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ON THE NEED FOR AMENDMENTS TO ADMINISTRATIVE PENALTIES AND THE CONVERSION OF CERTAIN OFFENCES TO ADMINISTRATIVE LAW IN THE POLISH LEGAL SYSTEM IN THE LIGHT OF SOLUTIONS ADOPTED IN THE CZECH REPUBLIC, THE REPUBLIC OF AUSTRIA, AND THE REPUBLIC OF GERMANY

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Summary. In administrative law sanctions and penalties are imposed by administrative authorities which results in the penalisation of administrative and the blurring of the boundaries between the penal sanction and the administrative fine. In Polish regulation some of the administrative and policy-administrative violations are regulated in specific acts of administrative law and the code of offences applies. Presently in a legal doctrine there is a discussion about the need to change some of the offenses that should be transformed into administrative delicts.

Key words: authorities, administrative penalty, sanctions, sanctioning procedure, offense law, administrative law

INTRODUCTION

Although administrative law is not classified as criminal law, it includes repressive forms of law in the form of sanctions and penalties – mainly financial – imposed by administrative authorities. Such solutions exist not only in Poland but also in other European countries, where national legislators try to create appropriate procedural guarantees for the penalised.

The doctrine of Polish administrative law underlines that, "as the years go by, the scope of application of administrative penalties has evolved, making them more and more similar to a fine," and it notes that this situation "should be accompanied by an increasingly widespread application of standards developed by penology at the expense of standards of proper administrative decisions" [Wierzbowski and Kraczkowski 2018, 350; Oczkowski 2011, 253; Nowicki and Peszkowski 2015, 11]. Moreover, the Ombudsman I. Lipowicz notes that "administrative fines are imposed more frequently, often replacing the existing liabi-

lity for offences,"[1] which results in the penalisation of administrative-legal relations and – from the viewpoint of the criminal law doctrine representatives – in an escape from criminal [Kardas and Sławiński 2016, 26–27; Król–Bogomilska 2016, 47]. This phenomenon is also recognised in the rulings of the Constitutional Court, which emphasises the blurring of the boundaries between the penal sanction and the administrative fine. Moreover, the Constitutional Court indicates "three types of sanctions for breach of administrative and legal obligations: 1) a penal type sanction (punishment in the strict sense or a misdemeanour liability); 2) a typical administrative fine (objective and, above all, preventive); 3) a penal type administrative fine subject to individualisation and, above all, repressive" [Majchrzak 2015, 70].

The Polish Code of Petty Offences[2] penalizes acts of various nature, ranging from criminal to policy and administrative violations [Jakubowska–Hara 2016, 179]. Furthermore, some of the administrative and policy-administrative violations are regulated in specific acts of administrative law. Moreover, some of them are subject to the penal regime (i.e. the code of offences applies), while others are subject to the administrative-legal regime (i.e. the solutions adopted in substantive acts consisting mainly in imposing an administrative penalty apply). In the practice of law enforcement, the delimitation between an administrative offence and an administrative tort poses many problems and depends on the will of the legislator.[3] At the same time, these phenomena are linked to the lack of a sufficient catalogue of guarantees in the Polish administrative law, appropriate for criminal law [Czichy 2017, 93]. This state of affairs should change, which undoubtedly requires appropriate reflection and reform. It is essential and key to maintain the distinction between criminal law and administrative law. It is obvious that both criminal-substantive act and criminal-procedural standards cannot be directly transposed into administrative law, for various reasons.

1. IS THE CONVERSION OF CERTAIN OFFENCES INTO ADMINISTRATIVE LAW AND CHANGE IN THE SUBJECT OF ADMINISTRATIVE PENALTIES IN POLAND NECESSARY?

For a long time, the problem of sanctions in Polish administrative law was of a dispersed and disordered nature, which gave rise to a sense of chaos. Despite the introduction of some legal changes in recent years, this state continues today, although to a lesser extent. In response to social expectations, the needs of practice, and postulates voiced by doctrine representatives [Kmieciak 2000, 132]. Po-

[1] A Letter from the Ombudsman to the Minister of Digitalization [Szumiło–Kulczycka 2004, 25–26; Król–Bogomilska 2001, 15–16; Radecki 1995, 46] also expresses the view that, "in the current state of law I consider fines as a form of penal liability [...]. Consequently, I consider fines as a surrogate of criminal liability of legal persons." See also Bojarski and Radecki 2011, 192.

[2] Journal of Laws of 2020, item 568 as amended.

[3] Ruling of the Polish Constitutional Tribunal of 15 January 2007, P 19/06, OTK–A 2007, No. 1, item 2.

lish legislator only partially regulated this matter in the Code of Administrative Procedure,[4] limiting itself to only regulating administrative fines. However, it seems that the changes consisting in the introduction of fines to the CAP are not a perfect solution, as they are only a reference point for further necessary legislative changes aimed at systematising both financial and non-monetary fines in administrative law.[5]

We should indicate that the code regulation of administrative penalties is assessed negatively in the doctrine of administrative procedure [Radecki 2017, 39, 42]. The doctrine also emphasises that "The Code of Administrative Procedure is not an administrative ordinance which, like Tax Ordinance, would regulate substantive-legal issues, control proceedings, and jurisdictional proceedings; the Code of Administrative Procedure is a process regulation" [Bogusz 2018, 60]. Hence, due to their substantive nature, the provisions of section IVa of the CAP should be excluded.[6] Moreover, the administrative literature already highlighted the problem of the "autonomy" of certain fines [Nowicki and Peszkowski 2015, 20, 26], further exacerbated by the recent changes in the CAP regulations. As Nowicki and Peszkowski note, the solutions adopted in the changes – applicable in some cases only (i.e. administrative fines) [ibid., 21] – lead to a "systemic incoherence discriminating against those on whom is imposed an administrative sanction other than a financial penalty." Gregorczyk adopts a similar standpoint and notes that this situation creates a far-reaching inequality in the administered positions, which receive non-cash administrative fines [Gregorczyk 2017, 389]. Additionally, when assessing the changes introduced in the CPA, many notice that the adopted regulation does not take into account such specific issues as circumstances excluding the penalty (like the state of necessity [Łaszczyca 2007, 285–98] or a custom[7]).

Taking into account the doubts concerning the regulation of penalties in Polish administrative law, the criticism of solutions adopted in the CAP in the area of administrative fines, and the lively discussion in recent years in the field of criminal and administrative law about the necessity to change certain offences that should be converted into administrative torts [Winceniak 2008, 211], we should pursue further changes including a broad legal reform that addresses all the identified problems. The reform should include not only the decriminalisation of certain offences and their subsequent transfer to administrative law but also the improvement of this matter in a separate normative act, which should be created on the basis of assumptions for administrative cash fines adopted in the CAP. In other words, the postulated reform could provide an impulse for changes necessary both in the law of offences and in the substantive and procedural administrative law on administrative fines. The reform would also enable certain termino-

[4] Journal of Laws of 2020, item 256 as amended [henceforth cited as: CAP].
[5] This problem in the doctrine is signallized e.g. by Staniszewska 2015, 28.
[6] Cf. Ziemski 2018, 406.
[7] About custom in administrative law, see Gronkiewicz and Ziółkowska 2011a, 465–75; Staniszewska 2017, 374.

logical arrangements and their ordering. We should remember that there is no uniform definition of an administrative sanction in the Polish legal system. Therefore, it is difficult to clearly define the mutual relationship between an administrative sanction and an administrative tort.

These difficulties are aggravated by the ambiguity of the term "legal sanction," which is most often understood as a difficulty consisting of negative consequences resulting from the violation of a legal norm[8] in the form of e.g. personal or property issues, the loss of rights, or the invalidity of transactions.[9] The doctrine of law indicates that a sanction can be penal, executive, or of nullity.[10] Nevertheless, administrative law also indicates administrative sanctions, divided into fines, other monetary sanctions, and non-monetary sanctions [Kmieciak 2000, 123].[11] In view of the above, we should assume that the concept of an administrative sanction in administrative law is broader than that of a penalty. Administrative sanctions may be broadly or narrowly defined. In the broader sense, the scope of administrative sanctions should also include disciplinary sanctions and penalties for the breach of orders [Gronkiewicz and Ziółkowska 2011b, 202–203].[12] Moreover, there is a lack of regulation on non-monetary administrative penalties. However, we should remember that – in addition to the administrative monetary sanctions – there are other administrative sanctions (e.g. exclusion/restriction of a certain entitlement, withdrawal of a licence, permit, or authorisation),[13] the application of which should also be comprehensively regulated, including financial penalties.

2. CZECH, AUSTRIAN, AND GERMAN SOLUTIONS FOR CRIMINAL–ADMINISTRATIVE AND ADMINISTRATIVE LIABILITY

Regulations of selected European countries show the reasons for legislative changes and attempts at regulating the matter under consideration. They may be a valuable guide for the Polish legislator and help to determine the direction of changes, while taking into account the specificity of the Polish legal system.

2.1. The Czech Republic

First of all, we should stress that the Czech experience seems to be particularly interesting for the Polish legislator due to the similar factual situation in terms of

[8] Cf. Wronkowska 2005, 123.
[9] Cf. Filipek 1963, 873.
[10] E.g. Zimmermann 2010, 33. Conversely argues Lewicki 2002, 63 who excludes executive and nullity sanctions from the sanctions of administrative law.
[11] Further classification includes sanctions on administrative entities, on legal persons and natural persons, formalised, and non-formalised. For more, see Gronkiewicz and Ziółkowska 2011b, 203.
[12] Resolution of the Polish Constitutional Tribunal of 9 May 2000, SK 15/98, OTK 2000, No. 4, item 113.
[13] See more Nowicki and Peszkowski 2015, 20 and bibliography.

administrative liability and administrative penalties. Moreover, in our opinion, they could be an inspiration for similar solutions in Polish law.

Until the reform in 2016, there was no uniform definition of an administrative offence in Czech law [Jemelka and Vetešník 2017, 48], although this term was included in the Constitution of the Czech Republic of 1992.[14] In the doctrine of administrative law, the notion is used as an umbrella term covering various types of administrative tort (*správního delikt*), regulated in applicable legislation to denote conduct whose elements are provided for by law, infringe or threaten a protected interest,[15] and for which the administrative agency imposes an appropriate penalty.[16] The regulation of administrative responsibility in Czech law was generally very complicated. Apart from the liability for offences (which there were 2200 of), the addressees of obligations contained in norms of administrative law were also liable for other administrative offences, i.e. administrative misdemeanour (*jiné správní delikty*; which there were about 5100 of). In regard to the so-called other administrative offences, there was no general legal regulation concerning the conditions of liability, as a result of which the conditions of liability were often determined by analogy by referring to the provisions of the Act on Offences, the Penal Code, and the Act on Criminal Liability of Legal Persons and Proceedings against them. The previous regulation on administrative offences showed shortcomings also at the procedural level. The treatment of offences was governed by the procedural provisions of the repealed Law on Offences (Law No. 200/1990). The so-called other administrative offences were dealt with exclusively in accordance with the CAP (*Správní řád*),[17] with possible procedural derogations laid down in the laws governing other administrative offences. However, the treatment of other administrative offences under the CAP (*Správní řád*) did not correspond to the specific features of a sanction procedure, and the CAP (*Správní řád*) protected the rights of defendants to a lesser extent than the Law on Offences (Law No. 200/1990). In view of the above, the Czech legislator considered it necessary to conduct a reform of administrative penalties that would eliminate deficiencies in the legal regulation of liability for administrative offences as new offences.[18]

As of 1 July 2017, the Act of 15 June 2016 on Liability for Violations and Arising Proceedings is in force in the Czech Republic,[19] while the Law on Some Offences[20] regulates selected offences in various areas of public administration.

[14] See Art. 65, sect. 1 of the Constitution from 16 December 1992. The President of the Republic cannot be detained, criminally prosecuted, or prosecuted for misdemeanours or other administrative offenses while in office.
[15] Ruling of the Supreme Administrative Court of 2 December 2015, 6 As 61/2015.
[16] Ruling of the Supreme Administrative Court of 1 February 2006, 5 As 4/2005.
[17] Law No. 500/2004 Sb.
[18] See guidelines to the law, No. 250/2016 Sb: 2.
[19] Law No. 250/2016 Sb [henceforth cited as: ZOP].
[20] Law No. 251/2016 Sb [henceforth cited as: ZNP].

The reform created a uniform concept of an offence, which also includes the so-called administrative offences (cf. para. 112 ZNP) [Jemelka and Vetešník 2017, 979; Kučerová and Horzinková 2017, 708; Ondruš, Ondrušová, and Vytopil 2018, 65] and regulated the proceedings in these cases with a single normative act.[21] According to para. 5 ZNP, an offence is a socially harmful and illegal act, which is clearly defined as an offence in the ZNP and which indicates the characteristics specified in the ZNP, unless it is a criminal offence. Therefore, the term is based on a substantive and formal concept [Ondruš, Ondrušová, and Vytopil 2018, 63–64]. On the other hand, the standardization of the procedure for all offences in one legal act (ZOP) resulted in the unification of procedural rules and procedural guarantees. Thus, the procedure for offences currently only provides for subsidiary application of the Czech CAP (s. ř.).

Meanwhile the ZNP is not extensive, as it has only fourteen paragraphs and applies to the proceedings not regulated by special provisions. In para. 1, ZNP defines the substantive scope of the Act by indicating that it applies to certain offences demonstrated in various normative acts concerning public administration, including the type and amount of administrative penalties. We should emphasise that the scope of the Act includes not only existing administrative torts.

In the light of the Czech regulation, the liability of natural persons is based on a subjective concept [ibid., 66]. On the other hand, the liability of legal persons is subjective in nature, but a legal person is not liable if s/he proves that s/he has made every effort that may be required to prevent an offence [ibid., 67]. Moreover, the liability of a legal entity transfers to its legal successor; if the entity has more successors, it passes to each one of them (see para. 102 ZOP). The legislator regulated circumstances that exclude penalty (the state of necessity; para. 24 ZOP) with the aim to ensure not only the possibility of protecting one's own interests but also the interests of other persons or the interests of the state, and the act was committed in an emergency situation;[22] necessary defence (para. 25 ZOP; only against an attack that is under way or has just begun);[23] victim's consent (para. 26 ZOP) [ibid., 190–93] permitted risk (para. 27 ZOP),[24] justifiable use of lethal force (para. 28 ZOP; with maximum precautions) [Kučerová and Horzinková 2017, 169]. Liability for the offence ceases after the expiry of the limitation period, death of the natural person, dissolution of the legal person if there is no legal successor, or amnesty.

The Czech legislator provided for the following administrative penalties (*správní tresty*; para. 35 ZOP): a warning (para. 45 ZOP), a fine (para. 46 ZOP), a prohibition of acting (nonfeasance; para. 47 ZOP), forfeiture or substitute value

[21] See guidelines to the law, No. 250/2016 Sb: 3.
[22] See Ruling of the Supreme Administrative Court of 23 June 2011, 5 As 10/2011–111; Ruling of the Supreme Administrative Court of 22 March 2013, 5 As 114/2012–19.
[23] See e.g. Ruling of the Supreme Administrative Court of 7 May 2008, 1 As 35/2008–51.
[24] Until the amendment, only the doctrine of criminal law and judicial decisions were used for this purpose [Kučerová and Horzinková 2017, 165].

(*náhradní hodnoty*; para. 48 and para. 49 ZOP), the publication of decision on the offence (para. 50 ZOP). The act also regulates how penalties are imposed. In the Czech Republic, an administrative penalty can be imposed separately or jointly with other administrative penalties; a reminder cannot be imposed together with a fine. The agency shall take into account the degree of social harm caused by the act when determining the penalty. The waiver of a penalty (para. 43 ZOP) is applicable to all acts that have not caused damage or that have not unlawfully enriched the defendant.

Title VIII regulates two types of protection measures [ibid., 277–91]. Restrictive measures may only be imposed on a natural person and only if provided for by law, provided that there is a direct link between the restrictive measure and offence. They may be imposed in proportion to the nature and seriousness of the offence and to the personal situation of the offender. Restrictive measures may be imposed only with an administrative penalty for a maximum of one year and – interestingly – also outside of the substantive competence of the agency that applies the measure (para. 52, sect. 3 ZOP), but this is connected with the informational obligation referred to in sect. 5. There are three types of these measures: 1) prohibition to visit designated public places or places where sports, cultural, and other events occur; 2) obligation to refrain from contact with a person or a group of persons; 3) obligation to submit to an appropriate programme to manage aggression or aggressive behaviour, whereby the administrative agency – after consultation with the perpetrator – specifies the type of appropriate programme, including the content, scope, and manner of its implementation in order to take into account the educational and preventive effects of the perpetrator (para. 52, sect. 6 ZOP). The second type of measure is the confiscation of property (*zabrání věci*; para. 53 ZOP), unless five years have passed since the offence.

In accordance with para. 104 ZOP, the President of the Czech Republic grants amnesty in cases of offence. The application of this prerogative covers all offences and is possible under Art. 63, sect. 1 of the Constitution of the Czech Republic [Jemelka and Vetešník 2018, 931–32]. The doctrine of Czech law emphasises that it may be difficult to apply this provision in practice due to the lack of practice and jurisprudence on amnesty for offences. However, in some cases, jurisprudence on amnesty in criminal matters may prove useful [Šťastný 2018, 607].

Interestingly, in para. 111 ZOP, the Czech legislator indicates the qualification requirements for officials adjudicating on offences, i.e. they should have at least the title of Master of Law obtained at a Czech university.[25] If an authorised official does not have such a degree, s/he must hold a university degree in another area and demonstrate his or her professional competence by taking the examination conducted at the Ministry of the Interior. Czech doctrine states that this is a qualitative change [ibid., 632], which requires a local government official not only to fulfil the

[25] For the list of such universities, see e.g. Šťastný 2018, 633.

requirements laid down in the Act on Local Government Officials[26] but also to pass a test of professional competence [Kučerová and Horzinková 2017, 697].

In his analysis of the reform conducted in the Czech Republic, Radecki poses a question about the possibility of transferring Czech solutions in the discussed scope to the Polish system, and he concludes that – while the efforts of the Czech legislator are worthy of recognition and appreciation – it will not be possible in the Polish reality [Radecki 2017, 42–43].[27] Simultaneously, Radecki formulates a view that we mostly support, that there is a need to create a single act with provisions not only of a substantive and procedural nature but also of a systemic nature, with the use of regulations from the CAP, and the need to resign from setting penalties in a rigid manner.

2.2. The Republic of Austria

Administrative criminal law exists also in Austrian law (*Verwaltungsstrafgesetz* 1991).[28] Austrian criminal law distinguishes between judicial criminal law (*Justizstrafrecht*), applicable to the most serious crimes, and administrative criminal law (*Verwaltungsstrafrecht*). This is similar to the model adopted in the Republic of Germany. Like German law, the Austrian *Verwaltungsstrafgesetz* is of a substantive and procedural nature.

The provisions contained in the first part of the Act are of substantive character: "Allgemeine Bestimmungen des Verwaltungsstrafrechts" (para. 1–22 VStG). An administrative offence can consist of both act and failure to act ("Handlung oder Unterlassung"), as indicated in para. 1, sect. 1 *initio* VStG.[29] Examples of such offences arise from traffic law or construction law. Inciting, aiding, and abetting an offence (para. 7 VStG) and attempting to commit an offence (para. 8 VStG) are also punishable. The principles of *nullum poena sine lege* and the principle of the application of the more favourable regulation for the offender (para. 1, sect. 2 VStG) apply in proceedings for administrative offences.[30] The legislator also indicated circumstances that exclude punishability (e.g. disorders of consciousness caused by illness or mental impairment; para. 3, sect. 1 VStG), age under fourteen years of age (para. 3, sect. 4 VStG). In the regulation para. 6 VStG, the legislator provided for the state of necessity. In the light of the Austrian legis-

[26] Law No. 312/2002 Sb.

[27] The author's view evolved, and he expressed the following view in the publication from 2019: "I do not postulate to 'take offences out' of the framework of criminal law and 'bring them into' one framework with administrative torts in the form of administrative liability, but I dream about the opposite way: to 'bring' offences and administrative tort into the framework of criminal law in the form of criminal liability. After all, these are only my phantasmagories, which I do not impose and do not intend to impose on the team of authors examining the concepts of a fundamental reform of the law on offences" [Radecki 2019, 80].

[28] BGBl. No. 52/1991 with amendments [henceforth cited as: VStG].

[29] It also includes those related to economic activities [Eicker, Frank, and Achermann 2012, 49].

[30] See e.g. Ruling (*Entscheidung*) of TE UVS Tirol of 28 June 2006, 2006/25/1522–2; Ruling of VwGH of 27 April 1995, 95/11/0012.

lation, negligence is sufficient to hold a person liable for an offence, unless provided otherwise (para. 5, sect. 1 VStG).[31] Ignorance of an administrative regulation breached is only justified if it has been proven that the breach occurred without guilt (*Schuld*) and the perpetrator was unable to understand the unlawful behaviour without the knowledge of administrative regulations (para. 5, sect. 2 VStG).

In the light of Austrian regulations, not only natural persons are liable for their actions but also persons authorised to represent legal persons (cf. para. 9 VStG).[32]

Besides differently shaped cash fines (cf. para. 10, sect. 1 and para. 13 VStG),[33] the Act provides for a custodial sentence of up to two weeks in order to prevent further administrative offences of the same kind from being committed, with the possibility of an extension to six weeks (cf. para. 10, sect. 1; para. 11; para. 12, sect. 1 VStG), with a minimum custodial sentence of twelve hours (para. 12, sect. 1 VStG). The provisions para. 17 and para. 18 VStG regulate the forfeiture of goods and property.

The principle of proportionality (para. 14, sect. 1 VStG), the significance of the protected goods, the intensity of the infringement of the law (para. 19 VStG), and the financial situation of the defendant apply when sentencing.[34] In the event the cash fine is irrecoverable, the court will impose a substitutive penalty in the form of imprisonment under the abovementioned rules (para. 16 VStG). The death of the punished person results in the expiry of the fine's enforceability.

Extraordinary mitigation (*Außerordentliche Milderung der Strafe*) laid down in para. 20 VStG allows for a minimum penalty below the half of original penalty, when reasons for the mitigation – not in number but in weight – outweigh aggravating circumstances.[35] The concurrence of liability is regulated in para. 22 VStG.

Provisions on general administrative procedure (*Allgemeines Verwaltungsverfahrensgesetz* 1991)[36] apply to proceedings for offences, with the exceptions set out in para. 24 VStG. As a general rule, proceedings shall be initiated *ex officio*, with the exceptions set out in para. 56 VStG. The Act regulates substantive jurisdiction in para. 26 VStG, local jurisdiction in para. 27 and para. 29 VStG of bodies in administrative and criminal proceedings, the institution of legal aid known in the Polish administrative procedure in para. 52 CPA (para. 40, sect. 3 VStG), and allows for the possibility of transferring the proceedings (*Strafverfahren*) or transferring the enforcement of a penalty to an administrative agency, if it will hasten and simplify the proceedings (para. 29a VStG). The prosecution of a person is inadmissible if no action has been taken against them within one year. Criminal liability for an administrative offence expires as a result of

[31] See e.g. Ruling of VwGH of 21 April 1997, Zl. 96/17/0097.
[32] See e.g. Ruling of VwGH of 23 January 2018, Ra 2017/05/0090.
[33] E.g. para. 10, sect. 1 VStG provides for a penalty of up to 218 euros, unless specific provisions provide for a different penalty amount. If the conditions set out in para. 12, sect. 2 VStG are met, a fine of 2180 euros must be imposed.
[34] Ruling of TE Lvwg of 29 May 2019, VGW–031/091/4858/2019.
[35] Entscheidung of VwGH of 27 March 2015, Ra 2015/02/0009.
[36] BGBl. No. 51/1991 with amendments [henceforth cited as: WV].

a limitation period of three years (para. 31, sect. 1 VStG). The limitation period does not include cases referred to in para. 31, sect. 2 VStG, *inter alia*, the duration of proceedings before the Administrative Court, the Constitutional Tribunal, or the Court of Justice of the European Union. The limitation period for the enforcement of a penalty is three years from its final imposition, with the exceptions set out in para. 31, sect. 3 VStG. From 1 January 2019, if the findings of the agency show that the act's nuisance is minor, the agency may terminate the proceedings by calling the accused person to put an end to the infringement and by requesting, in writing, that s/he restored a lawful state within a specified period (para. 33a VStG – Beratung), with the exceptions set out in sect. 5 of this provision.

The Austrian legislator provides for two modes of proceedings for administrative offences: a regular one (*Ordentliches Verfahren*; para. 40–46 VStG) and a simplified one (para. 47–49 VStG). In the first mode, the agency gives the defendant the opportunity to be heard. In principle, the verdict (*der Spruch*) should contain an instruction to exercise the right to assistance in administrative court proceedings (para. 44b VStG). *Der Spruch* must make it clear for what the defendant is to be held liable (para. 44a VStG).[37] Under para. 45 VStG, the agency does not initiate or continue proceedings, e.g. where there are circumstances that preclude prosecution, where prosecution is impossible, or where prosecution would result in costs disproportionate to the value and intensity of the infringement. In the case of low harmfulness of the act, the agency may warn the defendant not to commit a certain type of act (para. 45, sect. 1 *in fine* VStG) and may do so any time.[38] However, administrative infringements under Viennese law continue to be punished without warning. Therefore, ordinary administrative criminal proceedings result in a payment order (*Strafgernisnis*), a warning, or in another way. The decision is subject to appeal (*Beschwerde*) to the administrative court. The first instance courts make a ruling on the substantive issue in criminal administrative cases of illegality.

The simplified procedure (*Abgekürztes Verwaltungsstrafverfahren*) is allowed in three cases, i.e. criminal warrant, penalty proceedings, and an anonymous warrant.

A criminal warrant (*Strafverfügung*) applies if an administrative offence has been established by a court, an administrative agency, a controlling public agency, a military agency in the security service (e.g. the police) on the basis of its own findings or an admission of guilt, or if the offence has been detected by means of traffic monitoring using technical image processing equipment. By means of a criminal behaviour order, the agency may impose a fine of up to 600 euros. This warrant is always addressed to the individual and must contain the elements indicated in para. 48 VStG, including the information about the right to object (*Einspruch*). *Einspruch* must be filed within two weeks with the agency

[37] Ruling of TE Vwgh of 6 May 1996, 94/10/0017.
[38] Ruling of BFG of 5 April 2016, RV/7500348/2016.

that issued the warrant [Beck and Berr 2006, 462] and results in the initiation of the regular procedure.

An anonymous warrant (*Anonymverfügung*) is used if the offence results, e.g., from the recording of a traffic monitoring device.[39] Proceedings are not initiated against any particular person but against the person who – in the opinion of the administrative-criminal authority – may be guilty because she can easily be identified. There are no legal measures in this procedure. Should the accused find him/herself innocent and does not pay the fine, there begin ordinary administrative criminal proceedings, without the prohibition of *reformationis in peius*.

Penalty proceedings (*Organmandat*; para. 50 VStG) happen when a penalty is imposed for an offence with the maximum fine of ninety euros. In the event of a minor offence, the authority may refrain from imposing a fine under para. 50, sect. 5 VStG. There are no legal remedies for penalty proceedings. Failure to pay the penalty within two weeks results in normal proceedings and the possibility of a higher fine.

The presented characteristics of the Austrian administrative criminal procedure indicate that Austria adopts a model, in which offence is first decided by an administrative agency (in one of two modes: simplified or regular) on the basis of the *Verwaltungsstrafgesetz*, in unregulated matters – by provisions on general administrative procedure, and following an objection – by administrative courts.

2.3. Federal Republic of Germany

In Germany, the substantive and procedural basis of criminal administrative law was laid down in the *Gesetz über Ordnungswidrigkeiten* act of 1968.[40] According to para. 1 of the *Ordnungswidrigkeit* (offence understood as a disciplinary contravention) [Szumiło–Kulczycka 2004, 52–53; Skupiński 1974, 62] is an unlawful and punishable act for which a fine is provided (cf. para. 65 OWiG). The objective attribution of liability under German criminal law is rarely applied in OWiG, but this does not mean that it is not possible [Bohnert, Krenberger, and Krumm 2016, 4]. Both intentional and unintentional acts are punishable when the law provides so (para. 10 OWiG).[41] The legislator specified a minimum penalty (of five euros) and a maximum penalty (of 1000 euros), unless otherwise provided by law. The amount of the fine takes into account the significance of the offence and the accusation committed by the offender. Moreover, the economic situation of the offender is taken into account, although it is usually ignored in minor administrative offences [ibid., 88]. The fine should exceed the economic benefit that the defendant derives from the administrative offence (para. 17, sect. 4 OWiG).

[39] A higher authority may also issue a general act indicating this procedure, in which a fine of up to EUR 365 may be imposed (para. 49a VStG).

[40] From 24 May 1968 (BGBl. I p. 602), last amendment 21 June 2019 (BGBl. I p. 846) [henceforth cited as: OWiG].

[41] Cf. Order of the Higher District Court [henceforth cited as: OLG], Hamm of 10 March 2005, 3 Ss OWi 85/05.

Therefore, the agency must assess the value of the benefit [ibid., 86]. The provisions contained in para. 19–21 OWiG regulate the issue of coincidence of law infringements. The fine is to be paid on time but may be divided into instalments (para. 18 OWiG). The provisions para. 22–29 OWiG regulate the confiscation of property. The sixth section regulates the fine's amount for legal persons and associations, specifying in para. 30, sect. 1 OWiG which entities are liable,[42] and in para. 30, sect. 3 OWiG – the amount of the fine (in the case of intent, up to 10 million euros, and in the case of negligence, up to 5 million euros). In the case of universal succession or partial inheritance by division (para. 123, sect. 1 of the German law on conversion; *Umwandlungsgesetz*), a fine may be imposed on the successor or successors.[43]

In para. 31, sect. 2, the OWiG indicates the limitation periods for prosecution (from six months[44] to three years), while para. 33 OWiG indicates cases of interruption of the limitation period. In para. 34, OWiG sets forth limitation periods for the execution of fines (five years for a fine of over 1000 euros and three years for a fine of up to 1000 euros) and the suspension of its execution (para. 34, sect. 4 OWiG).

The second chapter of OWiG regulates the proceedings (*Bußgeldverfahren*), including agency jurisdiction (substantive – para. 35 OWiG; local – para. 37 OWiG), the rules of cooperation with the prosecution (para. 41–45 OWiG), the rules of procedure (reference to criminal proceedings; *Strafprozeßordnung*),[45] the Act on the judiciary (*Gerichtsverfassungsgesetzes*),[46] and the act on courts for minors (*Jugendgerichtsgesetzes*; para. 46 OWiG;[47] including the right for defence, the presumption of innocence, the right to active participation, and the need to indicate the facts considered to be proven which signify an administrative offence).[48] The Act also regulates the tasks of the police with regard to the investigation of administrative offences and related activities (e.g. searches; para. 53 OWiG).

In para. 56–58, the OWiG regulates the signalling procedure *Verwarnungsverfahren*. In the case of minor administrative offences, the agency may warn a person and impose a fine of five to fifty-five euros. It can also issue a warning without a fine. In such cases, a warning certificate is issued, which indicates the amount of the penalty and the deadline for payment. Acceptance of the warning and payment of the fine means that the same offence cannot be prosecuted for the

[42] A fine applies even if several people are responsible for the offence. See Ruling of the Federal Court (BGH) of 9 May 2017, 1 StR 265/16.
[43] See Resolution of the Federal Court (BGH) of 16 December 2014, KRB 47/13, and 10 August 2011, KRB 55/10, BGHSt 57, 193.
[44] See Resolution of Bavarian Supreme Court (*Bayerisches Oberstes Landesgericht*) BayObLG, 16 June 1999, 2 ObOWi 270/99.
[45] 12 September 1950, (BGBl. I: 1074, 1319), last updated on 11 July 2019 (BGBl. I: 1066).
[46] 12 September 1950, (BGBl. I: 1077), last updated on 8 July 2019 (BGBl. I: 1002).
[47] 4 August 1953, (BGBl. I: 3427), last update on 19 June 2019 (BGBl. I: 840).
[48] Cf. Resolution of OLG, Hamm, 10 March 2005.

factual and legal reasons on the basis of which the warning was issued.[49] This is because this procedure replaces the regular procedure for administrative offence [Bohnert, Krenberger, and Krumm 2016, 251]. Nevertheless, even an already-initiated regular procedure may end with a warning [ibid.].

The content of the order for payment of the fine is regulated by para. 66 OWiG, whereas the remedies are specified in para. 67 et seq. OWiG. The appeals are dealt with by the district criminal court (*Amtsgericht*) with a single judge.

Therefore, the procedure for administrative offences is a two-stage procedure. Stage I is conducted by the administrative authorities and consists of clarifying the case and a ruling, while stage II – before the criminal court. The administrative authority conducts an investigation before issuing a decision. The written explanations submitted in the course of the investigation conclude the proceedings with an order for payment that includes a fine (*Bußgeldbescheid*). The party may lodge a notice of objection (*Einspruch*) within two weeks from the date of delivery of the payment order about the amount of the fine, which triggers court proceedings. The addressee of the objection is the administrative agency (*Verwaltungsbehörde*) which issued the order. The right to object may be waived [ibid., 285, 289].

From the above outline of the German regulation, we should conclude that German law did not separate the law and proceedings for administrative offences in the form of a separate and independent act. For this type of offence, a modified and simplified penal regulation is generally applicable. The decisions made on administrative offences are controlled by the common courts: the criminal courts.

3. THE SCOPE OF PROPOSED CHANGES IN THE SPHERE OF POLISH LAW, ADMINISTRATIVE PROCEEDINGS, AND JUDICIAL REVIEW OF RULINGS

The arguments in favour of legislative changes in the postulated direction in the Polish legal order are the simplification and unification of proceedings and the guarantee of expediting proceedings while respecting the individual's rights, including the right of appeal and the right to court.

Conversion of the current legal status requires multi-faceted actions, linked with each other in the area of substantive misdemeanour law and substantive administrative law, along with changes in the CAP and in administrative court proceedings, depending on the adopted model of judicial control, as presented below. Because there is no possibility for the automatic transfer of offences to administrative law without developing for them general substantive regulations and uniform procedural rules. A "simple" incorporation of offences into administrative law is not possible for various reasons resulting from the differences between an offence and an administrative tort. Firstly, only natural persons are liable for offences, while natural persons, legal persons, and organizational units without

[49] Ruling of Finanzgericht Düsseldorf of 4 November 2016, 1 K 2470/14 L.

legal personality are liable for administrative tort. Secondly, the nature of liability for an offence is different. It is subjective and based on guilt, as opposed to liability for an administrative tort, which is in principle objective, although this has also changed in recent years. Thirdly, the purpose of administrative penalties is prevention and – in the case of criminal penalties – repression. We should note that the mechanical transfer of offences to administrative law and, thus, their submission to administrative jurisdiction does not automatically guarantee a quicker resolution. We should remember that administrative decisions by which converted offences would be settled will be subject to administrative court control, which is also two-instance.

The legislator should take into account the issues signalled both in the area of criminal practice (overburdening judges, judging trivial cases by the judiciary) and those arising in the area of administrative practice (the unification of responsibility rules for administrative tort, taking into account cash and non-cash penalties, developing for them appropriate standards, the transfer of substantive legal provisions from the CAP to the planned act).

First of all, the aim should be to identify the offences that should be considered as administrative torts and then to transfer their regulation to specific administrative laws according to what appears to be the subject criterion. Secondly, it would be appropriate to amend the specific act of administrative law by removing from them all existing provisions on the conditions for imposing and administering administrative fines or other sanctions of an administrative nature. In other words, the substantive administrative law should only specify the constituent elements of administrative tort (including converted offences), along with the penalties to be imposed for committing them. Finally, there is a need to create a general law on administrative tort and the procedure for imposing and administering it, consisting of a general substantive part and a procedural part. This act should take into account the currently binding regulations of the CAP (Section IVa) and the part of regulations from the special administrative law, but also regulate the institutions related to punishing for converted offences.

An administrative tort should be defined in the law. Taking into account the views expressed so far, we should assume that "administrative tort" should be understood as an act or omission committed by a natural person, a legal person, an organizational unit without legal personality, which is socially harmful, prohibited by the act, or inconsistent with the act at the time of its committing/omitting and liable to an administrative sanction of a monetary or non-monetary nature.

The creation of new bodies to rule on administrative torts does not seem necessary or justified. However, one should consider a change in the organisation and functioning of existing bodies and in the competences of the staff of administrative agencies. Therefore, even at this point in time, *de lege ferenda*, there is a need to increase the substantive requirements for persons adjudicating on administrative tort cases on behalf of specific agencies. Perhaps, we should strive to ensure that – as in the Czech Republic – only officials with legal education make

decisions on matters of tort. We should remember that there are also non-lawyers working in the administration, which is impossible in the case of courts as far as ruling is concerned.

A single law regulating administrative tort and its procedures should lay down the main substantive rules on administrative tort already indicated in the draft General Administrative Law Rules of 2008 and partly included in the added Section IV (a) on administrative fines of the CAP, while respecting the basic rules on the application of administrative sanctions indicated in Recommendation No. R (91).[50] These should be further developed by introducing appropriate institutions. The catalogue of these principles should be the following: the principle of liability for an administrative tort, the principle of non-retroactivity of the law (*lex retro non agit*), the prohibition of punishment by analogy, the principle of not punishing twice for the same act (*ne bis in idem*), the principle of limitation, the principle of mitigating penalties, the principle of applying a more relative regulation (law), the principle of probation. Countertypes also require regulation.

The amendments would also cover the administrative procedure due to the nature and subject matter of the administrative tort procedure. The rules of this procedure need to be modified in order to strengthen the procedural position of the tort party, on the one hand, and to create a framework for certain activities of the authority, such as measuring the penalty, on the other hand. Moreover, the control of decisions in cases of administrative tort would require revision. Three models must be considered in this respect. The first one involves decisions under the sole control of administrative courts (which, however, would require changes, by extending the competence of administrative courts to make substantive decisions and, consequently, to change the current model of this judiciary, from mixed to substantive). The second one involves the transfer of control over decisions on administrative tort cases to criminal courts. And the third, most extensive one in which the court control would be of mixed nature conducted by administrative and common courts.

CONCLUSIONS

Currently, the Polish doctrine emphasizes that fines are highly correlated with criminal sanctions [Radecki 1996], whereas there are discrepancies in the recognition of the issue of administrative tort and fines as an object within the public administration [Wierzbowski and Kraczkowski 2018, 348].[51] Nevertheless, the postulated issue of converting some regulations so far contained in the code of offences into administrative law is not a novelty in the legal system, both historically and comparatively. The changes in the existing Polish legal system are su-

[50] Content published in Polish in Jasudowicz 1996, 129–32.

[51] Moreover, in a more recent publication [Radecki 2019, 75] stresses that the doctrine of administrative law does not deal with administrative tort and penalties for them, because it is not administration in the sense adopted in the field of these legal sciences.

pported by practical reasons – signalled by practitioners – and by social needs, as the chaos in this respect does not foster the feeling of legal certainty as one of the determinants of a democratic state of law. However, the changes require not only a certain legal retrospection but also an in-depth analysis of legal solutions in other European countries, drawing on their experiences to date, and then reflecting on the institutions and regulations that can be applied to the Polish legal system.

The proposed normative act would be of significant importance for the entire Polish legal system, as it would have both an ordering and unifying character. It would also be of high importance for the citizens, as it would move the adjudication of previous administrative offences by the court to the jurisdiction of administrative bodies without abandoning judicial protection. However, with the above in mind, we should not forget that the proposed change will result in further de-codification of administrative proceedings by creating a hybrid procedure, in which the CAP will be referenced in unregulated matters.

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O POTRZEBIE ZMIAN W ZAKRESIE KAR ADMINISTRACYJNYCH ORAZ KONWERSJI NIEKTÓRYCH WYKROCZEŃ DO PRAWA ADMINISTRACYJNEGO W POLSKIM SYSTEMIE PRAWNYM W ŚWIETLE ROZWIĄZAŃ PRZYJĘTYCH W REPUBLICE CZECH, REPUBLICE AUSTRII I REPUBLICE NIEMIEC

Streszczenie. W prawie administracyjnym sankcje i kary wymierzają organy administracyjne, co powoduje zacieranie się granic między karą penalną i administracyjną karą pieniężną. W Polsce część naruszeń porządkowo-administracyjnych jest uregulowana w ustawach szczególnych prawa administracyjnego oraz w kodeksie wykroczeń. Obecnie trwa dyskusja na temat konieczności zmian niektórych wykroczeń, które powinny być poddane przekształceniu w delikty administracyjne.

Słowa kluczowe: organy administracji publicznej, kara administracyjna, sankcje, nakładanie sankcji, prawo wykroczeń, prawo administracyjne

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