeyer, A. Hacker, Y. Kuroki.op.cit., p. 745 – 746.

16 C. Bertel, *Die Ablehnung von Beweisanträgen im Strafverfahren*, ÖJZ 1972, p. 592.

17 R. Leitner, O. Plückhahn. R. Brandl, *op. cit.,* p. 161 – 163.

18 E. Köck , M. Kalcher, S. Judmaier, M. Schmitt. *op.cit*. p. 176.

One of the major differences between the common criminal procedure and proceedings before financial authorities is the much more modest treatment of the audience principle. According to § 160 section 4 FStG hearings are generally held in public before the Federal Finance Court [19], and with some limitations also before a jury (§ 127 section 2 FStG) [20]. In other cases, the evidence is carried out without the participation of the audience, and the accused and the responsible entity may summon two trusted persons each, who are not, on any other basis, participants in the proceedings (§ 127 section 4 FStG).

On the other hand, § 57 section 7 FStG sets out very clearly the principle of the presumption of innocence; stating that the accused should be considered innocent in the proceedings before the financial authority until he is legally found guilty [21].

It is worth to mention about § 161 section 3 FStG, which contains a prohibition of reformationis in peius[22]. Modification of the alleged judgment to the detriment of the accused or the responsible entity is permitted only in the event of an appeal by the public prosecutor. If the judgment has been challenged only by one of these entities, it is not allowed to change the judgment to their disadvantage.

The principle of direct assessment of evidence states that evidence must be taken before the investigating authority itself, in such a way that that authority can freely evaluate it. The financial authority may independently carry out any kind of evidence, or request it from other federal administration agencies.

By regulating the proceedings, the legislator clearly departs from the legal theory of evidence known to Austrian administrative law in favor of the free evaluation of evidence, which is essentially unrestricted. In particular, § 98 section 1 FStG [23] clearly states that evidence can be anything that allows the reconstruction of the facts in a specific situation. There are no mechanisms to regulate the weight of an individual piece of evidence – any evidence is essentially of equal value. It is also unacceptable to deny the probative value of measures that have not been explicitly mentioned in the provisions of the Financial Criminal Act describing the evidentiary procedure. According to § 98 section 3 the financial authority should assess whether the fact has been proved or not. Thus, the assessment of the evidence is left to the free conclusion of the financial authority, which is not bound in this respect by legal norms in the form of evidence rules. An essential feature of free judgment is that the authority must assess the value of the evidence to the best of

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19 F. Reger, H. Nordmeyer, A. Hacker, Y. Kuroki.op.cit., p. 1056 – 1057.
20 E. Köck , M. Kalcher, S. Judmaier, M. Schmitt. *op.cit*. p. 936 – 938.
21 R. Leitner, O. Plückhahn. R. Brandl, *op.cit.,* p.121.
22 E. Köck , M. Kalcher, S. Judmaier, M. Schmitt. *op.cit*. p. 1155 – 1159.
23 *ibidem,* p.126.

its knowledge and belief. All evidence should be assessed for its truthfulness and usefulness in relation to the subject of evidence.

It is worth mentioning that the Polish Financial Criminal Act of 1971 "borrowed" solutions from the Code of Criminal Procedure to a slightly wider extent. However, this does not change the fact, that most of the procedural regulations were based on the own provisions of the Act, referring to the principle of inquisitiveness to a greater extent and limiting the public nature of proceedings [24].

In proceedings before financial authorities, the principle of writing applies to a much broader scope than in the general procedure. Not only personal documents can be used to recreate the facts, but also those that were registered in writing in the previous proceedings by the requested authority or by another authority through the channels of administrative or legal assistance. Similarly, it is also, in principle, permissible to use evidence that was registered in tax or customs proceedings prior to the commencement of criminal proceedings [25].

Finally, an important principle of proceedings before a financial authority is the participation of lay judges, i.e. non-professional members of the jury. The composition of collegial bodies is uniform, and all their members have equal rights, including jurisprudence. As they come from professional circles, they have a high level of competence in financial matters (§ 67 section 2 FStG)[26]. This distinguishes them from lay judges in common criminal proceedings, whose composition reflects the full spectrum of society.

The jury of the financial adjudicating body is composed of three people. The chairman is always the professional judge, and the other two members are recruited from among the highest grades of officials of the financial administration. All members are appointed by the Federal President (§ 67 section 1 FStG) [27]. They are assigned to a specific financial body, and within its framework they are placed in a specific jury (it is possible to assign them to more than one of them). They are appointed from a group of persons delegated by professional self-government bodies for a period of six years, and there is virtually unlimited re-election. They may not be removed from this function during the six-year term of office (§ 67 section 2 FStG). However, it should be remembered, that it is the professional self-government bodies that decide whether a specific person reappears on the list of candidates. There are also no specific guarantees to protect officials from being transferred to another post after the end of their term.

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[24] Ustawa karna skarbowa…, art. 126.

[25] R. Leitner, O. Plückhahn. R. Brandl, *op.cit,* p. 121.

[26] F. Reger, H. Nordmeyer, A. Hacker, Y. Kuroki.op.cit., p.232.

[27] E. Köck , M. Kalcher, S. Judmaier, M. Schmitt. *op.cit*. p. 251 – 252.

According to § 66 sec. 1 members of the jury in exercise of their judicial functions are not bound by any official orders. This provision has a specific status, as it introduces an exception to the art. 20 section 1 of the Austrian Constitution, which expresses the principle of subordination of administrative bodies to institutions superior to them. However, section 2 of the aforementioned provision allows, notwithstanding the exceptions explicitly mentioned in its content, to introduce further restrictions of this mechanism by means of a federal act.

Decisions made by a financial authority may not be revoked or amended by a higher-level financial administration authority (§ 170 section 2 FStG) [28]. Only the Federal Financial Court, acting as an appeal body, is entitled to revoke or amend them (§ 161 section 1).

In this aspect, the differences with the old Polish regulation are perhaps the most pronounced. The Financial Criminal Act of 1971 did not contain any formal guarantees of the independence of members of financial bodies, who were simply employees of the financial authorities. The only antidote to the related problems were the broad grounds for judicial review of decisions issued by these authorities.

The specific status of financial bodies has in the past repeatedly attracted the attention of the Austrian constitutional court. The status of financial bodies adjudicating in criminal cases in Austrian criminal law has been a source of doubts from the constitutional point of view[29].

Later sentences consistently drawn attention to the high level of guarantees of independence granted to members of financial adjudication bodies, bringing them closer to the courts in this respect. The interpretative line set by these rulings, based on the quite unanimous views of the representatives of criminal law science, defines financial bodies as institutions that are not courts within the meaning of the provisions of the Austrian Constitution, in particular its Art. 83, but falling within the concept of „court"[30] in the meaning of Art. 6 of the European Convention on Human Rights[31].

Summarizing the above considerations, it should be emphasized, that although the financial bodies indicated in the provisions of the Austrian Financial Criminal Act are clearly specific in comparison to common judiciary bodies, their system and the resulting guarantees of independence – in contrast to the situation in Poland under the rule of the Financial Criminal Act of 1971 – in principle, they give no reason to question their status under European law. An additional benefit

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[28] F. Reger, H. Nordmeyer, A. Hacker, Y. Kuroki.op.cit., p. 1217 – 1219.

[29] Judgment of the Federal Constitutional Court, March 1, 1985, B489/82, VfSl g 10639/1985.

[30] in the official German text of the convention called not "Gericht", but "Tribunal".

[31] e. g. VfSl g 7284 / 1974, 8501/1979, 8828/1980.

resulting from the structure of the discussed institutions is the high level of competence of their members, who – apart from the legal knowledge of their chairman, a professional judge – may easily profit from the economic and financial knowledge, accumulated while working in financial institutions. Although the level of protection provided to non-judicial members of jury may raise some objections, it does not differ from the standards provided in other European criminal law orders, for example for lay judges. This fact gives grounds to supposition, that the specific nature of their jurisprudence will not become the basis for resignation from the solution having long traditions in the Austrian legal system and, despite some controversies, coping well with the challenges of the present day.

BIBLIOGRAPHY:

C. Bertel, *Die Ablehnung von Beweisanträgen im Strafverfahren*, ÖJZ 1972.
E. Köck , M. Kalcher, S. Judmaier, M. Schmitt. *Finanzstrafgesetz Band I1.* Vienna 2021.
R. Leitner, R. Brandl, R. Kert. *Handbuch Finanzstrafrecht*, Vienna 2017.
R. Leitner, O. Plückhahn. R. Brandl, *Finanzstrafrecht kompakt.* Vienna 2020.
S. Seiler, T. Seiler. *Finanzstrafgesetz. Kommentar,* Vienna 2011.
F. Reger, H. Nordmeyer, A. Hacker, Y. Kuroki. *Finanzstrafgesetz. Band I,* Vienna 2016.
F. K. Vogl, *Die rechtlichen Wirkungen des Finanzstrafverfahrens*, Vienna 2020.

Jurysdykcja w sprawach karnych finansowych sprawowana przez organy pozasądowe w austriackim prawie karnym, z uwagami prawnoporównawczymi

STRESZCZENIE

Przedmiotem artykułu jest obecność we współczesnym austriackim prawie karnym pozasądowych organów powołanych do wymierzania sprawiedliwości. Artykuł analizuje gwarancje niezależności członków tych organów oraz założenia procedury karnej stosowane w toczącym się przed nimi postępowaniu. Zwraca również uwagę na obecność podobnych instytucji w polskim prawie karnym finansowym, które obowiązywało do 1999 roku.

Słowa kluczowe: prawo karne finansowe, austriacka ustawa karna finansowa, pozasądowy organ orzekający, gwarancje niezawisłości