



ADMINISTRATIVE PECUNIARY PENALTY IN THE LIGHT OF AMENDMENTS TO THE ADMINISTRATIVE PROCEDURE CODE

RENATA KOZIOŁ^a,

^a *WSB University in Torun, Poland*

ABSTRACT

The dynamic changes that have been caused by political transformations and Poland's accession to the European Union increased the administrative and legal obligations, and in consequence increased the number of instruments for their implementation. Introducing new sources of law to the legal order has given rise to previously unknown problems, particularly in the area of administrative law. European law has had an impact on the application of administrative law and the judicial activity of administrative authorities and courts. The administration operates in practically all spheres of the state's functioning and handles a huge number of cases. Its role and tasks are changing through new competencies (Kmieciak, 2009). The Europeanisation of administrative law includes, in broad terms, legal regulations re-

other non-EU organisations which as part of their objectives cooperate in Europe, e.g. the Council of Europe, and in narrow terms, all sources of EU (Community) law. Since 1 May 2004, administrative law constitutes the merger of two systems of law, namely EU law and national law. Public administration still operates on the basis of and within the limits of Article 7 of the Constitution of the Republic of Poland (Boć.2007, pp.52-125).

The increase in the obligations of public administration led to the development of instruments guaranteeing their observance in the form of administrative sanctions.

INTRODUCTION

The dynamic changes that have been caused by political transformations and Poland's accession to the European Union increased the administrative and legal obligations, and in consequence increased the number of instruments for their implementation. Intro-

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ducing new sources of law to the legal order has given rise to previously unknown problems, particularly in the area of administrative law. European law has had an impact on the application of administrative law and the judicial activity of administrative authorities and courts. The administration operates in practically all spheres of the state's functioning and handles a huge number of cases. Its role and tasks are changing through new competencies. (Kmieciak, 2009). The Europeanisation of administrative law includes, in broad terms, legal regulations resulting also from other non-EU organisations which as part of their objectives cooperate in Europe, e.g. the Council of Europe, and in narrow terms, all sources of EU (Community) law. Since 1 May 2004, administrative law constitutes the merger of two systems of law, namely EU law and national law. Public administration still operates on the basis of and within the limits of Article 7 of the Constitution of the Republic of Poland (Boć, 2007, pp. 52-125).

The increase in the obligations of public administration led to the development of instruments guaranteeing their observance in the form of administrative sanctions.

Due to such widespread activity of administration, the spread of administrative pecuniary penalties has become an important problem. The repressive nature of these penalties became an interference with the rights and freedoms of individuals. The imposition of penalties in the administrative procedure takes place with the omission of principles guaranteed in the criminal procedure. In the current state of law, about two hundred legal documents regulate the administrative penalties. In 2004, the administrative penalties were indicated in about 49 of them. (Szumiło-Kulczycka, 2004). Pecuniary penalties were introduced in such documents as the Public Transport Act (Journal of Laws, 2011) Act amending the Waste Act and some other acts (Journal of Laws, 2010), and the Gambling Act (Journal of Laws, 2016). The Constitutional Court found on the *ne bis in idem* prohibition that the state is free to simultaneously impose administrative and criminal sanctions (*Gry hazardowe bez koncesji i kary*, <http://trybunal.gov.pl/rozprawy/komunikatypo/art/8639-gry-hazardowe-gry-bez-koncesji-kary>).

Penalties are imposed on various entities starting from natural persons, by imposing them on persons responsible for managing economic entities – members of management or supervisory boards, where the entity that committed the administrative tort does not suffer the sanctions, ending with other entities, legal persons and organisational units without legal personality. Attention should be given to the terms associated with the sanction, namely the institution of administrative liability (Kwaśnicka, 2011). Administrative penalties are starting to play a new role and take over the function of criminal liability (Radecki, 1996, pp. 14-15; Stahl, Lewicka, Lewicki, 2011; Szydło, 2003 pp. 123-150).

ADMINISTRATIVE SANCTION VERSUS ADMINISTRATIVE PECUNIARY PENALTY

The term 'administrative sanction' is not defined, but it is used in judicial decisions of the courts, the Constitutional Court and the doctrine. There is no general regulation in the provisions of administrative law on administrative sanctions relating to the principles of their imposition, the possibility of mitigation, the method of appeal, withdrawal from their imposition or the statute of limitations for penalties (Duniewska, 2009, pp.

81-88). The legislature pursues various objectives through administrative sanctions. This situation makes it difficult to introduce general principles to establish a system of administrative penalties and the principles of their imposition.

This problem was noticed in the Memorandum to the Recommendation of the Committee of Ministers of the Council of Europe No. R(91) 1 of 13 February 1991 on administrative sanctions (Jasudowicz, 2008). The recommendation formulates the principles aimed at strengthening the protection of the individual against the authoritarian actions of administrative authorities. The Committee of Ministers of the Council of Europe noticed a problem posed by the phenomenon of the 'spread of administrative sanctions'.

The Committee identified a set of principles, the objective of which is to establish guarantees for individuals on whom administrative penalties have been imposed with administrative documents due to any illegal activity in various forms: pecuniary or non-pecuniary penalties or other punitive measure. In the recommendation, the Committee ordered Member States to introduce the principles set out therein into their domestic law. The recommendation is considered a non-binding document, but it is recognised as the so-called soft law, and its task is to specify models - standards of law application.

In the explanatory memorandum to the recommendation it was noted that the substantive and procedural principles included therein should be treated as 'minimum shared standards'. The interpretation of the provisions of the recommendation that allows to go beyond the minimum shared standards or justifying the restriction of the recognised guarantees is unacceptable. The aforementioned recommendations formulate the following principles:

1. the basis for the imposition of sanctions must be the act;
2. no one can be punished twice for the same deed;
3. sanctions cannot be imposed for a deed which, at the time of its committing, was not subject to penalty;
4. the act should regulate the method of imposition and the level of penalties;
5. any action taken to impose sanctions should be taken within a reasonable time;
6. any proceedings instituted in the case relating to the imposition of sanctions must end with a resolution.

In addition, in accordance with the principles regulated by Resolution (77)31 of the Committee of Ministers of the Council of Europe of 28 September 1977 on the protection of the individual in relation to acts of administrative authorities (Jasudowicz, 2008), the following should be applied:

1. the principle of the right to inform the individual about the allegations made against it,
2. the principle of informing the individual about evidence against it,
3. the principle of the right to be heard,
4. the principle of stating the grounds (justification) of the decision,
5. the burden of proof lies with the public administrative authority,
6. the obligation of the judicial review of the act of administrative authorities.

The recommendation indicated subjecting the establishment of administrative sanctions and the parallel establishment of guarantees of respect for the rights of the

individual to more stringent legal rigours as significant. In accordance with the guidelines contained in the recommendation, administrative sanctions are penalties imposed on individuals with acts of administrative authorities – based on conduct contrary to the applicable law. These penalties may take the pecuniary or non-pecuniary form (Kwasnicka, 2011).

The right to good administration was first set out in the Charter of Fundamental Rights (Act, 2010; article 41); Gronowska, Jasudowicz, Balcerzak, Lubiszewski, Mizerski, 2005). Another source is the European Code of Good Administrative Behaviour – the European Parliament Resolution of 6 September 2001 and the Recommendation of the Committee of Ministers of the Council of Europe of 20 June 2007 (The Ombudsman's newsletter, 2008). This document contains a set of principles of good administration. It comprises 27 Articles, which include, among others: the principle of law, the principle of non-discrimination, the principle of proportionality, the principle of prohibition of abuse of rights, the principle of impartiality and independence, the principle of objectivity, the principle of fairness, the principle of courtesy, the principle of replying to letters in the language of the citizen. It also contains the right to lodge a complaint with the European Ombudsman in the event of failure to comply with the principles expressed in the code (Świątkiewicz, 2002). It does not constitute binding law, but a set of principles applied by European Union institutions. As the so-called 'soft law', it plays an important role in judicial decisions of Member States, and sometimes leads to creating the sources of law (Jurcewicz, 1998). The Code provides guidance on substantive and formal law. It constitutes a set of guarantees addressed to the citizen to which the administrative authority is bound (Rabska, 2003).

The above-mentioned minimum standards arising from the indicated sources are addressed to Member States, but it should be emphasised that they are not binding on them. Referring to the issue of the imposition of pecuniary penalties, such source is the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, amended by subsequent Protocols Nos. 3, 5, 8 and Protocol No. 2, where Art. 6 points to the guarantee of the respect for the rights and interests of the individual with particular reference to the right of defence (Journal of Laws, 1993). Similarly, the jurisprudence of the Supreme Court and the Supreme Administrative Court indicates the necessity of taking into account the achievements of the European Court of Human Rights in the context of Art. 6 of the Convention as regards the imposition of administrative penalties. See the resolution of the Supreme Court of 10 April 1992, file no. I PIP 9/92, the jurisprudence of the Supreme Court – Civil/Labour Chamber 1992/12/210 the judgement of the Supreme Administrative Court of 5 December 2012, file no. II OSK 2377/12)

PROPOSED AMENDMENTS TO THE ADMINISTRATIVE PROCEDURE CODE RELATING TO ADMINISTRATIVE PENALTIES

In the current legal status, in Polish administrative law it has not been possible to establish general provisions relating to the issue of administrative penalties despite several attempts (The Bill, Chancellery of the Prime Minister Publishing House, 1997). The agreement of trade associations and law societies and the Ombudsman on amendments

to the Administrative Procedure Code as regards the regulation of administrative sanctions and the coexistence of the criminal liability with the administrative liability moved for taking measures aiming at implementing directives on the imposition of administrative sanctions. The authors argue that in the years 2000–2015 there was an increase in the number of acts introducing administrative sanctions, the pecuniary penalties of which often exceed the number of fines imposed for committing a crime and offence that are similar to the administrative tort. It was noted that administrative and criminal repressions are often doubled. It was argued that when imposing an administrative sanction, the administrative authority does not take into account many factors, such as the degree of fault of the offender, the harmfulness of violation and the lack of possibility of executing the penalty. The complainants argued in the complaints that the level of protection of the entity subject to punishment was not properly secured. It was noted that there are still no uniform premises and the principles of the level of administrative sanction. Such a situation hinders public administrative authorities and courts to make a correct assessment of the amount of the administrative penalty.

A new section IV A “Principles of the imposition of the administrative penalty and granting reliefs from its execution” from Art. 189¹–189¹⁰ of the Administrative Procedure Code was introduced in draft amendments to the Administrative Procedure Code. A proposal to establish uniform general provisions on the imposition of administrative penalties was presented. These provisions will be addressed to everyone, i.e. natural persons, legal persons and organisational units without legal personality.

It is proposed to define the term ‘administrative penalty’ in Art. 189 b as a pecuniary or non-pecuniary sanction imposed by a public administrative authority by way of an administrative decision in the case of violation of the law as a result of failure to comply with the statutory obligation imposed on a natural person, legal person or organisational unit without legal personality.

Currently, the provisions also do not contain the general guidelines on the imposition of administrative penalties, the principles of their statute of limitations or the application of reliefs. The level of potentially possible penalty is often determined by specifying the upper limit or the framework with a very large range. This favours automatic and excessively rigorous application of penalties by administrative authorities. The aim of the bill is to ensure the adequacy of administrative penalties to the actual violations.

The proposed provisions will complement the regulations in the specific provisions, in accordance with the *lex specialis derogat legi generali* principle. These provisions will be of general nature as regards the regulation in the provisions of separate premises of the level of administrative penalty, withdrawal from the imposition of administrative penalty or periods of the statute of limitations of the imposition of administrative penalty or its execution. They will not be applicable to the general provisions in the scope regulated in separate provisions.

The above principles will not apply to penalties imposed by a public administrative authority in relation to disciplinary liability, or due to committing a crime, offence, financial and penal crime or financial and penal offence.

It is proposed to introduce, when using the principles of standards of criminal liability and the liability for violation of the public finance discipline, the norm under which the new act will be applied if in the situation of the obligation to issue a decision on the

administrative penalty, applicable is the act other than at the time of failure to comply with the obligation, due to which the penalty is to be imposed.

On the other hand, when the act applicable to the party is more relative to it, the previously applicable act should be applied.

Due to the fact that punishing the party for a crime, fiscal crime, offence or fiscal offence will constitute a premise justifying the withdrawal from the imposition of administrative penalty, the administrative proceedings on the imposition of penalty, in case of initiating any of the above proceedings, should be mandatorily suspended until its final completion.

It is proposed that the authority should act within the administrative discretion when imposing administrative penalties understood as sanctions (The bill, art.189d). Therefore, the following standards were established to guarantee of the level of the amount of the administrative penalty:

1. the importance of circumstances, in particular circumstances requiring the protection of life or health, the protection of property of significant value or the protection of an important public interest or an extremely important interest of the party and the duration of violation;
2. the frequency of failure to comply with the obligation, for which the penalty is to be imposed, in the past;
3. the degree of contribution of the party on whom the penalty is imposed to the violation;
4. actions taken by the party to avoid the effects of the violation;
5. the amount of the advantage gained, if any;
6. in the case of a natural person – personal circumstances of the party on whom the penalty is imposed.

Moreover, if it is in the legitimate interest of the party, the public administrative authority may also take into consideration the financial position of the party when imposing the penalty (The bill, Art.189d, Art.189e).

It is proposed in the bill to take into account for the level of penalty the so-called 'personal circumstances' of the party. This concept is known to criminal law and it applies to natural persons. The principles of the level of penalty and punitive measures are regulated in Art. 53 of the Criminal Code (Act, 1997). The application of the above standards was proposed in the bill by moving them to the standards of administrative liability as regards the imposition of administrative pecuniary penalties.

The bill proposes premises for withdrawing by the authority from the imposition of penalties and confining to a warning. They include the following situations:

- when the gravity of the violation is negligible, and the party has put an end to the violations, or
- the violation has occurred as a result of events or circumstances which the party could not have foreseen or overcome (force majeure), or
- the party has previously been imposed with an administrative penalty for the same violation by another authorised public administrative authority or legally punished for the crime, fiscal crime, offence or fiscal offence.

In cases other than those mentioned, the public administrative authority may, by way of a decision, set a time limit for the party to present evidence confirming:

1. the remedy of violation of the law;
2. the notification of competent authorities of identified violations of the law, specifying the date and method of notification.

In indicated cases, the public administrative authority withdraws from the imposition of administrative penalty and confines to providing the warning if the party presents evidence confirming the execution of the decision. By withdrawing from the imposition of the penalty, the authority is obliged to give a warning in cases where the nature of violation is not significant, or where the party has already incurred the liability or when it has restored the status consistent with the law or if the party had no influence on the creation of the illegal status.

The bill proposed in Art. 189f §1 a 5-year period of the statute of limitations of the imposition of penalty on committing the violation or on the occurrence of the effects of violation. §2 of this provision proposed a 5-year period of the statute of limitations of the collection of the administrative penalty from the date on which the penalty should be executed.

Regulations on suspension and termination of the imposition and collection of the administrative penalty were introduced.

The period of the statute of limitations of the imposition of penalty is interrupted upon announcing the bankruptcy of the party.

The period of the statute of limitations of the imposition of administrative penalty does not commence, and the commenced period of the statute of limitations is suspended as of:

1. lodging an appeal to the administrative court or a common court, accordingly, or lodging an appeal against a final decision on the administrative penalty;
2. lodging a request to the common court for determining the existence or non-existence of a legal relationship or the right;
3. the receipt of a preservation order according to the provisions on the enforcement proceedings in the administration if separate regulations provide for the preservation order.

It was proposed to introduce a provision under which there will be an obligation to pay default interest on outstanding pecuniary penalties as on tax arrears.

In the proposed Art. 189 j, at the request of the party, in cases justified by an important public interest or an important interest of the party, the administrative authority may grant reliefs for the execution of the administrative penalty by:

1. postponing the time limit for the execution of the penalty or spreading it in instalments;
2. postponing the execution of the penalty or spreading it into instalments;
3. cancelling the penalty in whole or in part;
4. cancelling default interest in whole or in part.

It should be noted that the existing principles of the statute of limitations of administrative penalties are governed by various legal documents. The lack of regulations

raised a problem as to whether the provisions on public levies can be applied to pecuniary penalties. It is said by Wincenciak that “the administrative liability, especially for an administrative tort punishable by a pecuniary penalty of repressive function, cannot be an eternal liability that does not contain the norms on the statute of limitations. The institution of the statute of limitations is related to the purpose of the penalty” (Wincenciak, 2008, p.141). Over time, the possibilities of exerting an influence with an educational penalty and as regards shaping the legal awareness of the society are ruled out. This issue has been discussed in the judgements of administrative courts. In the judgement of the Voivodeship Administrative Court in Gorzów of 28 October 2010, the court stated that it is impossible to agree with the view that the imposition of pecuniary penalty can never fall under the statute of limitations. This view is contrary to Art. 2 of the Constitution, namely the principle of the democratic state governed by the rule of law (II SA/Go 570/10/ Legalis).

CONCLUSIONS

The above issue concerning administrative pecuniary penalties points unequivocally to a legal gap as regards the lack of general principles in the sphere of the imposition of these sanctions. In the proposed amendments to the Administrative Procedure Code of July 2016 an attempt was made to fill the gaps and to define such terms as ‘administrative penalty’, ‘general principles of their imposition’, ‘granting reliefs for its execution’ and ‘the statute of limitations’. It was proposed to regulate the principles by adding a new section IVa – “Principles of the imposition of administrative penalty and granting reliefs for its execution” – to the Administrative Procedure Code (Raport ekspercki KPA, www.nsa.gov.pl, str.7 i 281–289). It should be noted that this issue is present in the jurisprudence of administrative courts and the activity of the Ombudsman, (*The Ombudsman’s opinion of 2013*, www.sprawny-generalne.brpo.gov.pl) These instances correspond with the proposed amendments to the Administrative Procedure Code as regards the above deficiencies (The Draft Amendment to the Administrative Procedure Code of 2016, www.rcl.gov.pl).

The Legislative Council assessed the bill differently in its opinion of 16 September 2016. It found that there is a need for amendments, but it drew attention to the legal nature of the regulations provided for in section IVa. The proposed provisions of this section include the norms of substantive law. The Council referred to regulating similar terms in relation to criminal penalties, which are governed by the general part of the Criminal Code, and not in the provisions of the Code of Penal Proceedings. Furthermore, the Council does not question the legitimacy of the normative order of the construction of administrative penalty, but emphasises that the proposed matter does not match the content of the procedure act. In the opinion of the Council, the substantive and legal regulations in the code containing the norms of procedural law should not be expanded. (The Opinion of 16 September 2016, www.radalegislacyjna.gov.pl)

As can be seen, disputable is the way of achieving the objective, which is to regulate the general principles with regard to the imposition of administrative penalty.

The standards relating to administrative sanctions are derived from the Constitution, Community law, “minimum standards” referred to in the Recommendation of the

Committee of Ministers of the Council of Europe No. R(91)1. However, there is still a serious lack of such statutory regulation at the level of national law.

Therefore, the draft amendments to the Administrative Procedure Code as regards the imposition of administrative penalties should be positively assessed as a general advantage. Undoubtedly, due to the lack of provisions of substantive law of general nature in Polish administrative law, it seems that such a solution is provided by the amendment to the provisions of the Administrative Procedure Code. Undoubtedly, due to the existing dispersed nature of regulations in the field of the imposition of administrative penalties, the bill may create a new legal order in the sphere of functioning of administrative law. It seems that many years of waiting for the amendments could be met and in its current state it would result in avoidance of doubt in the application of administrative pecuniary penalties.

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