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**THE ADMISSIBILITY OF MITIGATION
OF THE ADMINISTRATIVE MONETARY
PENALTY FOR THE OCCUPATION
OF THE ROAD LANE WITHOUT PERMISSION
IN THE LIGHT OF ARTICLE 189D OF THE CODE
OF ADMINISTRATIVE PROCEDURE**

The road lane of the public road is a special space in which traffic is allowed. Thanks to that, public administration is able to carry out tasks in the spheres of transport and movement. The road lane is an element of public property that should meet the basic needs of society. Moreover, it is an element of the development of state trade or internal security. The road lane is a public wealth which has been covered by special protection expressed in the Act on Public Roads.¹ The manifestation of this protection is a general prohibition of any activities that might cause damage or destruction to the road and its components, reduce its durability or pose a danger in the road lane (article 39 A.P.R.). One of such activities is occupying the road lane for purposes unrelated to construction, reconstruction, renovation, maintenance and protection of the road. In accordance with article 40 (12) A.P.R., the occupation of the road lane for non-road purposes without appropriate permission is subject to an administrative monetary penalty. In this article, the authors discuss the admissibility of mitigating the administrative monetary penalty for the occupation of the road lane in the light of article 189d of the Code of Administrative Procedure.²

¹ Act of 21 March 1985 on Public Roads (Journal of Laws of 2017, item 2222, as amended), further on referred to as: „A.P.R.”.

² Act of 14 June 1960 – Code of Administrative Procedure (Journal of Laws of 2017, item 1257, as amended), further on referred to as C.A.P.

It is indicated that penalties may be mitigated in the form of the competent legal authority determining their scope.³ Before chapter IVa was introduced to the C.A.P., there were no regulations in administrative substantive law which standardized the rules and methods of imposing monetary penalties. The single manifestation of such intention on the part of the legislature could be found in specific regulations.⁴ Presently, pursuant to article 189d C.A.P., a public administration body which wants to impose a monetary penalty is obliged to determinate the factual situation while simultaneously considering the circumstances that may reduce or increase this sanction.⁵ In order to determinate the level of the penalty, the authority must take into consideration the following factors:

- the importance and the circumstances of the violation, especially circumstances relevant to the protection of: life or health, property of significant value or important public interest or an extremely important interest of the party, as well as the duration of violation;
- the frequency of the non-compliance with the obligations or of the violation of the prohibition in the past;
- previous punishment for the same action for a crime, fiscal crime, misdemeanour or fiscal misdemeanour;
- the degree to which the party on whom the penalty is imposed contributed to the violation;
- voluntary actions taken by the party to avoid the effects of the violation;
- the amount of the benefit that the party gained or the amount of loss that the party avoided;
- the personal circumstances of the party on whom the penalty is imposed (in the case of natural persons only).

The first factor is considered as a collective category.⁶ It is noted that the expression “the importance and the circumstances of the violation” should be understood as “the consequences of the violation for specially protected goods”,⁷ whose catalogue is indicated in legal provisions. The second element refers to the conduct of the entity which violates the law. Therefore, the authority has to examine the frequency of non-compliance with obligations or of the violation of the prohibition in the past. It is pointed out that in this case, the authority should include in its considerations similar infringements which belong to the collective cate-

³ H. Nowicki, (in:) R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), *System Prawa Administracyjnego*, Vol. 7, *Prawo administracyjne materialne*, Warszawa 2012, p. 646.

⁴ M. Kaczocho, *Miarkowanie sankcji administracyjnej – wybrane zagadnienia*, „Przegląd Legislacyjny” 2013, issue 3, p. 43.

⁵ R. Stankiewicz, (in:) R. Hauser, M. Wierzbowski (eds.), *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 2017, p. 1243.

⁶ *Ibidem*, p. 1243.

⁷ B. Adamiak, (in:) J. Borkowski, B. Adamiak (eds.), *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 2017, p. 967.

gory of administrative delicts.⁸ The next factor concerns previous punishments for the same conduct for a crime, fiscal crime, misdemeanour or fiscal misdemeanour. It forces the public administration authority to investigate the degree of the punished person's respect for the law.⁹ Therefore, on the one hand, this factor can alleviate the punishment (if previous punishments or penalties were strict enough) or tighten it (if the entity keeps violating the law despite previous punishments). According to the next factor, the authority must determine the degree to which the punished entity contributed to the violation. The expression "contribution" should be understood in the light of civil law provisions (e.g. article 362 of the Civil Code¹⁰). It is said that "the contribution of an injured person to the damage or its increase takes place when the damage is the result of actions and conduct of the injured person, not only of another event which obliges another person to repair the damage".¹¹ As for administrative responsibility, it would be very difficult to find any "injured person", so it is noted that with regard to "contribution" in the meaning of article 189d (4) C.A.P., the authority should consider whether the entity had influence on the occurrence of the state of illegality with full knowledge or whether this type of state occurred as a consequence of the authority's action (e.g. the authority forced the entity to take an action which turned out to be illegal) or third party's actions, which the entity had no influence on.¹² Following the next factor, the authority should examine all voluntary actions taken by the party to avoid the effects of the violation. It cannot be denied that these actions can work either in favour or to the disadvantage of the punished entity. It is pointed out that it is enough in this case to take any actions (only if the action was not apparent), which is why it is not required to remove the effect of the violation.¹³ Moreover, the authority should consider the amount of benefit that the party gained or the amount of loss that the party avoided by the violation. This element applies only to situations in which the imposition of the administrative penalty depends on the amount of the entity's financial gain.¹⁴ The last factor indicated in article 189d C.A.P. concerns only natural persons. When determining the monetary penalty, the authority should take into account conditions such as: material, living, social, health and family circumstances as well as the resulting responsibilities.¹⁵

⁸ M. Jabłoński, *Komentarz do art. 189d KPA*, (in:) M. Wierzbowski, A. Wiktorowska (eds.), *Kodeks postępowania administracyjnego. Komentarz*, Legalis 2018.

⁹ B. Adamiak, (in:) J. Borkowski, B. Adamiak (eds.), *Kodeks...*, p. 967.

¹⁰ Act of 23 April 1963 – the Civil Code (Journal of Laws of 2018, item 1025, as amended).

¹¹ Z. Banaszczyk, *Komentarz do art. 632 KC*, (in:) K. Pietrzykowski (ed.), *Kodeks cywilny. Komentarz*, Legalis 2018.

¹² M. Jabłoński, *Komentarz do art. 189d KPA*, (in:) M. Wierzbowski, A. Wiktorowska (eds.), *Kodeks...*

¹³ *Ibidem*.

¹⁴ R. Stankiewicz, (in:) R. Hauser, M. Wierzbowski (eds.), *Kodeks...*, p. 1243.

¹⁵ M. Jabłoński, *Komentarz do art. 189d KPA*, (in:) M. Wierzbowski, A. Wiktorowska (eds.), *Kodeks...* The author noted that this construction is similar to the construction indicated in article

It should be noted that not every monetary penalty can be mitigated under article 189d of the C.A.P. If special provisions indicate factors which should be taken into account by the authority in the course of the procedure of imposing a penalty, then it is impossible to make auxiliary use of the guidelines expressed in the Code of Administrative Procedure (in accordance with the principle *lex specialis derogat legi generali*). Therefore, it should be considered if the road administrator can mitigate the administrative monetary penalty for the occupation of the road lane.

It is recognised that the authorities can mitigate only relatively described penalties for which it is possible: to impose them within a specific range, to decide about the punishment itself (even if the penalty rate is fixed¹⁶) or to select one of allowed types of penalties depending on the individual aspects of the violation.¹⁷ Penalties which are completely described are considered as mandatory, because in their cases, just committing the administrative delictis enough to impose the administrative monetary penalty.¹⁸ The penalty established in article 40 (12) A.P.R. can be classified as a completely described penalty – the road administrator (guided by the principle of legalism) is obliged to impose a monetary penalty if it is possible to ascertain that the road lane was occupied without an appropriate permission or that the occupation time or the occupied area specified in the permission were exceeded, regardless of any circumstances in which the violation occurred. The statement quoted above is confirmed in the rulings of administrative courts, which drew attention to the fact that “if it is ascertained that the road lane was occupied without permission, the road administrator must impose a monetary penalty independently of the motives, the personal and mate-

53 (3) of the Criminal Code (Act of 6 June 1997 – Criminal Code; Journal of Laws of 2017, item 2204, as amended), according to which the court takes into account the motivation and the manner of conduct of the perpetrator, the fact that the offence was committed together with a minor, the type and degree of the transgression against obligations imposed on the perpetrator, the type and dimension of any adverse consequences of the offence, the characteristics and personal conditions of the perpetrator, their way of life prior to committing the offence and their conduct thereafter, and particularly their efforts to redress the damage or to compensate the public perception of justice in another form and also consider the behaviour of the injured person. It is assumed in criminal law that “personal conditions” include: family, social, environmental and occupational situation; marital status; the number of children and dependents, the source of income, the housing situation, social relations, contacts with positive and negative environments; the position on the labour market; the opportunity to earn money; the level of education and professional qualifications (cf. V. Konarska-Wrzošek, *Komentarz do art. 53 KK*, (in:) R. Stefański (ed.), *Kodeks karny. Komentarz*, Legalis 2017). In the author’s opinion, the interpretation of the expression “personal conditions” adopted in criminal law should be applied to administrative monetary penalties.

¹⁶ *Ibidem*, p. 1242.

¹⁷ M. Kaczocha, *Miarkowanie...*, pp. 48–49; Ł. Sadkowski, *Zmiany w kodeksie postępowania administracyjnego*, Warszawa 2017, p. 129.

¹⁸ M. Kaczocha, *Z problematyki administracyjnych karpieńicznych bezwzględnie określonych*, „Przegląd Legislacyjny” 2014, No. 2, p. 60.

rial situation of the person who occupied the road lane and the person's awareness of fact that he or she should have a permission to occupy the road lane".¹⁹ Moreover, "it is unnecessary to examine any other additional circumstances, because they do not affect the entity's liability or the range of the imposed administrative sanction".²⁰ The impossibility to apply article 189d C.A.P. to monetary penalty for the occupation of the road lane results indirectly from the distinction specified in article 189a C.A.P. – it is pointed out that the provisions of chapter IVa apply to cases related to "imposing" and "determining the level" the penalties. The statement that the construction of article 189a is only and exclusively a consequence of the alternate use of the indicated terms in practice (without distinguishing their denotations)²¹ should be admitted as unjustified, because in accordance with section 10 of the Principles of the Legislative Technique,²² the use of these two terms is a sign of that the legislative body gives them different meanings. Moreover, this distinction was highlighted in the explanatory memorandum to the law draft amending the act – Code of the Administrative Procedure and some other acts, according to which "imposing" a penalty involves only the fact of punishing the party who breached the law, while "determining the level" of the penalty refers to specifying the range and amount of it within the limits provided in specific legal provisions.²³ Therefore, it is noted that the "determination" of penalties (according to the legislative body's aim) should be understood as a special type of "imposition" that can only be applied when mitigation is allowed.²⁴ The road administrators have no discretionary power to determine the amount of the pen-

¹⁹ Judgment of the Supreme Administrative Court of 14 October 2016, file No. II GSK 773/15, Legalis No. 1576953.

²⁰ Judgment of the Supreme Administrative Court of 25 February 2015, file No. II GSK 2326/13, LEX No. 1657694.

²¹ M. Jabłoński, *Komentarz do art. 189a KPA*, (in:) M. Wierzbowski, A. Wiktorowska (eds.), *Kodeks postępowania administracyjnego. Komentarz*, Legalis 2018. The author rightly noted that in practice, these terms are used interchangeably. For example, in article 40 (12) of the A.P.R., it is indicated that the administrative monetary penalty should be "determined" by the authority, but in fact it should be "imposed". Therefore, such wording definitely should be evaluated negatively.

²² Annex to the Regulation of the Prime Minister on "Principles of the Legislative Technique" of 20 July 2002 (Journal of Laws of 2016, item 283).

²³ Explanatory memorandum to law draft amending the act – Code of Administrative Procedure and some other acts of 28 December 2016, Sejm papers No. 1183, Sejm of the 8th term of office, p. 70.

²⁴ K. Ziemiński, *Wymierzanie a nakładanie administracyjnych kar pieniężnych*, <http://prawodlasamorzadu.pl/2017-09-28-wymierzanie-a-nakladanie-administracyjnych-kar-pienieznych> (accessed: 9.08.2018). The author noticed accurately that an expanding interpretation of chapter IVa of the C.A.P. (and according to its assumption authorities can mitigate penalties both relatively and complete determined) could cause far-reaching interference in the provisions of substantive law which refer to "fixed" penalties. Moreover, the author mentioned that it could turn out in practice that "if the amount of penalty is predefined, it would result in an imposition of its upper limit". In the author's opinion, this could be considered as inconsistent with the principle expressed in chapter IVa.

alty (in any case, it must be a multiple of the amount of the fee for the occupation of the road lane), so it only can be “imposed”.

Despite the fact that introducing the general principles of determining administrative monetary penalties should be evaluated positively, it should be pointed out that the practical application of article 189a C.A.P. can be marginal and in many cases even impossible (e.g. in cases related to the occupation of the road lane). There are calls to strive to create a system of administrative penalties in which there would be no provisions permitting “fixed” and complete determined penalties.²⁵ The currently adopted model of objective liability for administrative delicts was invalidated by the Constitutional Tribunal.²⁶ The views expressed by the Tribunal in its judgement in the case SK 6/12 deserves particular attention (the case concerned the constitutional assessment of the penalty for cutting trees without appropriate permission based on the provisions of the Nature Conservation Act²⁷). The Tribunal noticed that pursuant to the examined regulations, the public administration authority is absolutely obliged to impose the administrative monetary penalty if a party breaches the law (in the form of an administrative delict). In the Tribunal’s opinion, this procedure is “mechanized” and deprived of the possibility to consider any factors that could subjectivize the responsibility of the party who breached the law. Moreover, the Tribunal pointed out that the current system of adjudicating about administrative responsibility does not make it possible to adjust the amount and severity of the penalty to a specific, individual factual situation and the specificity of the case or does not make it possible to consider the financial situation of the punished party. Therefore, in the Tribunal’s opinion, the provisions of the Nature Conservation Act did not pass the proportionality test and could not be considered as constitutional. It should be noted that in the same judgment, the Tribunal drew attention to the fact that “the premises of applying administrative monetary penalties and determining their amounts should follow the principle of adequacy of state interference in the constitutionally protected sphere of the individual. The severity of administrative penalties should be adequate to the degree of violation of a legally protected good in the form of an administrative penalty (...). Moreover, such administrative sanctions should not be determined without consideration for the financial situation of the person who will be punished, because it is particularly important for the real degree of severity felt by the entity – a high amount of administrative monetary penalty can lead a person who, in particular, has a low income to financial degradation (...). Substantive law should give the competent authority the possibility to mitigate

²⁵ W. Sawczyn, (in:) R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), *System Prawa Administracyjnego*, Vol. 9, *Prawo procesowe administracyjne*, Warszawa 2017, p. 415.

²⁶ Cf. judgment of the Constitutional Tribunal of 14 October 2009, file No. Kp 5/09, LEX No. 51989; judgment of the Constitutional Tribunal of 1 March 1994, file No. U 7/93, Legalis No. 10199; judgment of Constitutional Tribunal of 1 July 2014, file No. SK 6/12, Legalis No. 981748.

²⁷ Act of 14 April 2004 on Nature Conservation (Journal of Laws of 2018, item 142, as amended).

the degree of the monetary penalty or to abstain from imposing the penalty (...). At the same time, the Tribunal emphasizes that it does not contest the whole mechanism of nature protection and afforestation, which consists of: the obligation – as a rule – to obtain the appropriate permission to fell a tree or cut a bush, connected – in certain situations – with the obligation to pay an administrative fee (in a rational amount), and the administrative penalty for non-compliance with these obligations. Neither does the Tribunal challenge the currently adopted concept of the administrative penalty as an administrative sanction for unlawful demeanour which breaches the administrative obligation, provided that the individual circumstances of a particular case are taken into account in the punishment procedure”. In view of the whole presented considerations and comments, it might seem that provisions which limit the possibility of mitigating penalties to only selected situations should be evaluated negatively. They might be considered as aimed at differentiating the situation of various punished entities. Due to this, the situation in which in some cases it is possible to reduce the level of the administrative penalty after taking into account the premises which subjectivize the administrative responsibility, and in other cases the entities have no real chance to extenuate the monetary penalty or to “escape” from responsibility, should be considered as unjustified.

If we refer the above remarks and reflections to the Act on Public Roads, it seems that the admission of mitigation of the administrative monetary penalty for the occupation of the road lane without permission could be very important for parties that are natural persons. The administrative monetary penalty indicated in article 40 (12) A.P.R. is undoubtedly onerous and severe. It can often reach the amount of tens of thousands zlotys; combined with the inability to take into consideration, for example, the financial situation of the punished person, they might bring him or her to financial ruin. It should be noted that the imposition on natural persons of administrative monetary penalties which cannot be mitigated or flexibly determined can negatively affect the process of building the citizens’ trust in public authorities. With regard to the administrative penalty provided for in article 40 (12) A.P.R., this may result in accusations against the public authorities and road administrators that they supposedly seek to increase their income at the expense of the interests of the punished entities. That is why changes are necessary with regard to the administrative monetary penalty for the occupation of the road lane without permission and other administrative penalties which are “fixed”. It should be allowed to take into consideration the premises that render it possible to determine the penalty in each situation in which the competent authority has to impose an administrative monetary penalty on the entity responsible for breaching the law.

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Summary

It should be noted that not every monetary penalty can be mitigated pursuant to article 189d of the Code of Administrative Procedure – if special provisions include premises which should be followed by the authority in the course of imposing a penalty, then it is impossible to make auxiliary use of the guidelines expressed in the Code (following the principle *lex specialis derogat legi generali*). Pursuant to article 40 (12)

of the Act on Public Roads, the occupation of the road lane for non-road purposes without appropriate permission is punishable with an administrative monetary penalty. In this article, the authors discuss the admissibility of mitigation of the administrative monetary penalty for the occupation of the road lane in the light of article 189d of the Code of Administrative Procedure.

KEYWORDS

administrative monetary penalty, mitigation, Code of Administrative Procedure, public roads, Act on Public Roads

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administracyjne kary pieniężne, Kodeks postępowania administracyjnego, drogi publiczne, Ustawa o drogach publicznych