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CONSENSUAL MODEL OF PROCEDURE ON GRANTING A CONSENT TO VOLUNTARY SUBMISSION TO LIABILITY IN CASES OF FISCAL CRIMES AND INFRACTIONS – AN OUTLINE OF THE PROBLEM

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Abstract. The paper addresses the issues of the model of proceeding for granting a consent to voluntary submission to liability. An attempt was made to show the features of the consensual model of proceedings and an analysis was made of the basic condition of "payment of a public-law receivable" starting the negotiation procedure on other conditions specified in Article 146(2) of the Code of Criminal Procedure. The last part of the article contains some remarks relating to the judicial proceedings with emphasis on the "benefit" for the accused in the form of a judgment in which the court allows for voluntary submission to liability – it is not entered in the National Criminal Register and it does not constitute a condition for fiscal recidivism.

Keywords: model of proceeding on the consent to the voluntary submission to liability, penal-procedural "agreement," negotiation, payment of a public-law receivable, judgment

INTRODUCTION

First, it should be noted that proceedings in cases involving fiscal crimes or infractions, despite constituting a branch of criminal law in the broad sense,[1] are also linked to financial law.[2] The main element which gives fiscal criminal

[1] A.R. Światłowski, when supporting the position expressed in Bafia 1980, 105, states that "the fiscal criminal procedure forms an integral part of the same system of procedure as the general criminal procedure and differs from the latter primarily in forms of proceeding," he rightly takes the view that "such a position should be taken today when the courts have been fully entrusted with adjudication powers in those cases. In the light of Article 1 of the Fiscal Criminal Code, there is no doubt about the nature of liability for fiscal crimes (although «liability» without adjectives refers to fiscal infractions), if we consider that fiscal criminal procedure concerns proceedings the main subject of which is criminal liability, the nature of proceedings conducted on the basis of the Fiscal Criminal Code should not give rise to doubt" [Światłowski 2008, 160].
[2] According to L. Wilk, "Fiscal criminal law plays a subsidiary role for financial law, in particular tax law, customs law, foreign exchange law and regulation on gambling, which means that

law its attribute of "connection" with financial law is its specific object of protection. This object of protection is the financial interest and financial order [Prusak 2002, 4], which determines its distinctiveness in relation to common criminal law [Wilk and Zagrodnik 2019, 4]. Fiscal criminal law protects the financial interest of the State Treasury, local government units and the EU [ibid.] and secures it by specifying which acts that violate the financial regulations of the state are to be countered with penalties and punitive measures [Sawicki and Skowronek 2017, 24]. A comprehensive understanding of the State Treasury covers its legal, economic and organisational senses [Prusak 2002, 4]. Due to the specific nature of the object of protection of the fiscal criminal law, the provisions of this branch of law define the principles of liability and punishment for fiscal crimes and infractions as infringements of the norms of financial law resulting in the direct or indirect depletion of State Treasury's assets or risk thereof, and also define the rules of procedure before adjudicating bodies and the manner of implementing their decisions [ibid.].

At this point, it should also be stressed that the essence of fiscal penal law is not so much repression, but first and foremost the striving to enforce payment of public-law receivables and to compensate for financial loss to the State Treasury, local government units or another entitled entity. Fiscal criminal law performs the enforcement function, also referred to as the enforcement/compensation function. According to its directives, fiscal criminal law is to ensure compliance with financial orders and prohibitions, and if necessary, the recovery of depleted public receivables (customs duties, taxes), which is to be achieved by means of penal measures specified in the Fiscal Criminal Code[3] [Sawicki and Skowronek 2017, 24–25].

The adoption by the legislature of the overarching objective – enforcement – gives this right a specialised character. It is largely linked to the implementation of the fiscal policy aimed at recovery of depleted public-law receivables as soon as possible [Znamierowski 2018, 109]. The normative expression of fiscalism expressed in procedural regulations is the purpose of fiscal criminal law defined in Article 114(1) FCC. The procedure for the cases of fiscal crimes

fiscal criminal law protects and safeguards, by means of criminal sanctions, compliance with financial law norms to the extent in which financial law alone does not have sufficient sanctions to compel compliance with its own rules. […] The link between fiscal law and financial law is reflected in the specific legislative technique used in the special part of the substantive fiscal law. This is a technique called the blanket structure of provisions. [...] Blanket fiscal provisions make reference outside the Fiscal Criminal Code to the provisions of financial law which supplement the statutory descriptions of criminal offences. Without this complement, the descriptions of the acts are incomplete. A clear reference to non-penal legal acts is made, for example, in the explanations of the so-called glossary of terms (Article 53 of the Fiscal Criminal Code), in which it refers to certain acts of tax, customs, foreign exchange or gambling law as regards the understanding of certain concepts used in the special part of the Fiscal Criminal Code (see e.g. Article 53(30–35a) of the Fiscal Criminal Code)" [Wilk 2019, 6–7].

[3] Hereinafter: FCC.

and fiscal infractions are shaped in such a way as to achieve the objectives of such proceedings in terms of compensating for the financial loss to the State Treasury, a local government unit or other entitled entity caused by such an offence. It is noted by scholars in the field that this objective, in relation to Article 2(1) of the Code of Criminal Procedure[4] in conjunction within Article 113(1) FCC should be regarded as complementary and, as regards the specificities of fiscal criminal law and the strong inclination of the legal rules in this area towards maximising the objective of compensation of the damage to public finances, should be regarded as very important [Skowronek 2017, 24–25].

The achieving of the fiscal objective of fiscal criminal law is enabled by a number of fiscal criminal regulations,[5] which reward compensation for the financial damage suffered by the creditor (State Treasury) as early as possible, and therefore the settlement of a public-law obligation, which entails greater relief and easing of fiscal criminal liability, which can be expected by the perpetrator of a fiscal crime or infraction. The condition for taking advantage of the benefits provided for by the provisions of the Fiscal Criminal Code is always the payment in full of the public-law receivable due (whether as a tax, duty, settlement of subsidies or subventions) depleted by an offence.

The next part of the study will outline the most important issues related to one of the most well-known instruments of a procedural nature, most commonly used in practice, provided for in fiscal criminal law for the purpose of achieving the essential objective of this regulation, i.e. the recovery of depleted dues for the Treasury and other entities indicated in the FCC.

The permission for voluntary submission to liability, discussed further herein, is considered to be one of those fiscal criminal law institutions carrying out an enforcement function that are most commonly used in practice and preferred by the legislature [Cichy 2015, 88].[6]

It is rightly assumed in the literature that voluntary submission to liability "as a means of implementing the principle of procedural economy, including due to the complete elimination of enforcement proceedings, is an expression of a rational trend in contemporary criminal policy based on practical considerations. Its essence is a clear degression of punishment in strictly defined

[4] Hereinafter: CCP.

[5] Such institutions include: voluntary submission to liability – Article 17(1)(1) FCC; penalty notice proceedings – Article 137(2)(1) FCC; conviction without hearing – Article 156(3) FCC; abbreviated hearing – Article 161(1) FCC; voluntary disclosure – Article 16 and 16a FCC; refraining from imposing a penalty or punitive measure – Article 19(2) FCC; refraining from decision on forfeiture of assets – Article 31(3)(2) FCC; extraordinary leniency – Article 36(2) and 77(4) FCC; refraining from extraordinary aggravation of penalty– Article 37(2) FCC; replacing the penalty of imprisonment with the penalty of restriction of liberty – Article 26(1) and (2) FCC; conditional discontinuation of proceedings, conditional suspension of penalty execution and release on parole – Article 41 FCC.

[6] See also statistical data of the Ministry of Justice on convicts for fiscal offences, provided therein.

cases, consistent with the pragmatic approach to shifting the point of gravity of the criminal policy from punishment to resolving the social conflict by, *inter alia*, a compensation in whole or in part for the financial detriment suffered by the State Treasury or a local government unit (caused by an offence) in accordance with the principle that the formally imposed «penalty» is not the main instrument of combating fiscal crimes and infractions" [Stepanów 2001, 66].

This institution embodies the primacy of the enforcement function in the fiscal criminal law over the repressive one, and is undeniably the most vivid example of legal instruments serving this purpose.

1. CONSENSUAL MODEL OF PROCEDURE ON GRANTING A CONSENT TO VOLUNTARY SUBMISSION TO LIABILITY IN CASES OF FISCAL CRIMES AND INFRACTIONS – GENERAL REMARKS

The procedural institution of the consent to voluntary submission to liability constitutes a kind of model in fiscal criminal proceedings (i.e. in cases involving fiscal crimes and infractions). It has been constructed by lawmakers in such a way that certain characteristic elements may be distinguished that reflect its consensual nature, representing a kind of reflection of the legislature's assumptions regarding the normative shape of institutions based on negotiations or procedural agreements. Assuming that the legislature has assigned to the criminal fiscal law (in the broad sense) not only repressive goals, but especially the dominant enforcement goal, the institution in question should be analysed in the context of model solutions, characteristic of procedural consensualism, the essence of which is reaching an agreement (consensus). When presenting a model of proceedings that is part of a given legal system or a specific legal institution within a given branch of law, it is first of all necessary to explain what the "model"[7] refers to and how the term used in the title will be understood herein.

As H. Paluszkiewicz points out, science uses modelling understood as a cognitive procedure for idealisation and concretisation, leading to a set of statements describing the relationship between features characterising certain legal phenomena or features that are considered particularly important.[8] In the analysis of normative solutions, it is important to distinguish descriptive models, models that reconstruct a specific reality, and normative models, which

[7] Model may be defined as "someone or something that is an extremely good example of its type, esp. when a copy can be based on it." See Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/model [accessed: 05.02.2021].

[8] See Paluszkiewicz 2008, 151ff and the literature listed therein, especially studies by Malinowski and Nowak 1972, 88; Zieliński 1979, 8ff; Lang 1962, 59ff.

define what this reality should look like [Malinowski and Nowak 1972, 88]. This manner of understanding is also accepted in contemporary literature on the subject.[9]

Further discussion presents the model of the institution of consent to voluntary submission to liability as defined in Articles 17(2) and 142 FCC, understood as a normative model reflecting the provisions of the currently applicable fiscal criminal law. At the same time, it is an optimisation model presenting the properties by which this consensual institution is characterised, enabling it to achieve, by its application in tax proceedings, the essential objective of that proceeding, i.e. the recovery of the depleted dues for the State Treasury.

The normative form of the institution of consent to voluntary submission to liability is part of a much broader area of solutions corresponding to the consensual model, characterising proceedings for fiscal crimes and infractions, and regulated currently by the provisions of the Fiscal Criminal Code.

In penal-law literature, the term "model" is most often explained using the "trial model." Thus, Z. Gaberle defines the "trial model" as "a set of procedural institutions forming one whole focused on the achievement of specific objectives. In this sense, there are two extremely opposing models distinguished: the criminal control model, aimed at the crime control (combating), which focuses on efficiency, and the due process model that emphasizes a fair trial model, which focuses on a fair hearing of the case. In Poland, this term is most commonly used for the various stages of the procedure" [Gaberle 2004, 99–100].

On the other hand, S. Waltoś assumes that a "model" is "a set of basic characteristics of an arrangement which characterise its structure and thus make it possible to distinguish that arrangement from others" [Waltoś 1968, 9; Gerecka–Żołyńska 2009, 19].

Referring these comments to the present deliberations, it may be stated that while very proceedings in cases involving fiscal crimes and infractions is shaped in such a way as to create a separate model of proceedings in these categories of offences (although the subsidiarity of provisions of the general criminal procedural law – Article 113 FCC – should be noted), also this branch of law contains certain normative constructs, which constitute separate procedural institutions with their own characteristics. Due to these characteristics, the term "model" may also be applied to them and in this sense, the manner in

[9] B. Janusz–Pohl, when referring his remarks to the notion of "model," points to two its basic variants, namely a "constructed, proposed model" and a "model representing a certain actual arrangement." According to the author, "in the first case, the model is created *ab ovo*, from the outset and in the abstract, while in the second case the answer to the question of what the model represents (e.g. the model of criminal trial) is determined by the shape of the legal framework; in this sense, the basis for its determination is specifically applicable law; in that sense, it is determined by the applicable law" [Janusz–Pohl 2013, 85–86].

which the institution of consent to voluntary submission to liability is normatively shaped may be regarded on the grounds of fiscal criminal law as a kind of model institution, characteristic of consensual proceedings.

The model of a procedural institution is a kind of benchmark, which distinguishes its construction, in whole or in part, from other legally determined institutions located in a closed legal system, while maintaining consistent elements subordinated to the main objectives of the procedure (trial).

In my opinion, the institution of consent to voluntary submission to liability is this kind of normative construct having specific features, and also serves to achieve the objective of the proceeding conducted in cases of fiscal crimes and infractions, and moreover is clearly distinguished in the model of fiscal criminal proceedings. This objective, as I have mentioned earlier, is largely linked to the implementation of fiscal policy aimed at reclaiming depleted public dues as soon as possible [Znamierowski 2018, 109]. This pragmatic aspect, intrinsically linked with the fiscal function of the fiscal criminal law [ibid.], seems to support the functioning of consensual institutions in the fiscal criminal law, including the institution of consent to voluntary submission to liability.

For the purpose of these considerations, it also seems reasonable to answer the question what the 'consensual' model refers to and why this institution is considered a model with already developed features, which are in line with the assumptions of consensualism. As indicated by P. Wiliński, consensualism in the criminal procedure is a trend towards solutions introducing an agreement between the participants of the proceedings as a basic factor for reaching and speeding up the final decision.[10]

In fiscal criminal proceedings, the normative structure of consensual institutions or instruments is based on the element of "agreement." S. Steinborn, citing the definitions of "agreement" formulated by S. Waltoś[11] and A.R. Światłowski,[12] rightly notices that "the element that seems to be insufficiently exposed in these definitions, and which perfectly highlights the linguistic meaning of the word «agreement», is the fact that the parties agree on the issue being negotiated." According to this author, firstly, in the definition of a penal-procedural agreement, emphasis should be placed on the consent of two opposing parties as to the resolution of a procedural issue or an issue

[10] See Wiliński 2014, 606 and the literature referred to therein.

[11] The definition proposed by S. Waltoś as cited in: Steinborn 2005, 49–50. An agreement is an accord concluded by the accused with the public prosecutor, the aggrieved party or even the procedural authority in which, in exchange for the conduct of the accused, a decision is made more favourable to him than he would have expected without such conduct [Waltoś 1992, 38].

[12] A.R. Światłowski's definition is as cited in: Steinborn 2005, 49–50. "Penal-procedural agreements are accords whereby two participants in the criminal proceedings, acting within the limits of their powers make reciprocal concessions as to the course of the proceedings or the decision on the merits" [Światłowski 1998, 53].

related to the content of a decision on the merits, and secondly, the result of the agreement must be included in the process [Steinborn 2005, 49–50].

The procedure for the consent to voluntary submission to liability is based on an "agreement," but it is distinguished from other procedural instruments included in the FCC by its quite peculiar normative structure. The measure of distinction is, among other things, the fact that the provisions governing these proceedings constitute a closed whole, placed directly before the regulations concerning the subsequent stages of fiscal criminal proceedings [Wilk and Zagrodnik 2018a, 636]. Thus, we have here a peculiar "proceeding" within the fiscal criminal procedure. It is normatively distinguished, but still maintains the consistency of goals with the entire fiscal criminal procedure, remaining only one of several consensual procedural institutions provided for in its structure. Thus, one can also speak of its normative model.

The peculiarity of the structure of this procedure also boils down to a penal-procedural "agreement," but worked out through negotiations. It should be pointed out that the negotiations do not occur in any of the consensual proceedings regulated both at the level of fiscal criminal procedure and common criminal procedure.

As I mentioned, a common element characterising consensual institutions in proceedings concerning fiscal crimes or infractions, including proceedings on granting a consent to voluntary submission to liability, is a penal-procedural "agreement" concluded between the procedural body and the perpetrator of a fiscal crime or infraction. This means that the decision in the matter of granting a consent to voluntary submission to liability takes place in cooperation with the perpetrator [Prusak 2002, 311], by way of a specific "agreement" concluded between the state authority and the perpetrator, or more precisely – the state administration and the perpetrator of a fiscal crime or infraction [Sawicki and Skowronek 2017, 345]. This does not mean, however, that the agreement will release the procedural authority (financial authority or court) from the obligation to establish the course of the offence committed, and the perpetrator – from the obligation to pay the due public levy.

A penal-procedural agreement is the agreeing of a position or decision by two or more participants in criminal proceedings [Światłowski 1997, 50]. Procedural bodies may participate in an agreement where the law expressly so permits (Articles 142–149 FCC) or where the agreement concerns an institution, such as conditional discontinuation of proceedings. An agreement is not an "contract," as contract is a concept derived from civil law which emphasises equality of the parties. It would be difficult to see the principle of equality between the financial authority and the perpetrator in proceedings concerning the consent to voluntary submission to liability, or equality between the parties (i.e. the public prosecutor and the accused) in judicial proceedings.

Despite the lack of equivalence between the parties, it can be considered that, in proceedings concerning the consent to voluntary submission to liability, there is a "resolution of the dispute" and, consequently, a "settlement of the dispute." A. Korybski understands dispute resolution as any conduct of the parties involved in the conflict, aimed at peaceful (with the exclusion of violence) and not sovereign (i.e. without the possibility of arbitrarily imposing on the parties the decision terminating the dispute) elimination of the dispute, either permanently or temporarily [Korybski 1993, 20]. On the other hand, "dispute resolution," according to that author, is an arbitrary process based on the obligation to impose a decision terminating the dispute against one or both parties [ibid.]. Since the financial authority authorised to apply that institution and the offender who paid the financial obligation due have reached a common position and concluded a formal penal-procedural agreement, the consent to such an agreement is a consensus. In this case, we are talking about the resolution of a dispute at the preparatory stage. As P. Hofmański points out, adjudication occurs when the quality of being bound by a decision of another authority concerns another stage of judicial application of the law, namely the one in which the court, having regard to the facts, carries out the subsumption on the basis of an interpreted rule of law and bindingly determines the legal consequences of the facts established [Hofmański 1988, 103]. On that basis, the application for voluntary submission to liability may be upheld by the court, which results in issuing the decision concluding the procedure.

The distinguishing feature of the penal-procedural "agreement" in relation to other "agreements" occurring among consensual regulations is that it contains a previously unregulated element of negotiations in the criminal procedure.[13] It may therefore be concluded that the legislature, by introducing a specific instrument in the form of negotiations, clearly implements the assumptions of consensualism regarding negotiations between the offender and the administrative authority (financial authority). It is the offender who applies to the financial authority for the preparatory proceedings for the consent to voluntarily submission to liability. However, for the application to be accepted and for the negotiations to be commenced, the offender is required to comply with the conditions set out in Article 142 FCC.

An additional argument in favour of considering this institution as corresponding to the model of consensual proceedings is also the fact that it is the archetype, and its normative roots, shaped on the basis of elements of an agreement, date back to the Fiscal Penal Law of 1926.[14] Under this Act, the decision of the fiscal authority to accept a request for voluntary submission to

[13] A.R. Światłowski notes that "the shape of this institution is similar to plea bargaining known in various form in criminal procedures of countries of the Anglosphere" [Światłowski 2008, 202].

[14] Journal of Laws of 1926, No. 105, item 609.

punishment could take place as a result of an agreement concluded with the accused on condition that he relinquished a formal criminal ruling [Tużnik 2013, 54].

Moreover, it should be noted that the granting of the consent to voluntary submission to liability is not provided for with regard to common crimes regulated by the Criminal Code and common infractions regulated by the Code of Infractions, and the proceedings on this subject have no institutional counterpart in the Code of Criminal Procedure.[15]

2. OBJECTIVE SCOPE OF NEGOTIATIONS BETWEEN THE OFFENDER AND THE FINANCIAL AUTHORITY

In the proceedings conducted by a pre-trial financial authority, before a bill of indictment has been filed, the perpetrator of a fiscal crime or infraction may submit a request for the consent to voluntarily submit to liability (Article 142(1) FCC). This means that "before the first questioning, the pre-trial financial authority is obliged to instruct the offender also about the right to submit such a request" (Article 142(2) FCC).

J. Zagrodnik is right in stating that "a fundamental manifestation of the consensual nature of the special procedure under analysis is the possibility for the pre-trial financial authority to make the submission of the request for the consent to voluntary submission to liability conditional on the offender's fulfilment of additional preconditions (negotiation conditions) outlined by this authority, going beyond the scope of duties, which constitute the preconditions on whose fulfilment the effectiveness of the offender's request depends" [Wilk and Zagrodnik 2018b, 284–85].

[15] J. Brylak points to a kind if "permeation of voluntary submission to punishment into related acts. First, it was provided for in Article 196 et seq. of the Fiscal Penal Act of 1971 and then it was included in Article 141 of the proposed Fiscal Penal Code. From there it was transposed into the Code of Criminal Procedure" [Brylak 2017, 77]. However, the position of A.R. Światłowski should be supported here and it should be assumed that voluntary submission to liability in the FCC should not, of course, be confused with two legal institutions, which after the introduction into the general criminal procedure began to be commonly referred to as voluntary submission to liability, i.e.: conviction without trial (Article 335 and Article 343 of the Criminal Code) and conviction without evidence-taking proceedings (Article 387 of the Criminal Code), especially since both of these institutions, respectively modified, have been applied since 1999 also in the fiscal criminal procedure (Articles 151 and 161) and in infractions proceedings (Articles 58 and 73of the Code of Infractions Procedure) [Światłowski 2008, 196 (note 116)]. Institutions under Article 335 CCP and Art. 387 CCP are characterized by a different normative structure. A common feature of the institutions governed by the Fiscal Criminal Code and the Code of Criminal Procedure is their structural component in the form of a penal-procedural agreement.

2.1. "Payment of a public-law receivable" as a mandatory condition for the negotiating phase to be commenced

Article 146(1) FCC[16] makes the commencement of the negotiating phase conditional on the offender's payment of the public-law receivable if the fiscal crime or infraction has depleted that receivable.

It should be noted that Article142(4) FCC *in fine* also formulates in this regard an order to attach to the request the evidence of performance of the activities listed in Article 143(1–3),[17] i.e.: 1) the proof of payment of the public-law receivable if, as a result of the fiscal crime or infraction, the amount of the levy has been depleted, unless, until the request is submitted, that amount has been paid in full – Article 143(1)(1); 2) as a fine, an amount corresponding to at least one-third of the minimum wage and an amount corresponding to at least one-tenth of the minimum wage for a fiscal infraction – Article 143(1)(2); 3) at the least a flat-rate equivalent of the costs of the proceedings – Article 143(1)(3).

Of the above-mentioned conditions, evidence in the form of "payment of the public-law receivable" is of fundamental importance in the face of the requirement of a prior payment [Zgoliński 2011, 91], and on the part of the authority it makes the obligation to make the "request" conditional on the payment of the public-law receivable.

The analysis of the requirements set out in Article 143 FCC indicates that the obligation to pay a public-law receivable is not subject to negotiation: if it has not been paid in advance, the offender must pay it when submitting the request [Światłowski 2008, 203]. It is rightly assumed in the literature that this obligation is a manifestation of the legislature's taking into account of different axiological assumptions of the Fiscal Criminal Code and of the strive towards compensation for the financial damage caused by a fiscal crime or infraction [Zagrodnik 2019b, 922].

The requirement to pay a public-law receivable will be met both when the payment is made by the offender and when it was made by a third party "on behalf" of the offender [Skwarczyński 2006].[18]

As regards the condition in question, however, the question of the determination of the amount of the public-law receivable, i.e. the question of the obligation of the taxable person to pay the amount of the arrears itself or the arrears plus interest, has been raised. The position of the scholars in the field

[16] Article 146(1) reads as follows: "The pre-trial financial authority makes the filing of a request for the consent to voluntarily submission to liability conditional on the fulfilment of the obligation to pay the public-law receivable in full, if that receivable has been depleted as a result of a fiscal crime or infraction, and it has not yet been paid."

[17] Act of 16 November 2016 on the National Fiscal Administration, Journal of Laws item 1947.

[18] The same view proposed Razowski 2017a, 329.

on this point is not clear[19] and the context of the views expressed in this regard is based, *inter alia*, on a different interpretations of the phrase "due payment."

The provision of Article 143(1)(1) provides for that the offender, when submitting the request for the consent to voluntarily submit to liability, is obliged to pay a due public-law receivable if, as a result of a fiscal crime or infraction, this receivable has been depleted.

The Polish Fiscal Penal Code defines a "public-law receivable depleted by an offence" in Article 53(27). According to this provision, a "public-law receivable which has been depleted by an offence is a numerically expressed monetary amount the obliged person has evaded paying or declaring to pay in full or in part and this depletion actually occurred."

The scope of the notion of public-law receivable covers situations where the offender, by committing an offence, causes tax arrears by failing to pay, or declaring the payment of, a public-law levy [Łabuda 2017, 584]. On the other hand, according to commentators, "the notion of «due» receivable means a state of objective character, in which the entitled entity has a legal possibility to effectively demand from the offender the public-law claim to be paid (according to the Supreme Court, a state in which 'a tax authority may effectively claim through any legal means available."[20] This leads to the conclusion that it is necessary to identify a "due" public-law receivable additionally with its final determination in the course of appropriate administrative proceedings (tax, customs proceedings, etc.). Thus, the notion of "due" public-law receivable cannot extend to the meaning of a receivable distributed in instalments or for which deferred payment has been decided. What is more, this interpretation of the term makes it quite clear that in order to use the penal measure under analysis, it is not necessary to pay interest for delayed payment of public-law receivables.[21] This position should be supported in full.

According to the definition of tax arrears as set out in Article 51(1) of the Tax Ordinance,[22] a tax arrears is a tax not paid on time (the definitions of tax and tax liability, in turn, are contained in Articles 6 and 5 of this Act). At the same time, as follows from Article 53(30) FCC, the terms used in Chapter 6 of the Code, in particular: "checking activities," "declaration," "tax information," "collector," "tax inspection," "tax obligation," "tax," "taxpayer," "tax remitter," "tax refund," "tax scheme," "standardized tax scheme," "NSP [tax scheme number]," have the meaning given to them in the Act of 29 August 1997 the Tax Ordinance, except that the terms: 1) "tax" shall also mean an advance tax payment, a tax instalment, as well as fees, other non-tax claims

[19] P. Lewczuk pursues the view that there are no groundsfor the offenderto paythe dues together with interest [Lewczuk 2014, 122]. A different position see Kaczorkiewicz 2017, 135–38.

[20] Judgment of 9 January 2012, ref. no. V KK 327/11, BPK 2012, no. 1 item 1.2.17.

[21] See Razowski 2017a, 322 and the literature referred to therein.

[22] Journal of Laws of 2019, item 900 as amended.

of the State budget of a similar public levy nature and solidarity contribution referred to in Article 30h of the Personal Income Tax Act of 26 July 1991;[23] 2) "taxpayer" shall also mean a person obliged to pay fees, non-tax claims of the State budget of a similar public levy nature and solidarity contribution referred to in Article 30h of the Personal Income Tax Act of 26 July 1991.

Article 53(30a) FCC states that the term "taxpayer" used in Chapter 6 of the Fiscal Penal Code also means an entity obliged to pay the receivables referred to in para. 26a (i.e. receivables constituting the revenue of the general budget of the European Communities or the budget managed by the European Communities or on their behalf, within the meaning of the provisions of European Union law binding the Republic of Poland, which are the subject of a fiscal crime or infraction).

The Specific Part of the Fiscal Criminal Code covers not only fiscal crimes and infractions against tax obligations (Chapter 6), but also includes fiscal crimes and infractions against customs obligations and the rules of foreign trade in goods and services (Chapter 7).

Thus, in view of the above-mentioned statutory definitions and the regulations of the Specific Part of the Code, in my opinion, the public law receivable referred to in Article 53(27) of the Fiscal and Penal Code, and consequently also in Article 143(1)(1) of the Polish Fiscal Criminal Code should not be limited only to overdue tax receivables.

Interest is charged on the tax arrears, but the rule is that the interest is calculated by the taxpayer himself (Article 53(1) and (3) of the Tax Ordinance). The question of calculating and paying the correct amount is therefore a separate issue. Also, for example, the issue of interest on customs duties is regulated separately. in the provisions of customs law (the Polish Customs Law[24] and the Union Customs Code[25]). Obviously, customs duties are not an independent levy. They are ancillary to the principal amount due and may arise only when the arrears has arisen.

Nevertheless, taking into account the definition of a public-law receivable depleted by the offence specified in Article 53(27) FCC, it should be assumed, in my opinion, that the payment of this receivable, entailing the *sine qua non* condition of submitting a request for a consent to voluntary submission to liability, should be made up to the principal amount depleted as a result of a fiscal crime or infraction. As of today, there are no normative grounds for this public-law claim depleted as a result of an offence to cover also interest. As it follows directly from the legal definition of this term, it is "a numerically

[23] Journal of Laws of 2020, item 1426.
[24] Journal of Laws of 2020, item 1384.
[25] Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, OJ L No. 269, p. 139.

expressed monetary amount the obliged person has evaded paying or declaring to pay in full or in part and this depletion actually occurred."

However, bearing in mind the purpose of the fiscal criminal procedure itself, which is to compensate for the financial loss of the State Treasury, a local government unit or other authorised entity, caused by an offence, it appears reasonable to put forward a proposal for the law as it should stand about the need to clarify this regulation and cover the principal amount of the claim together with interest. Only in this case will we deal with the compensation of the actual loss (financial detriment) suffered by the State Treasury, a local government unit or other authorised entity as a result of a committed fiscal crime or infraction, and thus with full implementation of the objective of the fiscal criminal procedure.

In view of the foregoing, it must be assumed that the "payment of the public-law receivable if, as a result of the fiscal crime or infraction, the amount of the levy has been depleted" must be made up to the amount outstanding on the part of the taxable person.

Finally, it should be noted that if having submitted the requests, it appears that the depleted public-law receivable has not been paid, the financial authority, as is apparent from Article 146(1) FCC, must make the request for the consent conditional on the full payment of that receivable [Świecki 2001, 97]. In such a situation, there is no room for negotiation, since the condition for payment of the public-law receivable in its entirety is mandatory [ibid.]. Therefore, it was only in Article 146(2) FCC that the legislature left the fulfilment of the additional conditions by the offender to be recognised by the financial authority in charge of the investigation [ibid.].

2.2. Optional conditions subject to negotiation under Article 146(2) FCC

To open the negotiations, the financial authority running the pre-trial procedure may make the acceptance of the request for a consent to the voluntary submission to liability conditional on the fulfilment by the offender of the additional conditions set out in Article 146(2) CCP.[26]

[26] Article 146 reads as follows: § 1. The pre-trial financial authority shall make the filing of a request for the consent to voluntarily submission to liability conditional on the fulfilment of the obligation to pay the public-law receivable in full, if that receivable has been depleted as a result of a fiscal crime or infraction, and it has not yet been paid. § 2. The financial authority in charge of the proceeding may make the submission of the request referred to in § 1 conditional on: 1. the payment of an additional fine, not exceeding, together with the amount already paid, half of the sum corresponding to the upper limit of the statutory range of penalty for the offence in question; 2. consenting to the forfeiture of items not covered by the offender's request, referred to in Article 142 § 1 and, if they cannot be lodged, from the payment of the monetary equivalent of those items, unless the forfeiture relates to the items referred to in Article 29 item

The notion of the negotiation conditions should be understood as the boundary conditions for the voluntary submission to liability by the offender [Razowski 2017b, 1273].

Negotiations between the offender and the financial authority should be carried out within the framework delineated, on the one hand, by the boundary conditions which must be met when the offender requests a consent for the voluntary submission to liability, and, on the other hand, by the further specified maximum requirements which may be imposed on the offender [Zagrodnik 2019a, 285].

The negotiations between the offender and the financial authority may concern the determination of the conditions which are limited by the provisions of the Fiscal Criminal Code, and once they are met, the authority applies to the court for the consent to the voluntary submission to liability [Tatarczak 2001, 44].

Accordingly, in order to open negotiations, the financial authority in charge of the proceedings has the right to make the request dependent on:

1) The payment of an additional fine, but not exceeding, together with the amount already paid, half of the sum corresponding to the upper limit of the statutory range of penalty for the offence in question (Article 146(2) CCP). This means that the amount of the fine can be negotiated both in terms of the number and level of day-fine units. The negotiation covers also conditions relating to the method of payment of the surcharge and the duration of performance and they shall be determined after hearing the offender or his legal representative. It must be stressed that the method of determining the amount of the fine is not defined differently for fiscal crimes and fiscal infractions. According to the provision of Article 143(1)(1) FCC, the amount paid as a fine should correspond to at least one-third of the minimum wage and for a fiscal infraction at least one-tenth of the minimum wage. The date of request submission and the minimum wage applicable at this point should be decisive here [Marciniak 2006, 104]. It should be noted that in practice the mere amount of the fine set by the minimum wage ceiling can be relatively problematic to pay by a potential offender. Accordingly, the negotiation conditions imposed by the authority as to the amount of the fine may be rejected, which in consequence will mean a refusal to accept the request. Instead of the request, an indictment will be brought before the court. The judicial proceedings will continue with the effect of the suspension of the limitation period for the tax liability.

4. 3) payment of other costs of the proceedings. § 3. The financial authority in charge of the proceedings determines the time, type and manner of performance of the obligations referred to in § 1 or § 2 after hearing the offender and the statutory representative referred to in Article 142 § 3 of the National tax Administration Act of 16 November 2016, Journal of Laws of 2016, item 1947.

2) The consent to the forfeiture of items not covered by the offender's request, referred to in Article 142(1) and, if they cannot be lodged, from the payment of the monetary equivalent of those items, unless the forfeiture relates to the items referred to in Article 29(4) (Article 146(3) CCP). Where forfeiture of items is mandatory, the offender must consent to the forfeiture of the items and, where forfeiture cannot be made, he must pay the monetary equivalent of the items to be forfeited. Failure to comply with this condition makes it impossible to apply for voluntary submission to liability. Where the forfeiture of items is optional, the authority may make the acceptance of the request conditional on the offender's consent to the forfeiture of items not covered by the request and, if these cannot be lodged, on the payment of the monetary equivalent of those items.

3) Payment of other costs of the proceedings (Article 146(4) CCP). According to the Regulation of the Minister of Justice of 8 December 2005 on the amount of the flat-rate costs of proceedings on the request for the consent to voluntary submission to liability in cases of fiscal crimes and fiscal infractions, it amounts to 1/12th of the minimum monthly remuneration for fiscal crimes and 1/10th of that remuneration for fiscal infractions.

The objective of the pre-trial (negotiation) proceeding is, where evidence so allows, to prepare the judicial proceedings [Skowronek 2005, 157].

The phase of negotiation between the offender and the financial authority, concluded with a positive result, is culminated by the authority's request for a consent to the voluntary submission to liability.[27] On the other hand, where the negotiation conditions are not accepted or not met by the offender, or where the exceptions to voluntary submission to penalty provided for in Article 17 FCC are disclosed, the authority shall refuse by a decision to make such a request.

3. JUDICIAL PROCEEDING – ISSUANCE OF THE JUDGMENT

In the literature, the proceedings concerning the examination by the court of the request for the consent to the voluntary submission to liability are referred to as the decision-making phase [Tużnik 2012, 95]. The issue of granting the consent to the voluntary submission to liability is decided by the court in a ruling issued at a hearing on the basis of the principles indicated in Article 17 FCC, i.e. if the guilt and circumstances of the commission of a fiscal crime or fiscal infraction raise no doubts, and those indicated in Article 143(1) FCC.

In the scope of conditions negotiated by the financial authority with the offender, the request is binding for the court. Pursuant to Article 18(1) FCC,

[27] It is assumed that the request for the consent to the voluntary submission to liability is a principal action other than an indictment or a substitute for an indictment [Owsicka 2017, 99].

the court, when allowing the offender to voluntarily submit to liability, shall pronounce, as a fine, the amount paid by the offender, as well as the forfeiture of items only to the extent to which the court has consented to it, and if it is not possible to lodge them, the payment of the monetary equivalent [Gajewska–Kraczkowska and Suchocki 2012, 37]. A judgment by which the court allows the offender to voluntarily submit to liability under Article 18(2) FCC is not entered in the National Criminal Register and at the same time, pursuant to Article 18(3) FCC, it does not constitute a condition for fiscal recidivism [ibid.]. It seems that this type of solution is part of the consensual trend and helps to achieve the objectives arising from the Fiscal Criminal Code.

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