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Veröffentlichungsversion / Published Version
Zeitschriftenartikel / journal article

Empfohlene Zitierung / Suggested Citation:
Strąk, K. (2022). On Carrier Sanctions - A Voice from Poland: The Liability of Carriers in the Jurisprudence of Administrative Courts. *Studia Europejskie - Studies in European Affairs*, *26*(1), 63-81. https://doi.org/10.33067/SE.1.2022.4

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gesis Leibniz-Institut für Sozialwissenschaften

Mitglied der Leibniz-Gemeinschaft

DOI: 10.33067/SE.1.2022.4

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On Carrier Sanctions – A Voice from Poland. The Liability of Carriers in the Jurisprudence of Administrative Courts

Abstract

This article analyses carrier sanctions in light of Poland's membership of the European Union and its obligation to protect the EU's external borders. It offers an in-depth analysis of the scope of the carriers' obligations with regard to bringing third-country nationals to the Eastern external border of the European Union and explores ways how these obligations should be fulfilled correctly so that carriers are not obliged to pay administrative fines of as much as 3000-5000 euro per person. The research is based on an extensive review of the jurisprudence of Polish administrative courts and takes into account the specificity of this jurisprudence.

Keywords: Liability of Carriers, Administrative Fines, External Borders Crossing, Immigration Policy, Administrative Courts, European Union, Poland

Introduction

The liability of carriers (termed as natural or legal persons or organisational units without legal personality that, for economic purposes carry persons by air, sea or land) bringing third-country nationals who do not possess the required documents, to the Polish border - the EU's external border with Ukraine, Belarus, and Russia, which results in the imposition of financial penalties on carriers, dates back as a broader phenomenon as far as the 18th century (Bloom, Risse, 2014). It took its contemporary form in the 1980s, becoming a constitutive element of national legal orders of

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several European states. The liability of carriers in Poland was first introduced in 1997. It was not until 2011, however, when the first rulings were delivered by the Warsaw Regional Administrative Court (hereinafter: WRAC), the only regional administrative court which has jurisdiction in cases involving the liability of carriers, and the Supreme Administrative Court (hereinafter: SAC), to which cassation appeals can be lodged.

This article analyses the liability of carriers in the context of the obligations taken on by the Republic of Poland in light of its membership in the European Union, so as to protect the EU's external borders. It offers an in-depth analysis of the scope of the carriers' obligations with regard to bringing third-country nationals to the EU eastern external border and, at the same time, explores ways how these obligations should be fulfilled correctly so that carriers are not obliged to pay administrative fines of EUR 3000-5000 per person. The research is based on an extensive review of the jurisprudence of Polish administrative courts and takes into account the specificity of this jurisprudence.

Extensive research in the area of carrier sanctions is direct evidence of the importance and variety of the problems that arise from the application of relevant legislation to both carriers and their passengers (Sadowski, 2019). The relevant academic literature encompasses a broad range of approaches and aspects in this regard (Baird, Spijkerboer, 2019), and the picture that arises is unambiguously negative. International and European law doctrine has been highly critical in their assessment of the liability of carriers (carrier sanctions regime), considering it controversial from the point of view of the rights of both the carriers and the transported persons. The discussion – at its initial phase – focused mainly on the issue of possible non-compliance of carrier sanctions with the 1951 Geneva Convention, and many scholars held the view that carrier sanctions were aimed at the limitation of access to safe territory for persons seeking international protection. The reservation to "being without prejudice", made in European legislation in the case of submitting an application for protection, was interpreted as still allowing states to impose penalties on carriers (Peers, 2006). Authors generally placed emphasis on the fact that third-country nationals using international carrier services were obliged to possess all the required documents, including valid visas, and it was therefore commonly assumed that penalties imposed on carriers are intended not only to prevent illegal immigration but to enhance visa policy as well. This view is supported by the fact that at that initial stage, a number of EU Member States opposed including regulation of the specific situation of persons seeking international protection within their legislation on the liability of carriers,

justifying it with the fact that there might be an increased influx of economic migrants (Moreno-Lax, 2012).

Research followed on the privatisation and outsourcing of migration management to third parties, and on the externalisation of border controls in light of the carriers assuming more and more obligations, and this became predominant at the next stage (Rogala, 2020). The academic literature questioned the ability of carriers to properly perform these two new tasks imposed on them, emphasising the lack of both resources and knowledge in this regard, but additionally questioning the very idea of the state enforcing the obligation of carriers to perform the tasks of border guards.

Recently it has been argued that – in what could be considered the third phase – carriers should assume responsibility for remedying harms to which they contributed, in view of the role that carrier sanctions play in perpetuating harms, such as denial of refugee protection or even death, against migrants. The importance of conducting research on the intersection of migration, corporations, and human rights has already been emphasised (Baird, Spijkerboer, op. cit.). The latest research has also attempted to put carrier sanctions in perspective against the migration crisis in the European Union (Cesarz, 2019).

However, although extensive research on the liability of carriers has been carried out, no single study exists which would offer an in-depth analysis of the scope of the carriers' obligations and of the ways in which these obligations should be correctly met. Scholten's works, extremely valuable ones, seem to focus on Dutch law and policy rather than on reconstructing the standard of 'an obeying carrier' (Scholten, 2015). This article attempts to fill this gap by combining a short description of the existing European and Polish legal frameworks with an extensive analysis of Polish administrative courts' jurisprudence, and is an answer to Baird's conclusion that "empirical studies explaining the development of carrier sanctions, their implementation and their impacts suffer from limited data and small-n case studies" (Baird, 2017).

At this point however, three remarks concerning the content of this article should be made. Firstly, although the liability of carriers covers the activities of air, sea, and road transport carriers, the jurisprudence of Polish administrative courts is, in practice, limited to the activities of entities carrying out regular passenger transport by motor vehicles in international road transport. Secondly, as has already been mentioned, the first judgements were delivered in 2011, eight years after the entry into force of the new liability of carriers regime, mostly due to the inactivity of administrative authorities. Thirdly, this article is partly based on earlier re-

search which, however, hardly takes account of the case-law based on the latest Act on Foreigners of 2013 (Act on Foreigners, 2013), due to its entry into force only on 1 May 2014. This revised and updated text makes fuller and deeper use of the latest case-law, concentrating on legal and jurisprudential developments in the area of the liability of carriers in 2011–2021 in Poland. As a consequence, it may be of interest to other researchers as a useful source of information on Polish practice and – hopefully – inspiration and invitation to conduct research on liability of carriers in other EU Member States. To develop the standard of liability of carriers and the scope of the carriers' obligations arising from that standard, the Central Database of Administrative Courts' Rulings (Centralna Baza Orzeczeń Sądów Administracyjnych) was consulted.

EU and Polish Legal Framework on the Liability of Carriers

The introduction of the liability of carriers regime was rooted in an EU objective to prevent and combat illegal immigration, as provided for in Article 79 of the Treaty on the Functioning of the European Union (Treaty on the Functioning of the European Union, 2007). However, this issue was first included in the 1990 Convention implementing the Schengen Agreement (Convention implementing the Schengen Agreement, 1990), which was at that time still outside the EU legal framework. Article 26 of the 1990 Convention lays down two specific obligations for carriers bringing third-country nationals by air, sea or land to the territories of Member States; to assume responsibility for a person refused entry to the territory of a Member State and to ensure that a third-country national is in possession of travel documents required for entry into the territory of a Member State. The 1990 Convention furthermore provides the obligation for Member States to impose penalties on carriers transporting third-country nationals who do not possess the required travel documents necessary to be admitted to their territories.

Council Directive 2001/51/EC supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 was adopted, as its preamble points out, mainly due to the need to more closely harmonise the financial penalties imposed by Member States on carriers 'failing to comply with their control obligations'. The minimum and maximum amount of the financial penalties were set at EUR 3,000–5,000.

Regulation No 2016/399 of the Parliament and of the Council of 9 March 2016 establishing a Community Code on the rules governing the

movement of persons across borders (Schengen Borders Code), namely Article 6 therein, is also important as it lays down entry conditions for third-country nationals for stays not exceeding 90 days in any 180-day period and specifies in detail documents necessary to cross the EU external border (Regulation, 2016). Under Article 14 of Regulation 2016/399, a person who does not meet these conditions is refused entry. However, persons who do not fulfil one or more entry conditions laid down in Article 6 may be authorised to enter the territory of a Member State on humanitarian grounds, on grounds of national interest or because of international obligations.

Due to the legal nature of Regulation 2016/399 which – by definition – has general application and is binding in its entirety and directly applicable in all Member States, the Polish 2013 Act on Foreigners sets out in its Article 23 in connection with Article 30 the rules on border crossings exclusively with regard to persons to whom the EU regulation does not apply.

Both Article 26 of the Convention implementing the Schengen Agreement and Directive 2001/51 stipulate that their application shall be without prejudice to the obligations arising for the Member States from accession to the 1951 Geneva Convention relating to the status of refugees (Geneva Convention, 1951). It was thus agreed that financial penalties are "without prejudice to Member States' obligations in cases where a third-country national seeks international protection". This rule constitutes a direct reference to the prohibition of *non-refoulement* as defined in Art. 33 of the Geneva Convention as well as to the prohibition, enshrined in its Art. 31, of imposing penalties on applicants for refugee status due to entering or staying illegally on the territory of the State concerned directly from a State where their life or liberty was in danger, provided that they report immediately to the authorities of that State and present credible reasons for their illegal entry or stay. Among the provisions that strengthen the above are Article 3 letter b) (application without prejudice to the rights of refugees) and Article 4 (fundamental rights clause) of Regulation 2016/399.

The Polish Act on Foreigners of 2013 contains a special chapter which regulates the liability of carriers in Articles 459–463. The key provisions that are relevant for this study are Articles 459 and 462. Article 459 establishes the obligation to verify documents. Accordingly, a carrier that intends to transfer a third-country national to the border by air or sea, or a carrier that performs regular passenger transport services in international road transport (excluding border traffic), shall take all the necessary measures to ensure that a third-country national wishing to enter the territory of the Republic of Poland has a valid travel document authorising

him or her to cross the border, a required visa or another valid document entitling him or her to enter and stay within that territory, and/or a permit to enter another country or a residence permit in another country, if such permits are required. Article 460 lays down the obligation of the carrier, under certain circumstances, to immediately transport a third-country national back from the Polish border while Article 462 provides that, if a third-country national who does not possess the documents specified in Article 459, is brought to the border, the carrier is obliged to pay an administrative fine in an amount equivalent to EUR 3,000 to 5,000 for each imported person. The size of the fine reflects the provisions of Directive 2001/51. The Act on Foreigners introduces two exceptions where no administrative fines are imposed. The first case concerns a situation where a third-country national, after being brought to the border, has submitted an application for refugee status during border control, while the second case concerns the situation where a carrier, despite exercising due diligence, was not able to find out whether the third-country national possessed all the required documents.

As an administrative decision, imposing an administrative fine is issued by the commanding officer of the Polish Border Guard outpost where the third-country national was refused entry into Polish territory. This decision may be appealed against to the Commander in-Chief of the Polish Border Guard. A decision issued by the Commander in-Chief of the Polish Border Guard may be appealed against by lodging an appeal with the Warsaw Regional Administrative Court and, as a last resort, a cassation appeal with the Supreme Administrative Court.

Jurisdiction of Polish Administrative Courts

In 2011–2021, the Warsaw Regional Administrative Court and the Supreme Administrative Court issued several dozen judgements in which they examined complaints lodged by carriers established in the Republic of Poland, in EU Member States, or in non-EU countries, against decisions of competent Polish border guard authorities imposing administrative fines. In almost all cases that were analysed here, the administrative courts dismissed the complaints.

In all cases, the passengers – third-country nationals – used the services of road transport operators. In some descriptions of the facts of the cases, it was pointed out that these were so called "closed door" tours – services whereby the same bus is used to carry the same group of passengers throughout the entire journey. Passengers travelled from a third country to the territory of Poland, or transited through Poland from the

territory of a third country to the territory of another Schengen States, without the possibility to disembark their buses in Poland. In all cases, the administrative authorities found that the third-country nationals did not possess one of the documents specified in the Act on Foreigners or that one of the required documents was invalid at the time of arrival at the border crossing point.

According to Article 3 para 1 of the Act on Proceedings before Administrative Courts (Act on Proceedings before Administrative Courts, 2002), administrative courts exercise a review of the activity of public administration and employ means specified in that act. In the context of the liability of carriers, the only task of the courts in the course of administrative court proceedings was to verify whether administrative authorities were correct in their findings as to whether the third-country nationals were in possession of the relevant documents at the time of their crossing the border. The Polish border guard authorities found most frequently that the required documents – travel document (IV Sa/WA 1855/12, 2013), residence permit (V Sa/Wa 1794/11, 2011) or visa (V Sa/Wa 2920/10, 2011) – were lacking, or that the required document was invalid at the time of arrival at the border crossing point (IV Sa/Wa 2326/13, 2013).

Such findings made it reasonable for the courts to ascertain that the fine, imposed by the competent administrative authority in accordance with the Act on Foreigners, was justified. The court has repeatedly concluded that the liability of carriers is objective and the carriers' fault does not constitute a prerequisite for such liability. The Supreme Administrative Court found that the Act on Foreigners contains a sanctioning legal standard which combines liability with an objective infringement of the law, (which, in this case, consists in bringing a person without the required documents to the border). Consequently, the administrative authority is not obliged to examine the degree of culpability or harmfulness of carriers' acts (II OSK 885/13, 2014).

The Scope of Carriers' Obligations

The courts focused on the interpretation of the phrase "[A carrier] shall take all the necessary measures to ensure […]", used in Article 459 of the Act on Foreigners. In this context, the courts were able to clarify the scope of the obligations that arise for carriers, as well as to explain how these obligations are to be correctly performed. All of this assuming that these obligations cannot be objectively impossible for carriers to fulfil (Ibidem).

Consequently, such obligations come into existence at the moment of the conclusion of the contract of carriage and they last until the passenger is brought to the border (IV Sa/Wa 135/14, 2014). In fact, the scope of the carriers' obligations is relatively limited and it includes the requirements:

- to demand (Ibidem) from the passenger – before the conclusion of the contract of carriage (IV SA/Wa 2951/16, 2017) the presentation of all documents necessary for that person to be authorised to cross the Polish border, and
- to check whether these documents are valid on the date of entry (II OSK 80/16, 2017) into the territory of Poland.

The third-country national's obligation to possess valid documents results from Article 23 of the Act on Foreigners which makes the right of a third-country national to cross the border conditional on the possession of the required documents (IV SA/Wa 2951/16, 2017). The obligation of the carrier thus includes an examination of each of these documents in order to confirm, in particular, that the document is current or will still be valid on the date of entry into Polish territory, and that there are no visible signs of falsification or counterfeiting (IV SA/Wa 2117/17, 2017).

The above is a manifestation of an evolution of jurisprudence, as in its first judgements, the Warsaw Regional Administrative Court pointed to the carrier's mere "right to demand" under the previous Act on Foreigners of 2003 (Act on Foreigners, 2003). In its earlier case law, the WRAC held that that law contained a standard from which a carrier was able to interpret the right to demand that a passenger show a document authorising them to cross the border, and a visa prior to travel (V Sa/Wa 2920/10, 2011), while the administrative authorities applied the term "effective verification" when referring to the way in which the carriers should exercise their obligations. During the scrutiny of administrative decisions, the courts also assessed which activities may or may not be considered as effective performance of the carriers' control obligations. Eventually the WRAC concluded at a later date that the term "to ensure" as arising from the previous law implied the obligation to verify the documents in such a way as to allow the carrier to fully confirm the entitlement of the third-country national to cross the border. The court subsequently accepted the position represented by administrative authorities on how effective verification should be performed.

Generally, the judgements of the WRAC confirm the previous findings of the administrative authorities that carriers did not take sufficient measures to ensure that third-country nationals were in possession of required

documents. Consequently, a procedure whereby a bus driver merely asks passengers, without checking, whether they have the required travel documents (V Sa/Wa 2920/10, 2011), or where the passenger refuses to present a travel document to the driver (IV SA/Wa 2977/16, 2017), cannot be considered as effectively performed control obligations. Nor may the carrier rely on the subjective impression of passengers that they have documents authorising them to cross the border (IV SA/Wa 1189/16, 2017). It is the responsibility of the carrier to verify them, not the responsibility of the passengers. Furthermore, relying on a passenger's impressions is not acceptable and cannot in any way lead to binding conclusions that the third-country national is entitled to enter the territory of Poland (IV SA/Wa 1022/18, 2018). In any event, the conduct of the carrier should be characterised by a high degree of diligence. However, this degree is commensurate with the scope of the controls arising from the Act on Foreigners (IV Sa/Wa 1414/13, 2013). Therefore, in the Court's opinion, the control and check activities to be carried out by the carrier in order not to be subjected to a fine, are in fact limited to a thorough verification of whether a third-country national intending to enter the territory of Poland has valid documents as specified in the Act. A procedure whereby the carrier checks whether a passenger is in possession of a passport but no longer checks whether he or she is in possession of a valid visa, demonstrates that the carrier has failed to exercise due diligence in performing their duties, and fully justifies the imposition of a fine by the administrative authority (IV Sa/Wa 86/15, 2015). Due diligence on the part of the carrier would require them to record the absence of the required documents (Ibidem). According to the SAC, the legal instrument available to the carrier in such a situation is to refuse to conclude a contract of carriage to the border with a third-country national and to prevent them from boarding the vehicle (IV SA/Wa 2117/17, 2017). If the third-country national refuses to comply with a carrier's orders, the carrier may request the assistance of the security services, for example the police (II OSK 740/13, 2014). In any event, the very fact that a third-country national present on board the bus does not possess a required document proves the lack of the effective verification on side of the carrier (IV SA/Wa 1022/18, 2018).

Hence, the condition of being in possession of a valid document authorising the bearer to cross the border of the Republic of Poland must be met here. This condition is deemed to have been met if the third-country national possesses a physical document and is able to present it for a document check to competent Border Guard authorities. The term "possession" means that the third-country national disposes of the document in a way that they are able to present it to the carrier, the carrier

is able to ensure that the third-country national possesses the required document, and then the Border Guard officer is able to check and verify that document in the course of that officer's activities related to border traffic control. This is why an administrative decision granting a temporary residence permit does not in itself entitle a third-country national to enter the territory of Poland; they must have on their person, and be able to present, a residence card issued on the basis of such a decision (IV SA/Wa 2561/18, 2019). The term "required visa" means a valid visa, i.e., a visa authorising a third-country national to enter and stay in the territory of Poland. Consequently, the mere fact of having 'a' visa is not sufficient (IV Sa/Wa 554/14, 2014). A visa, the validity of which beginning after the date of arrival at the border, does not meet this requirement (IV SA/Wa 2792/18, 2019). An act which allows the carrier to determine the period of validity of a visa and whether it entitles the third-country national to enter and stay in the territory of Poland is the examination of the visa's sticker (IV Sa/Wa 86/15, 2015). In the view of the administrative authorities, it is the carrier's primary duty to check the starting and ending dates of visa validity and to compare them with the date of the planned border crossing, as well as to check the type of the visa. Such conduct constitutes a high measure of diligence (IV SA/Wa 2951/16, 2017). The Court, while reviewing administrative decisions, has repeatedly concluded that verifying the right to enter the territory of Poland does not require special skills and is relatively simple (IV SA/Wa 1022/18, 2018), yet it is not performed correctly (IV Sa/Wa 135/14, 2014). A carrier cannot justify their non-compliance with the Act on Foreigners by claiming that the departure took place late in the evening and there were more than a dozen passengers getting on the bus (IV SA/Wa 2951/16, 2017) or that during the verification of documents there was an atmosphere of nervousness and haste (IV SA/Wa 1189/16, 2017). Such circumstances, according to the Court, should be foreseen by a professional carrier. Moreover they do not constitute extraordinary events (Ibidem). The burden of proof of the compliance of the carrier with the Act on Foreigners provisions lies, in any event, not with the administrative authority (the Border Guard), but with the carriers (IV Sa/Wa 420/20, 2020).

The Warsaw Regional Administrative Court has repeatedly pointed out that carriers are not obliged to verify the authenticity of these documents. The Polish lawmaker has clarified in this respect the content of the carriers' control obligations and decided not to punish carriers when it is impossible for them to verify whether third-country nationals possess appropriate documents, despite exercising due diligence. This is the case where the carrier will be unable to identify, without expert knowledge or

appropriate equipment, a forged or falsified document which may be presented to them by a third-country national so that said documents can be checked (Rogala, 2020). However, the SAC requires that the carrier check whether the document shows any visible signs of alteration or forgery or not (II OSK 740/13, 2014). It is important to emphasise at the same time the fact that the WRAC has already allowed for the waiving of the imposition of the administrative fine in such a situation under the Act on Foreigners of 2003, where no such basis was provided for (IV Sa/Wa 554/14, 2014).

Consequently, the carrier's only obligation is to check whether a third-country national is in physical possession of documents which, at the moment of entry, will entitle them to cross the Polish border. Hence, the WRAC considered it unreasonable to invoke, in order to justify their conduct, the argument that the carrier has no competence or resources, like the Border Guard, to carry out document checks. Without doubt, as the Court ascertained, the Border Guard has broad competences to verify documents submitted by third-country nationals and, also, by assessing their authenticity and, inter alia, on the basis of information available in various registers, e.g., the register of foreigners whose stay on the Polish territory is undesirable and the Schengen Information System, it should however be highlighted that the scope of carriers' control activities is only one of many elements of the Border Guard's tasks (IV SA/Wa 2951/16, 2017).

At the same time, the Court points to the fact that only carriers engaged in regular passenger transport services in international road transport are within the personal scope of the notion of "road carriers". These entities are supposed to be characterised by a high level of professionalism of services, and are thus expected to meet the obligations related to the provision of such services.

The carriers should undoubtedly, therefore, have an appropriate knowledge of the catalogue of required documents. They must also be familiar with and follow Polish and international (EU) legal frameworks concerning border crossings by both their employees and by passengers using their services, as well as with the obligations imposed on the carriers in connection with conducting transport services in international road transport (V Sa/Wa 790/12, 2012). In addition, the carriers must entrust the performance of control duties to persons (staff) who know the scope of those duties and are able to perform them reliably. The Court found that this falls within the requirements of due diligence in running a business, since the carrier is aware of the rule that delivering a passenger to a border check without valid documents results in an administrative fine being

imposed on the carrier (V Sa/Wa 554/14, 2014). The risk of ignorance of the provisions in force in this respect is borne by the carrier and therefore, in order to avoid an administrative fine, the carrier should entrust the verification of documents to a person or to an external company (IV SA/Wa 1022/18, 2018) which has sufficient knowledge of the catalogue of documents entitling one to enter and stay in the territory of Poland. The WRAC has repeatedly emphasised in its jurisprudence that the risk of ignorance of these regulations is borne by carriers, and only by carriers (IV Sa/Wa 135/14, 2014).

An important issue referred to in both WRAC and SAC jurisprudence is the allegation that a decision imposing a fine is inconsistent with the objectives set by EU law. As previously emphasised, the legal act providing for the obligation to impose penalties is Article 26 of the Convention implementing the Schengen Agreement, further developed in Directive 2001/51. The imposition of administrative fines on carriers is therefore an expression of the implementation of Directive 2001/51. The directive states the objective of effectively combating illegal immigration, to be achieved through preventive measures. One such action is the imposition of fines on carriers, which are to be dissuasive, effective, and proportionate. The adoption of a penalty payment scheme within the EU aimed to ensure that carriers complied more effectively with their control obligations. An administrative fine should therefore, first of all, force the carrier to act more effectively in the future in performing their obligations (e.g., through better work organisation and/or additional training of the carrier's staff) (II OSK 2275/20, 2021) and not to constitute a sanction aimed at creating a state of discomfort for them. The aim is to prevent carriers from creating an environment conducive to illegal immigration (IV Sa/Wa 554/14, 2014). Therefore, if the financial penalty is intended to achieve a preventive objective, the migration risk (e.g., a situation where a visa was issued but the third-country national presents themselves for a border check before the visa becomes valid) related to a person who has been brought to the border without the relevant documents, as well as the possible threat related to the person concerned, remain irrelevant (IV Sa/Wa 2355/13, 2013).

The Nature of the Administrative Fine

As previously mentioned, the absence or invalidity of the documents necessary to cross the border leads to an imposition of a fine. Unless the exceptions specified in art. 462 of the Act on Foreigners apply, the financial penalty is imposed obligatorily, which is determined by the wording

of that provision: "The carrier [...] shall be obliged to pay an administrative fine". However, the administrative authority has a discretionary power to determine the amount of the fine, which also follows directly from the wording of that provision: "in an amount equivalent to EUR 3,000–5,000 for each imported person" (IV Sa/Wa 554/14, 2014). One should note, however, that the judgements of the WRAC do not practically explain how fines should be measured. The same applies to the decisions of administrative authorities referred to in the judgements. Only in one case did the WRAC express an opinion from which the conclusion may be drawn that the presentation of a visa which was not yet valid on the day of arrival at the border, justifies the imposition of the lowest estimated penalty (Ibidem). The fullest manner in which fines should be measured was expressed in 2014 by the Supreme Administrative Court in a judgement dismissing a cassation appeal. In the SAC's view, the amount of relatively marked penalties is determined by the circumstances accompanying the commission of an act prohibited under the Act on Foreigners or the harmfulness of that act. In any event, the severity of the penalty should be proportionate to the related infringement (II OSK 885/13, 2014). In Poland, it is a fact, however, that at that time the administrative authorities imposed the lowest possible fines. This conclusion does not, however, refer to fines imposed on air carriers. Because an air carrier may be subject to higher requirements as to professionalism when checking passengers and in view of the different scale of its turnover in relation to road transport carriers, the WRAC had no doubt about the legality of the imposition of a fine at a rate equal to its higher limit of EUR 5000 (IV SA/Wa 729/16, 2016).

In 2017, the Code of Administrative Procedure (Code of Administrative Procedure, 1960) was amended so that a new Section IVa (Art. 189a–189k) was added, regulating the proceedings in the area of administrative fines and both a definition of administrative fines and general conditions to apply administrative fines were introduced (Stankiewicz, 2021). It is important to highlight that Section IVa of the Code applies only when special provisions are silent about detailed rules on the application of administrative fines. When imposing an administrative fine, the administrative authority must take into account, inter alia, the gravity and circumstances of the violation of law. In 2019, two judgements of WRAC were delivered stating that Article 462 of the Act on Foreigners contains only the prerequisites for the imposition of a fine, its minimum and maximum amount, or rules on the enforcement of its payment, there is therefore no doubt that administrative fines have not been fully regulated in the Act on Foreigners. The Act lacks a regula-

tion concerning, among other things, the measurement of the amount of the fine or the conditions for the withdrawal from imposing an administrative fine, the imposition of a fine therefore depends on an assessment by the administrative authority of whether there are any grounds for waiving such imposition. As section IVa of the Code of Administrative Procedure provides for the obligation, and not only for the possibility for the administrative authority to assess the grounds for waiving the administrative fine, where there is lack of regulation in the Act on Foreigners, the provisions of Section IVa of the Code should be applied. Therefore, not taking into account the relevant provisions of Section IVa of the Code results in the setting aside of the contested decisions by the WRAC, and in returning the case to the relevant administrative bodies/authorities (IV SA/Wa 2561/18, 2018). However, in a judgement delivered in 2020, the WRAC rejected the existence of the automatic and absolute obligation to assess the grounds for waiving the administrative fines in each case (IV SA/Wa 420/20, 2020).

Interim Protection – Staying of Execution of the Contested Decision

Pursuant to Art. 61 § 1 of the Act on Proceedings before Administrative Courts, the lodging of a complaint to the Regional Administrative Court does not stay the execution of the act or action. However, the court may, pursuant to § 3, at the request of the complainant, issue an order staying in whole or in part the execution of the act or action, if there is a danger of serious damage or near-irreversible consequences. The issuance of such an order is also provided for in a situation in which a complaint to the Regional Administrative Court has been dismissed and the complainant files a cassation appeal to the Supreme Administrative Court.

As demonstrated above, fines are imposed in the amount of between EUR 3,000 and 5,000 for each person, which, when converted into PLN, is on average between PLN 13,500 and PLN 22,500 (compared to the average gross salary – as of November 2021 – of about PLN 5900) depending on the average exchange rate in force on the issue date of the decision imposing the fine. Hence proceedings before the WRAC are very often accompanied by requests to stay the execution.

Thus, the complainant must demonstrate circumstances which give rise to a danger of serious damage or near-irreversible consequences. The statement of reasons for the request should refer to the specific circumstances demonstrating that the stay of execution of such a decision is justified.

Hence, failure to state reasons for the request to stay the execution of a decision imposing a fine, makes it impossible to assess the merits of the request (IV SA/Wa 1189/16, 2017). The Court cannot act for the complainant, as it is incumbent on the complainant to prove that the decision, if executed, is likely to expose them to harm. Thus, a Court must refuse to stay the execution of the decision on the ground that there is no statement of reasons for the request (IV Sa/Wa 1433/12, 2012), but also – even if such a statement of reasons was provided in the request (e.g., a difficult financial situation, loss of financial liquidity leading to the inability to meet current obligations) – if the complainant does not provide adequate documentation showing the financial standing of the transport company (IV SA/Wa 2951/16, 2016). The complainant should present consistent arguments, supported by facts and documents that justify the stay of execution of the decision imposing the fine (IV Sa/Wa 709/13, 2013). Moreover, the request should be thoroughly substantiated so that the circumstances invoked in it demonstrate that the complainant meets the conditions specified in Article 61(3) of the Act on proceedings before Administrative Courts (IV Sa/Wa 897/15, 2015). Otherwise, those conditions will not be substantiated and the court will conclude that the complainant has not demonstrated them. On the other hand, for example, if the complainant shows that the damage referred to in Art. 61 consists of the amount of operating costs, together with interest, of a loan taken out on account of the payment of the fine imposed, the Court will accept such an argument (II OSK 1675/14, 2014).

Conclusions

The primary aim of this study is to reconstruct the scope of the carrier's obligations and the way in which these obligations should be properly fulfilled according to Polish administrative courts. This reconstruction encounters limitations, albeit for reasons independent of the author. Until now, the courts have not had many occasions to rule on the liability of air or sea carriers. The author is aware of the extent of problems resulting from the execution of the liability of air carriers only from private conversations.

The Polish example is also specific because of the fact that none of the situations concerned persons seeking international protection being brought to the border by a professional carrier. Personal data is redacted from the rulings, but it was straightforward to deduce from the context that most of the cases concerned the crossing of the Ukrainian–Polish border by third-country nationals for economic and tourist-based reasons.

It is evident, however, that as far as road carriers are concerned, a general conclusion should be drawn that both the courts' jurisprudence, and – above all – observations made in administrative decisions and statements of administrative organs, which the courts had to consider, have contributed to a better understanding of the scope of their obligations by the carriers. This is clearly visible when comparing how these obligations were performed and fulfilled and when analysing the arguments put forward by carriers in administrative and judicial administrative proceedings shortly after the introduction of the liability of carriers to Polish legal system and how they are fulfilled now. Considerable progress has been made in this regard. In the initial period of the application of these provisions, fines were imposed on carriers mainly due to their own negligence. It is now difficult to say whether, in this early period, it would not have been advisable to increase the State's involvement in familiarising the carriers with the liability system and with the consequences of failing to comply with carrier obligations. The findings of this study suggest that such actions would have been beneficial, because it is necessary to be aware of the fact that the addressees of decisions imposing fines were often – as can also be deduced from the courts' jurisprudence – entities of low economic power and poor financial standing.

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