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Participation of the Polish Border Guard in Jurisdictary Fiscal Criminal Proceedings

Udział Straży Granicznej w jurysdykcyjnym postępowaniu karnym skarbowym

ABSTRACT

This article is an attempt to approximate the participation of the Polish Border Guard as a non-financial body of preparatory proceedings in fiscal criminal court proceedings. First, the tasks and material property of the Border Guard were presented. Most space was devoted to considerations about the permissions of the Border Guard in jurisdictional proceedings in fiscal criminal proceedings, limiting them to cases of fiscal misdemeanours due to the fact that the Border Guard was granted the status of public prosecutor only in this category of cases. The study also discusses the issue of appeals against the Border Guard and its participation in the appeal hearing. The legal regulations regarding the powers of the Border Guard in court proceedings in cases of fiscal misdemeanours were also assessed, referring them to similar powers granted to financial organs of preparatory proceedings.

Keywords: the Polish Border Guard; public prosecutor; fiscal misdemeanours; permissions; jurisdictional proceedings

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INTRODUCTION

The subject of the study is the participation of the Polish Border Guard in jurisdictional fiscal penal proceedings, regulated in the provisions of the Act of 10 September 1999 – Fiscal Penal Code[1] and the relevant provisions of the Act of 6 June 1997 – Criminal Procedure Code.[2] This topic is rarely taken up in the literature, and publications devoted strictly to this issue appeared several years ago.

The Fiscal Penal Code distinguishes two groups of preparatory proceedings bodies: financial bodies of preparatory proceedings and non-financial bodies of preparatory proceedings. The first category of authorities includes the head of the tax office, the head of the customs and tax office and the Head of the National Revenue Administration (Article 53 § 37 FPC and Article 118 § 1 (1) to (3) FPC). On the other hand, non-financial bodies of preparatory proceedings, in addition to the Border Guard, are the Police,[3] the Internal Security Agency, the Military Police and the Central Anticorruption Bureau (Article 53 § 38 FPC and Article 118 § 1 (4) to (6) and § 2 FPC).

The Border Guard, having the status of a non-financial criminal investigation body, is entitled to conduct preparatory proceedings in cases concerning fiscal offences and fiscal misdemeanours identified in Article 134 § 1 (1) FPC, but the participation of the Border Guard in fiscal criminal proceedings does not end there. The Border Guard is a public prosecutor in jurisdictional fiscal penal proceedings, but only in cases of fiscal misdemeanours, as she was deprived of such power in cases of fiscal offences (Article 121 § 2 FPC). However, it should be borne in mind that only the Border Guard and the Police from among the non-financial bodies of preparatory proceedings have the status of public prosecutors in cases of fiscal misdemeanours.

In connection with the above, it is entitled to formulate a hypothesis that the Border Guard, having the status of a public prosecutor only in cases of fiscal misdemeanours, has a number of powers in jurisdictional fiscal penal proceedings resulting from the indicated procedural position.

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[1] Consolidated text, Journal of Laws 2021, items 408 and 694, hereinafter: FPC.

[2] Consolidated text, Journal of Laws 2021, items 534 and 1023, hereinafter: CPC.

[3] In particular, the Cybercrime Fighting Office operates at the Police Headquartes. For more on cybersecurity, see M. Karpiuk, *Organisation of the National System of Cybersecurity: Selected Issues*, "Studia Iuridica Lublinensia" 2021, vol. 30(2), pp. 234–242. It is also worth paying attention to the competence of the Police to apply operational control in the performance of operational and reconnaissance activities in order to prevent, detect, identify perpetrators, as well as obtain and record evidence prosecuted under public indictment, intentional crimes listed in Article 19 (1) (1) to (8) of the Act of 6 April 1990 on the Police (consolidated text, Journal of Laws 2020, item 360, as amended). See also J. Kudła, A. Staszak, *Operational Control in the Information Technology System (Postulates de lege ferenda)*, "Studia Iuridica Lublinensia" 2021, vol. 30(2), pp. 264–281.

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The aim of the article is, therefore, to analyze these powers of the Border Guard at various stages of jurisdictional fiscal penal proceedings and to prove the hypothesis that this authority, as a public prosecutor in cases of fiscal misdemeanours, has been equipped with a number of legal instruments enabling it to exercise the powers conferred on it by the legislator.

The subject of the analysis are legal regulations and statements of the doctrine. The verification of reality takes place in the normative and dogmatic sphere, and not in the sphere of judicial application of the law. However, the study is not devoid of references to practice, but is limited only to the judicature's statements. When presenting the topic, the author used an analysis of legal texts, a dogmatic analysis and an analysis of the Supreme Court's rulings. Therefore, the title issue was presented in a normative, dogmatic and partially practical aspect.

TASKS AND PROPERTY OF THE BORDER GUARD

The Border Guard is one of the non-financial preparatory bodies (Article 53 § 38 and Article 118 § 1 (4) to (6) and § 2 FPC). It is competent in cases concerning fiscal offences and fiscal misdemeanours specified in Articles 63 to 71 FPC, Articles 85 to 96 § 1 FPC, Articles 106e, 106f and 106h FPC, disclosed in the scope of its operation (Article 134 § 1 (1) FPC). Therefore, the Border Guard is the body of preparatory proceedings competent only in relation to certain fiscal acts, in which the investigation or quest may be conducted primarily by the head of the customs and fiscal office (Article 133 § 1 (1) FPC), but also by the head of the fiscal office (Article 133 § 1 (2) FPC), provided that the Border Guard has disclosed this act.[4]

When establishing the property of the Border Guard as a non-financial body of preparatory proceedings, the legislator used two criteria: disclosure of an act within the scope of its activity and an objective criterion, referring to the legal qualification of an act or category of a prohibited act, with the last of these criteria appearing together with the first.[5]

Act of 12 October 1990 on the Border Guard[6] indicates the tasks of the Border Guard, among them and those that relate to the recognition, prevention and detection of fiscal offences and fiscal misdemeanours listed in Article 134 § 1 (1) FPC

[4] T. Grzegorczyk, *Kodeks karny skarbowy. Komentarz*, Warszawa 2009, p. 562; J. Sawicki, G. Skowronek, *Prawo karne skarbowe. Zagadnienia materialnoprawne, procesowe i wykonawcze*, Warszawa 2017, p. 325.

[5] L. Wilk, J. Zagrodnik, *Kodeks karny skarbowy. Komentarz*, Warszawa 2018, p. 858; *Kodeks karny skarbowy. Komentarz*, ed. I. Zgoliński, Warszawa 2018, pp. 848–849; M.R. Tużnik, *Udział Agencji Bezpieczeństwa Wewnętrznego w postępowaniu karnym skarbowym*, "Studia Prawnicze i Administracyjne" 2018, vol. 24(2), p. 57.

[6] Consolidated text, Journal of Laws 2020, item 305, as amended.

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(Article 1 (2) (4) (b) of this Act). The material property and tasks of the Border Guard are thus determined by a simple reference from the Border Guard Act to the provisions of the Fiscal Penal Code, or more specifically to Article 134 § 1 (1) FPC. This provision includes in detail the scope of competence of the Border Guard in the scope of fiscal misdemeanours specified in Articles 63 to 71, Articles 85 to 96 § 1, Articles 106e to 106f and Article 106h FPC, which must be disclosed by the Border Guard in the field of its operation. This is the only condition for conducting preparatory proceedings by the Border Guard. On the one hand, the Border Guard, within its overall substantive property, may not conduct preparatory proceedings outside the scope set out in Article 134 § 1 (1) FPC, at least with respect to the acts described in Article 72 ff. FPC. On the other hand, conducting preparatory proceedings by the Border Guard in relation to the scope determined by Article 134 § 1 (1) FPC is possible only under the statutory action of the Border Guard.[7]

POWERS OF THE BORDER GUARD IN JURISDICTION PROCEEDINGS IN CASES OF FISCAL MISDEMEANOURS

The Border Guard and the Police were granted the status of public prosecutor only in cases of fiscal misdemeanours and were deprived of such authority in cases of fiscal offences (Article 121 § 2 FPC). In cases of fiscal misdemeanours in which the investigation is the sole form of preparatory proceedings (Article 152 first sentence FPC), the Border Guard is a non-financial body of preparatory proceedings entitled to draw up and bring an indictment and to support it before a court, as well as to appear throughout proceedings, not excluding activities after the decision becomes final (Article 121 § 2 FPC).

In addition to the prosecutor, the public prosecutor before the court is the body that submits and supports the indictment (Article 121 § 1 FPC). As stressed in the doctrine,[8] if the Border Guard brings and supports an indictment in a fiscal misdemeanour case, it will thereby obtain the status of a public prosecutor in this case.

In determining the powers of the Border Guard as a public prosecutor, it is helpful to analyze the resolution of the Supreme Court of 16 November 2000[9] concerning the return of a fiscal misdemeanour case to the preparatory proceedings in a situation when the indictment was filed by the Police. This resolution was still valid also in the case of the Border Guard being conducted, in addition to policies

[7] M. Kołdys, *Rola i zadania niefinansowych organów postępowania przygotowawczego*, "Prokuratura i Prawo" 2017, no. 3, p. 112.

[8] H. Skwarczyński, *Uprawnienia Straży Granicznej w postępowaniu o przestępstwa i wykroczenia skarbowe*, "Wojskowy Przegląd Prawniczy" 2003, no. 3, p. 109.

[9] I KZP 38/2000, OSNKW 2000, no. 11–12, item 95.

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subject to the non-financial preparatory body and the status of the accused in cases of fiscal misdemeanours.

In this resolution, it was decided whether the court should, in the event of significant deficiencies in the preparatory proceedings, return the case to the prosecutor or to the body that brought the bill of indictment (in the discussed case – the Police). It stated that the return of a fiscal misdemeanour case in which the indictment was filed by the Police or other non-financial preparatory body takes place pursuant to Article 339 § 3 (4) CPC (currently Article 339 § 3 (3a) CPC) to the prosecutor. As the Supreme Court emphasized, the non-financial preparatory bodies were not equipped in any of the provisions of the Fiscal Penal Code with the competences vested in the preparatory and judicial proceedings of the prosecutor, because, unlike the financial bodies of the preparatory proceedings, the disposition of Article 122 § 1 FPC does not refer to them. Assignment of prosecutor's competence to the financial body of preparatory proceedings, referred to in Article 122 FPC, will not occur in the case of the Border Guard, and as a result, when this body acts as a public prosecutor before the court, he will have the rights of a party to the proceedings, and not those expressly reserved for the prosecutor. As a result, the Border Guard will not have the right to consent to the voluntary submission of liability by the accused (Article 387 § 2 CPC in conjunction with Article 113 § 1 FPC), because the provision does not refer to the party or public prosecutor in general, about the prosecutor. Depriving the Border Guard of the right to lodge an application for conviction without a hearing will already result from the very Article 156 § 1 FPC, and if it was not for this provision, such an exemption would occur under Article 335 § 1 *in principio* CPC, which talks about the prosecutor and not about the public prosecutor.

The Border Guard as a public prosecutor in cases of fiscal misdemeanours has the right to read the indictment that initiates the court proceedings, provided that the representative of this authority appears at the trial – otherwise, the indictment will be read by a representative of the financial investigation authority, whose participation is mandatory (Article 385 § CPC in conjunction with Article 113 § 1 FPC and Article 157 FPC). The Border Guard also has the power to charge the accused with another act, being a fiscal misdemeanour, falling within the property of the Border Guard, in addition to the indictment (Article 398 § 1 CPC in conjunction with Article 113 § 1 FPC). The Border Guard may also agree to conduct evidentiary proceedings only partially if the explanations of the accused who plead guilty will not raise doubts, provided that a representative of the Border Guard will be present at the trial (Article 388 CPC in conjunction with Article 113 § 1 FPC).[10]

In addition, the Border Guard gained the right to participate in the meeting before the trial, determined in accordance with Article 339 CPC in conjunction

[10] H. Skwarczyński, *op. cit.*, pp. 110–111.

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with Article 113 § 1 FPC. In this case, however, participation in the Border Guard meeting will not be compulsory, because it is a different party than the prosecutor. According to H. Skwarczyński, the Border Guard as another party may participate in the meeting if it appears, but its notification is not considered mandatory (*argumento ex* Article 339 § 5 CPC in conjunction with Article 113 § 1 FPC).[11] In turn, B. Kurzępa believes that also the Border Guard should be notified by the president of the court about the date of the meeting regarding the return of the case. Admittedly, Article 339 § 5 CPC provides for the compulsory participation of only the prosecutor, and other parties may participate if they appear, but this author recognizes Article 121 § 2 FPC as a special provision, obliging the president of the court (only in cases of fiscal misdemeanours) to notify the non-financial preparatory body about such a meeting,[12] which in my opinion does not deserve approval.

In addition to the above-mentioned powers of the Border Guard, which have their basis in the provisions of the criminal procedure, which apply accordingly under Article 113 § 1 FPC in criminal fiscal proceedings, this authority also has the rights arising directly from the provisions of the Fiscal Penal Code such as the right to ask questions to a person heard (Article 160 FPC) or the right to speak after closing the court proceedings (Article 162 FPC).

The political position and the status of the Border Guard as a public prosecutor in cases of fiscal misdemeanours require consideration through the relations of this authority with the public prosecutor and the financial authority of the preparatory proceedings.[13]

The issue of financial participation of preparatory proceedings at the main hearing in a fiscal criminal process is regulated by Article 157 FPC. The obligatory participation of the financial representative of the preparatory body at the hearing in cases of fiscal offences is provided for when he or she initiated legal proceedings and thus brought, as a rule, an indictment to the court after having previously conducted preparatory proceedings in the form of an investigation (Article 157 § 1 first sentence FPC). As indicated in the doctrine,[14] in cases of fiscal offences, the failure to appear at the main hearing of the financial preparatory body who brought an indictment after conducting an investigation stops the case, regardless of the fact that the body was properly informed of the date of the hearing. In this case, it will be necessary to order a break in the hearing and set a new date.

A scientific situation should also be subject to a procedural situation in which the prosecutor takes part in the main trial in court proceedings in a case of fiscal

[11] *Ibidem*, p. 111.

[12] B. Kurzępa, *Glosa do uchwały SN z 16 listopada 2000 r*., "Orzecznictwo Sądów Polskich" 2001, no. 4, p. 170.

[13] H. Skwarczyński, *op. cit.*, p. 111.

[14] J. Zagrodnik, [in:] J. Zagrodnik, L. Wilk, *Kodeks karny skarbowy…*, p. 1073.

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offence, inaugurated by the financial authority of preparatory proceedings. Using the language interpretation of Article 157 § 1 FPC J. Zagrodnik considers that, in the procedural configuration described above, in which the indictment was brought by the financial investigation authority, participation in the prosecutor's main hearing on the basis of the general authorization under Article 45 § 1 CPC in conjunction with Article 113 § 1 FPC does not release the financial authority from its obligation participation in the main trial in a fiscal offence case.[15] This means that if the prosecutor joins the prosecution, two public prosecutors will appear at the hearing: the prosecutor and the financial investigation body.

Unlike the obligatory participation in the hearing of the financial body of preparatory proceedings in cases of fiscal offences, in cases of fiscal misdemeanours the participation of this body is optional (Article 157 § 1 second sentence FPC). A deviation from this rule occurs if the president of the court or court issues a decision (ordinance or decision, respectively) obliging the pre-trial financial authority to participate in the hearing in a fiscal misdemeanour case.

In turn, in cases of fiscal offences in which an indictment was brought by the prosecutor, the financial investigation authority or his representative may act alongside the prosecutor as a public prosecutor (Article 157 § 2 FPC). Participation in the main hearing of the financial body of preparatory proceedings, next to the prosecutor, therefore remains exclusively within the sphere of the former's powers. As regards the application of the above provision to the participation of the prosecutor as a public prosecutor at the main hearing, Article 46 CPC in conjunction with Article 113 § 1 FPC shall apply. This means that the prosecutor is obliged to participate in the main hearing in cases of fiscal offences in which preparatory proceedings were conducted in the form of an investigation (*argumentum a contrario ex* Article 46 § 2 CPC in conjunction with Article 46 § 1 CPC and Article 113 § 1 FPC) and his failure to stop hearing the case. In cases of fiscal offences, in which the preparatory proceedings ended in the form of an investigation and the indictment was brought by the prosecutor, his failure to appear at the main trial does not stop the examination of the case (Article 46 § 2 CPC in conjunction with Article 113 § 1 FPC).[16]

However, there is no similar legal regulation, as in Article 157 FPC, in relation to non-financial preparatory bodies, which is an obvious oversight of the legislator and should be a reason to enact the relevant provision. As noted by J. Zagrodnik[17] and I. Zgoliński,[18] therefore, Article 121 § 2 FPC should be taken into account, which grants the Border Guard the right to appear as a public prosecutor in proceed-

[15] *Ibidem*.
[16] *Ibidem*, pp. 1073–1074.
[17] *Ibidem*, pp. 1074–1075.
[18] I. Zgoliński, [in:] *Kodeks karny skarbowy…*, ed. I. Zgoliński, pp. 962–963.

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ings before the court in cases of fiscal misdemeanours. In the presented procedural situation, the right to appear as a public prosecutor in court is also vested in the prosecutor's body acting alongside the Border Guard (Article 45 CPC in conjunction with Article 113 § 1 FPC). In the court proceedings in a fiscal misdemeanour case in which the indictment was filed by the Border Guard, the financial body of the preparatory proceedings does not take part (*argumentum a contrario ex* Article 157 §§ 1 and 2 FPC).

The legislator provided for the authorization of the financial body of preparatory proceedings to bring and support prosecution in cases of fiscal offences. The solution in the normative aspect of the issue of the pre-trial financial authority's right to bring and support prosecution in cases of fiscal offences is twofold. In cases in which the pre-trial financial authority investigated and in cases of fiscal offences in which he investigated, although the indictment is prepared by the pre-trial financial authority, it is subject to the approval of the prosecutor who brings him to court (Article 155 §§ 1 and 2 FPC). It follows that the financial investigation body has been deprived of the opportunity to comply with Article 121 § 1 FPC in so far as it relates to the indictment. Despite this, the legislator in Article 157 § 2 FPC, which is a *lex specialis* in relation to Article 121 § 1 FPC, explicitly provides for the authority of the financial preparatory body to appear as a public prosecutor in a fiscal offence case in which the prosecutor brought an indictment. In other cases of fiscal offences, the financial authority of a preliminary investigation has the *in genere* right to draw up, file and then support an accusation before a court. This means that in this category of cases, if a bill of indictment is drawn up and filed, he acts as a public prosecutor in the trial (Article 121 § 1 FPC).[19]

The provisions of the Fiscal Penal Code provide the basis for the thesis that the legislator does not provide for the right to bring and support prosecution in a fiscal offence case by a non-financial body of preparatory proceedings, including by the Border Guard. In order to definitively resolve the issue of the indicated authority's participation as a public prosecutor in a fiscal offence case, it becomes necessary to refer to the Criminal Procedure of Code. In this matter, it is crucial to state that by granting the Police, and indirectly – pursuant to Article 312 CPC – also to the Border Guard the authorization to draw up an indictment in an investigation, the legislator does not foresee the right to bring it, reserving this act in Article 331 § 1 CPC for the prosecutor's office. It should be emphasized that the sources of such entitlement are also not the provisions of the Regulation of the Minister of Justice of 22 September 2015 in the matter of bodies authorized to conduct investigations, apart from the Police, and bodies authorized to bring and support prosecution before the court of first instance in cases in which an investigation was conducted, as well

[19] L. Wilk, J. Zagrodnik, *Kodeks karny skarbowy*..., pp. 675–676.

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as the scope of cases commissioned to these bodies[20] in which the Border Guard is entitled to bring and support prosecution before the first court instances only in cases of offences referred to in Article 264 § 2, Article 264a § 1, Article 270, Article 271 §§ 1 and 2 and Articles 272 to 277 of the Criminal Code,[21] in Article 464 of the Act of 12 December 2013 on foreigners,[22] in Article 125 of the Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland,[23] and in Article 9 and Article 10 (1) and (2) of the Act of 15 June 2012 on the effects of entrusting the performance of work to foreigners staying contrary to the regulations on the territory of the Republic of Poland.[24]

Therefore, the right of the Border Guard to bring and support prosecution in the above-mentioned cases does not cover cases of fiscal offences. The analysis of the provisions of the Criminal Procedure of Code allows to state that non-financial authorities conducting preparatory proceedings in cases of fiscal offences do not have the right to bring and support prosecution, so they cannot act in such cases as a public prosecutor. On the basis of Article 331 § 1 CPC in conjunction with Article 113 § 1 FPC, it must be assumed that in the present procedural situation the indictment is brought and supported by a prosecutor in court.[25]

INCIDENT MEASURES AT A BORDER GUARD

There is no doubt that the Border Guard as a public prosecutor in cases of fiscal misdemeanours (Article 121 § 2 FPC) has the right to lodge an appeal, and hence as a party has the right to lodge an appeal against a decision issued at first instance (Article 425 § 1 CPC in conjunction with Article 113 § 1 FPC). The granting of the Border Guard status of a public prosecutor means that it has the opportunity to challenge decisions, both in favor and to the detriment of the accused (Article 425 § 4 CPC in conjunction with Article 113 § 1 FPC). The legislator has formulated the requirement that an appeal from a public prosecutor should contain an indication of the charges against the decision and a justification (Article 427 § 2 CPC in conjunction with Article 113 § 1 FPC). If the president of the court of first instance refuses to accept the appeal, the Border Guard may lodge a complaint (Article 429 § 2 CPC in conjunction with Article 113 § 1 FPC). Similarly, if the appeal court leaves no appeal, the authority may appeal to another equivalent composition of

[20] Journal of Laws 2015, item 1725.

[21] Act of 6 June 1997 – Criminal Code (consolidated text, Journal of Laws 2020, item 1444, as amended).

[22] Consolidated text, Journal of Laws 2020, item 35, as amended.

[23] Consolidated text, Journal of Laws 2021, item 1108.

[24] Journal of Laws 2012, item 769, as amended.

[25] See L. Wilk, J. Zagrodnik, *Kodeks karny skarbowy*..., pp. 676–677.

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the appeal court (Article 430 § 2 CPC in conjunction with Article 113 § 1 FPC). If the Border Guard lodges an appeal in favor of the accused, the accused cannot withdraw it (Article 431 § 2 CPC in conjunction with Article 113 § 1 FPC). In such a situation, also the Border Guard cannot withdraw an appeal lodged in favor of the accused, unless it has its consent (Article 431 § 3 CPC in conjunction with Article 113 § 1 FPC).[26]

The issue of the body competent to hear complaints against decisions, orders, actions, as well as the lack of acts of the financial investigation body was regulated autonomously in Article 167 § 1 FPC and Article 167 § 2 FPC as regards Military Gendarmerie.[27]A similar provision of the Fiscal Penal Code is missing in relation to non-financial preparatory bodies, with the exception of the Military Police, which should be criticized once again. Therefore, as indicated in the doctrine[28] in relation to other non-financial preparatory bodies, Article 465 § 3 CPC in conjunction with Article 113 § 1 FPC applies, from which it follows that the decision of non-financial bodies is subject to appeal to the prosecutor supervising this proceeding. On the other hand, the control of decisions issued in the fiscal criminal proceedings by the prosecutor is subject to Article 465 § 2 CPC in conjunction with Article 113 § 1 FPC, which provides for the control of the court competent to hear the case, unless the law provides otherwise.[29]

In turn, an appeal may be lodged against the order for judgement in the form of an objection. The right to lodge it is vested in the accused and the prosecutor (Article 506 § 1 CPC in conjunction with Article 113 § 1 FPC). It is obvious that if the Border Guard plays the role of the prosecutor, it will also have the right to appeal against the order.[30]

In the cases of fiscal misdemeanours, the Border Guard has been deprived of the possibility to lodge a cassation appeal, as such permission was granted in this category of cases only to the Prosecutor General and the Ombudsman (Article 167a FPC). As it is noted in the literature,[31] the discussed legal solution was dictated by the low weight of cases of fiscal misdemeanours, inadequate to the rank of this extraordinary appeal. Consequently, the Border Guard can only submit applications or requests to the above-mentioned special entities for lodging a cassation appeal. The Prosecutor General or the Ombudsman, without granting a request or

[26] H. Skwarczyński, *op. cit.*, p. 121.

[27] L. Wilk, J. Zagrodnik, *Prawo i proces karny skarbowy*, Warszawa 2019, p. 407.

[28] J. Zagrodnik, *op. cit.*, pp. 1135–1136; T. Razowski, [in:] P. Kardas, G. Łabuda, T. Razowski, *Kodeks karny skarbowy. Komentarz*, Warszawa 2017, p. 1389; J. Skorupka, [in:] *Kodeks karny skarbowy…*, ed. I. Zgoliński, p. 988.

[29] I. Sepioło-Jankowska, *Prawo i postępowanie karne skarbowe*, Warszawa 2017, p. 294.

[30] H. Skwarczyński, *op. cit.*, p. 121. More about opposition to an injunction, see M.R. Tużnik, *Postępowania szczególne w postępowaniu karnym skarbowym*, Warszawa 2013, pp. 239–253.

[31] T. Razowski, *op. cit.*, pp. 1390–1391; J. Zagrodnik, *op. cit.*, p. 1138; J. Skorupka, *op. cit.*, p. 989.

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application, is not obliged to issue a decision on this matter. Such a request should be considered in the context of the free but not arbitrary recognition of the entity to which it was submitted.[32]

Another extraordinary appeal that can be applied by the Border Guard is an application for resumption of proceedings, which may occur at the request of a party (Article 542 § 1 CPC in conjunction with Article 113 § 1 FPC). Such a request may be submitted by the Border Guard if the case concerns a fiscal misdemeanour in which it acted as a party (public prosecutor). An application for resumption of proceedings, if it does not come from a prosecutor, should be drawn up and signed by a lawyer, legal advisor or counsellor of the Prosecutor General's Office of the Republic of Poland (Article 545 § 2 CPC in conjunction with Article 113 § 1 FPC). H. Skwarczyński aptly notes that, seeing the need for such a request by the Border Guard, a more practical solution is to present this issue to the prosecutor who, recognizing the legitimacy of such a request, could draw it up and bring it to the competent court.[33]

An application for resumption of proceedings shall be submitted to the court with jurisdiction to resume the proceedings (Article 544 CPC in conjunction with Article 113 § 1 FPC). The president of this court refuses to accept the application if it was brought out of time or by an unauthorized person or is inadmissible by law (Article 429 § 1 CPC in conjunction with Article 545 § 1 CPC in conjunction with Article 113 § 1 FPC). Refusal to accept an application for resumption will also occur if, within the time limit set by the president of the court, the author of the application has not remedied the formal defects, to which he was summoned pursuant to Article 120 § 1 CPC in conjunction with Article 530 § 2 CPC in conjunction with Article 545 § 1 CPC in conjunction with Article 113 § 1 FPC. An order refusing to accept an application for the resumption of the Border Guard, if it was a party, may be appealed (Article 429 § 2 CPC in conjunction with Article 545 § 1 CCP in conjunction with Article 113 § 1 FPC).

Leaving an application without consideration occurs as a result of unjustified acceptance of the application or its effective withdrawal. Dismissal of the application takes place when the grounds for resumption are not shown. In both cases, the Border Guard may appeal against the court's decision, provided that the district court ruled (Article 547 § 1 CPC in conjunction with Article 113 § 1 FPC).[34]

The participation of the Border Guard in a court meeting regarding the resumption of proceedings is decided by the president of the court or the court (Article 544

[32] Decision of the Supreme Court of 1 July 1999, V KZ 31/99, OSNKW 1999, no. 9–10, item 63 with the approving commentary of R. Kmiecik (*Glosa do postanowienia SN z dnia 1 lipca 1999 r.*, "Orzecznictwo Sądów Polskich" 2000, no. 2, p. 92).

[33] H. Skwarczyński, *op. cit.*, p. 123.

[34] *Ibidem*; *Kodeks postępowania karnego. Komentarz*, ed. J. Skorupka, Warszawa 2018, p. 1265.

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§ 3 CPC in conjunction with Article 113 § 1 FPC). However, if the court ordered the examination of circumstances under Article 97 CPC, the Border Guard as a party has the right to take part in the screening (Article 546 CPC in conjunction with Article 113 § 1 FPC).

PARTICIPATION OF THE BORDER GUARD IN THE APPEALS

The Border Guard is guaranteed participation in the appeal hearing by the fact of having the status of a public prosecutor in cases of fiscal misdemeanours and the related right to bring and support an indictment before a court (Article 121 § 1 FPC). In addition, Article 121 § 2 FPC provides for the possibility of appearing in the course of the entire proceedings, without limiting it to proceedings before the court of first instance or providing further participation in the case from lodging an appeal, thus ensuring the Border Guard the right to appear also in appeal proceedings. As H. Skwarczyński emphasizes, even if the Border Guard meets the requirements set out in Article 121 § 1 FPC and appeals against the first-instance judgement, its participation in the appeal proceedings is not at all obvious.[35] The Fiscal Penal Code lacks provisions that would guarantee participation in an appeal hearing to a non-financial body of preparatory proceedings. In the margins of these considerations, it should be noted that with respect to the financial participation of the preparatory body as a public prosecutor in the appeal hearing, the provisions of Article 157 FPC under Article 165 FPC shall apply accordingly, which once again reveals legislative deficiencies in the participation in non-financial fiscal criminal proceedings preparatory bodies.

Therefore, it becomes necessary to refer to the provisions of the Code of Criminal Procedure, more specifically to Article 450 § 1 CPC, which stipulates that participation in the prosecutor's trial is compulsory and participation of other parties is compulsory, if the president of the court or court deems it necessary (Article 450 § 2 CPC in conjunction with Article 113 § 1 FPC). T. Grzegorczyk rightly observes that if the legal act confers prosecutor's rights only on the financial body of preparatory proceedings, and in the scope resulting from Article 122 § 1 FPC and if the conditions required therein are met, then another public prosecutor may only use such powers as the law attributed to "prosecutor" or "party".[36]

As a consequence, the Border Guard as a public prosecutor in a fiscal misdemeanour case will appear under Article 450 § 2 CPC in conjunction with Article 113 § 1 FPC as another party. The participation of another party is not obligatory, unless the president of the court or the court deems it necessary. This does not mean that

[35] H. Skwarczyński, *op. cit.*, p. 121.
[36] T. Grzegorczyk, *op. cit.*, p. 512.

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participation in the appeal of the Border Guard depends only on the discretion of the president of the court or the court, since it depends on these entities whether this participation will be mandatory or not. In the remaining scope, this share appears as the party's right.[37] The doctrine indicates that the right to participate in the appeal hearing of other parties does not arise directly from Article 450 § 2 CPC, but such a conclusion is derived *a contrario* from Article 450 § 3 CPC. Since the failure of the parties, defenders or proxies to be duly notified about the appeal hearing does not stop the examination of the case, the lack of proper notification resulting in the failure of the parties, their defenders and representative prevents it from being heard.[38]

CONCLUSIONS

A study of the issue of the participation of the Border Guard in jurisdictional fiscal penal proceedings led to the following conclusions.

The substantive jurisdiction of the Border Guard as a non-financial criminal investigation authority has been determined using two criteria: the criterion of disclosure of an act in the scope of its operation and the objective criterion, which refers to the legal qualification of the act or the category of the prohibited act.

The Border Guard has been granted the status of a public prosecutor in cases of fiscal misdemeanours. It was therefore entitled to draw up and bring a bill of indictment and to support it in court, and to act throughout the proceedings, including actions after the judgement has become final (Article 121 § 2 FPC).

The Border Guard, being a public prosecutor in cases of fiscal misdemeanours, has a number of powers resulting both from the provisions of the criminal procedure, e.g. the right to read the indictment (Article 385 § 1 CPC in conjunction with Article 113 § 1 FPC and Article 157 FPC) and Fiscal Penal Code, e.g. the right to ask questions of the interviewee (Article 160 FPC) and the right to speak after the closure of the trial (Article 162 FPC).

With regard to the participation of the Border Guard in the hearing in cases of fiscal misdemeanours, there is no legal regulation in which this participation would be directly provided for, which must be criticized and the adoption of an appropriate provision, e.g., analogous to Article 157 FPC, which regulates these issues exhaustively in relation to the financial bodies of the preparatory proceedings. In relation to the Border Guard, it is necessary to rely only on Article 121 § 2

[37] S. Zabłocki, *Postępowanie odwoławcze w nowym kodeksie postępowania karnego. Komentarz praktyczny*, Warszawa 1997, p. 133.

[38] P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego. Komentarz*, vol. 2, Warszawa 2000, p. 613; H. Skwarczyński, *op. cit.*, p. 122.

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FPC, which grants it the right to act as a public prosecutor in court proceedings in cases related to fiscal misdemeanours. On the other hand, it can be inferred from Article 157 §§ 1 and 2 FPC that in the event that an indictment is brought by the Border Guard, the financial body of the investigation is no longer involved in the court proceedings in the case of fiscals misdemeanours.

Analysis of Article 155 §§ 1 and 2 FPC and Article 157 § 2 FPC, as well as the provisions of the Regulation of the Minister of Justice of 22 September 2015 in the case of the authorities empowered to conduct investigations, apart from the Police, and the authorities empowered to bring and support the prosecution before the first instance court in cases in which the investigation was conducted, as well as the scope of cases commissioned by these authorities, confirmed the truth of the thesis that the legislator did not provide for the Border Guard's right to bring and supporting prosecution in cases of fiscal offences.

The Border Guard, which has the status of a public prosecutor only in cases of fiscal misdemeanours, has the right to appeal, which means that it has been granted the right to appeal against a judgement issued in the first instance as a party (Article 425 § 1 CPC in conjunction with Article 113 § 1 FPC).

Due to the fact that the provision regulating the issue of the authority competent to examine complaints against decisions, orders, actions and the lack of activities of the non-financial body of the preparatory proceedings, including the Border Guard, has not been passed, Article 465 § 3 CPC in conjunction with Article 113 § 1 FPC shall apply, which shows that the decisions of non-financial bodies of preparatory proceedings are subject to appeal to the prosecutor supervising the proceedings.

The Border Guard has the right to object to the injunction (Article 506 § 1 CPC read in conjunction with Article 113 § 1 FPC) and the right to request the reopening of the proceedings (Article 542 § 1 CPC read in conjunction with Article 113 § 1 FPC). However, the Border Guard was deprived of the right to lodge a cassation appeal, which is the right solution due to the low importance of cases concerning fiscal misdemeanours, inadequate to the rank of this extraordinary appeal.

The participation of the Border Guard in the appeal hearing as a public prosecutor in cases of fiscal misdemeanours amounts to acting as another party under Article 450 § 2 CPC in conjunction with Article 113 § 1 FPC.

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ABSTRAKT

Niniejszy artykuł stanowi próbę przybliżenia udziału Straży Granicznej jako niefinansowego organu postępowania przygotowawczego w jurysdykcyjnym postępowaniu karnym skarbowym. W pierwszej kolejności zaprezentowano zadania oraz właściwość rzeczową Straży Granicznej. Najwięcej miejsca poświęcono rozważaniom o uprawnieniach Straży Granicznej w postępowaniu jurysdykcyjnym w procesie karnym skarbowym, ograniczając je do spraw o wykroczenia skarbowe z uwagi na fakt przyznania Straży Granicznej statusu oskarżyciela publicznego jedynie w tej kategorii spraw. W opracowaniu omówiono także problematykę środków zaskarżenia przysługujących Straży Granicznej oraz jej udziału w rozprawie odwoławczej. Oceniono również uregulowania prawne w zakresie uprawnień Straży Granicznej w sądowym postępowaniu w sprawach o wykroczenia skarbowe, odnosząc je do analogicznych uprawnień przyznanych finansowym organom postępowania przygotowawczego.

Słowa kluczowe: Straż Graniczna; oskarżyciel publiczny; wykroczenia skarbowe; uprawnienia; postępowanie jurysdykcyjne