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COMMENTS ON STATUTORY REGULATION OF ADMINISTRATIVE PENALTIES

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1. ORIGIN OF FRAMEWORK PROVISIONS CONCERNING PECUNIARY ADMINISTRATIVE PENALTIES

The scope of administrative regulation has now reached the size in which, in general, there are no spheres of social life free from the state interference. Over years, the development of sanctioning solutions has been observed, especially within the range of broadly applied administrative penalties. Due to the repressive nature and painfulness for a party on which administrative penalties are imposed, there were calls for the regulation of general rules of their imposition taking into account conditions excluding a penalty or making it possible to differentiate its scope. The justification indicated legislative shortages leading to phenomena dangerous from the point of view of the protection of human rights and freedoms, in particular due to unequal treatment of entities to be punished based on different provisions.[1] There were opinions that entities that were to incur liability for an administrative tort were in a much worse situation than those who were accused of crime or misdemeanour.[2] The form of substantive and procedural guarantees of administrative penalty imposition was considerably influenced by the so-called "soft" international law, in particular Recommendation No. R (91) 1 of the Council of Ministers to Member States on administrative sanctions adopted on 13 February 1991, and Resolution (77) 31 on the protection of the individual in relation to the acts of administrative authorities

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1 L. Staniszewska, *Materialne i proceduralne zasady stosowane przy wymierzaniu administracyjnych kar pieniężnych*, [in:] M. Błachucki (ed.) *Administracyjne kary pieniężne w demokratycznym państwie prawa*, Warszawa: Biuro Rzecznika Praw Obywatelskich, 2015, pp. 28–29.

2 *Ibid.*, p. 35.

adopted on 28 September 1977.[3] For many years, it has not been possible to develop a coherent legislative conception of the method of establishing administrative sanctions.[4] Regulations concerning administrative sanctions were proposed in Chapter V of the bill entitled "General provisions of administrative law".[5] The bill did not enter the legal system. Another attempt to introduce general provisions concerning the imposition of pecuniary administrative penalties was made by way of the governmental bill entitled "Provisions implementing the Act: Law on business activities". The proposed solutions were to supplement the regulations laid down in the acts of substantive law and constitute *lex generalis* norms in nature. However, the bill was withdrawn from the Sejm. Some public administration bodies (e.g. the President of the Office of Competition and Consumer Protection), in order to influence the application of the provisions on pecuniary administrative penalties, started to apply the recommendations.[6] The next opportunity to introduce general provisions on pecuniary administrative penalties arose in the course of work on the amendment to the Code of Administrative Procedure, which entered into force on 1 June 2017.[7] As there was no better idea[8] for introducing such provisions, the Act of 7 April 2017[9] Part IVa entitled "Pecuniary administrative penalties" was added to the Act of 14 June 1960: Code of Administrative Procedure[10]. It included regulations concerning the rules of imposing pecuniary administrative sanctions, the possibility of withdrawing from their imposition, especially in justified circumstances, norms that were inter-temporal in nature, regulations concerning concurrence of sanctions as well as the limitation period for their establishment and execution. It should be highlighted that the introduction of substantive and formal normative solutions only within the scope of imposing pecuniary administrative penalties is insufficient. Indeed, one cannot forget about regulating also the rules of application of other administrative sanctions that are non-pecuniary, connected with the so-called negative regimentation (e.g. the withdrawal of a permission, the expiry of rights, the prohibition on applying for a permission or licence for a fixed period), which are not less painful than pecuniary administrative penalties.

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[3] T. Jasudowicz, *Administracja wobec praw człowieka,* Toruń: Dom Organizatora TNOiK, 1996, pp. 129–132.

[4] M. Błachucki, [in:] M. Błachucki (ed.), *supra* n. 1, p. 7.

[5] https://www.rpo.gov.pl/pliki/12059280660.pdf (accessed 7.7.2018).

[6] M. Błachucki, *Wytyczne w sprawie nakładania administracyjnych kar pieniężnych (na przykładzie wytycznych wydawanych przez prezesa UOKiK)*, [in:] M. Błachucki (ed.), *supra* n. 1, p. 43.

[7] It should be stipulated that in relation to the proceedings instigated and not concluded with a final decision or ruling before 1 June 2017, the provisions of the Code of Administrative Procedure in the former wording should be applied; however, the provisions concerning mediation should be applied in those proceedings (see Article 16 of the Act of 7 April 2017 amending the Act: Code of Administrative Procedure and some other acts).

[8] It can be considered whether it would be better to introduce the regulations concerning pecuniary administrative penalties into the Act of 27 August 2009 on public finance, consolidated text, Dz.U. of 2017, item 2077, as amended; hereinafter APF.

[9] Act of 7 April 2017 amending the Act: Code of Administrative Procedure and some other acts, Dz.U., item 935.

[10] Consolidated text, Dz.U. of 2017, item 1257, as amended; hereinafter CAP.

2. COMMENTS IN THE LIGHT OF STATUTORY REGULATION OF ADMINISTRATIVE PENALTIES

The concept of an administrative penalty often constitutes a shorthand, which is identified with a pecuniary administrative penalty. In fact, a pecuniary penalty is imposed, without adjudication of guilt, for objectively unlawful conduct for which liability is incurred *ex lege*. The study of administrative penalties in general looks for three elements that do not exclude one another: repression, compensation and compulsion.[11] The Constitutional Tribunal indicated that "the essence of pecuniary administrative penalties consists in stimulating entities to perform their duties towards the state timely and properly".[12] Taking into consideration the output of the doctrine and the practice of law application, the legislator introduced a legal definition of a pecuniary administrative penalty, which should be understood as "a pecuniary sanction determined in statute, imposed by a public administration body in the form of a decision as a result of the infringement of law consisting in failure to fulfil an obligation or the violation of a ban imposed on a natural person, a legal person or an organisational unit that does not have legal personality" (Article 189b CAP).

Before the amendment entered into force, the imposition of administrative penalties had been largely automatic. As a result of the introduction of Article 189f to the Code of Administrative Procedure, at the stage of imposing a penalty, administrative bodies are obliged to abandon it in certain circumstances. A party to the proceedings should not be punished in case the infringement of law results from force majeure (Article 189e CAP). If the infringement is of insignificant weight and a party stops violating law or the punishment might lead to a breach of the *ne bis in idem* principle, an administrative body is obliged to issue a decision on abandoning the imposition of a pecuniary administrative penalty and let a party off with a caution. Insignificance of the infringement can occur, e.g. when an act committed does not result in a threat to safety, health and life of other people, it does not cause damage or the protected legal interest (public roads, the environment, etc.) has not been harmed and, moreover, the party concerned has stopped violating law. In order to recognise the weight of the infringement of law as insignificant, it is necessary to consider the circumstances that have resulted in an administrative tort rather than the penalty amount.

In accordance with Article 189f § 1(2) CAP, a public administration body is obliged to abandon the imposition of a pecuniary administrative penalty and be satisfied with a caution, in a form of a decision, if "a final pecuniary administrative penalty was imposed on the party for the same conduct by another authorised public administration body or the party was punished for a misdemeanour or a fiscal misdemeanour, or was sentenced for an offence or a fiscal offence and the former penalty fulfils the aim for which a pecuniary administrative penalty

[11] L. Klat-Wertelecka, *Sankcja egzekucyjna w administracji a kara administracyjna*, [in:] M. Stahl, R. Lewicka, M. Lewicki, *Sankcje administracyjne*, Warszawa: Wolters Kluwer Polska, 2011, p. 70.

[12] Judgment of the Constitutional Tribunal of 1 March 1994, U 7/93, LEX No. 25109.

would be imposed". The provision is to prevent double punishment for the same conduct (*ne bis in idem*), inter alia, in the case of the concurrence of a penal sanction and an administrative penalty. While the legislator's assumption in the area can be recognised as noble, individuals who tend to infringe law and circumvent its provisions use the provision to reduce a sanction for a prohibited act. Justifying the need to introduce the solutions laid down in Article 189f § 1(2) CAP, the authors stated that pecuniary administrative penalties are often higher than a fine that can be imposed for the same conduct. In case the same act carries both criminal and administrative liability, it happens that perpetrators of an act that is subject to a sanction calculate which liability, criminal or administrative, will be favourable. Then they self-denounce their violation to law enforcement agencies, request the highest possible penalty and then, if penal administrative proceedings are instigated, they refer to Article 189f § 1(2) CAP and provide evidence of their former punishment or conviction for the same conduct. It should be highlighted that the final part of the provision contains a condition according to which an administrative body should abandon the imposition of a penalty in situations specified therein if the former penalty fulfils the aims for which a pecuniary administrative penalty would be imposed. It should be noticed that the use of a general clause might raise problems in public administration bodies' adjudication practice.

It was also decided to introduce optional abandonment of the imposition of a penalty to the amended CAP. If it turns out that there are no circumstances necessary for obligatory abandonment of the imposition of the above-mentioned penalty (e.g. the weight of the infringement cannot be recognised as insignificant), an administrative body can request a party, in the form of a decision, to eliminate the infringement in a fixed time limit or to notify entities concerned of the infringement of law in a fixed mode and time limit. Optional abandonment of the imposition of a penalty requires the conviction that the elimination of the consequences of conduct infringing law will make it possible to fulfil the aims for which a pecuniary administrative penalty would be imposed. It cannot be ignored that the provisions on the abandonment of the imposition of a penalty can be applied regardless of whether a penalty is specified as a fixed one or based on a "from … to …" limit.

Abandoning the imposition of a penalty should be distinguished from concluding administrative proceedings in a situation when an infringement results from force majeure (Article 189e CAP) because the form of the proceedings is different. Abandonment of the imposition of a penalty takes place by way of an administrative decision which is issued in accordance with Article 189f § 1 or 3 CAP and is constitutive in nature,[13] while in case the infringement of law results from force majeure, administrative proceedings should not be initiated at all. However, when they start and the influence of force majeure is recognised, the proceedings concerning the imposition of an administrative penalty should be discontinued as

[13] M. Strączek, *Kary administracyjne – analiza prawnoporównawcza stanu prawnego sprzed i po nowelizacji Kodeksu postępowania administracyjnego z 2017 roku*, [in:] A. Gronkiewicz, A. Ziółkowska (eds), *Nowe instytucje procesowe w postępowaniu administracyjnym w świetle nowelizacji Kodeksu postępowania administracyjnego z dnia 7 kwietnia 2017 roku*, Katowice: Wydawnictwo Uniwersytetu Śląskiego, 2017, p. 354.

irrelevant based on Article 105 § 1 in conjunction with Article 189e CAP. The concept of "force majeure" has no legal definition. It is interpreted in jurisprudence as an event that is random or natural, impossible to avoid, one that a human being cannot control. Most often, these are natural disasters as well as extraordinary disruptions of community life such as a war or civil riots.[14] In order to apply Article 189e CAP, there must be a causal relationship between force majeure and the infringement of law.

Due to the protection of safety and stability of legal transactions, the legislator decided to introduce provisions regulating time limitation for the imposition of a penalty and its execution to the amended Code of Administrative Procedure. In accordance with Article 189g § 1 CAP: "A pecuniary administrative penalty cannot be imposed five years after the date of the infringement of law or the occurrence of the consequences of the infringement of law". "A pecuniary administrative penalty shall not be subject to execution after five years from the date when it should have been executed" (Article 189g § 3 CAP).

The statute of limitations concerning pecuniary administrative penalties (Article 189g § 1 CAP), interest rates for default in pecuniary administrative penalty payment (Article 189i CAP), and concessions in the execution of a pecuniary administrative penalty (Article 189k CAP) were regulated before the amendment to the Code of Administrative Procedure. Pecuniary administrative penalties are public resources constituting non-tax budgetary receivables within the meaning of the Act on public finance (Article 60 para. 6 APF).[15] There is a problem arising here connected with the relationship between regulating the statutory pecuniary administrative penalties and norms laid down in the Act on public finance. On the one hand, with the amendment of CAP, para. 2 was added to Article 67 APF, which stipulates: "The provisions of the Act of 14 June 1960: Code of Administrative Procedure shall be applicable to cases concerning pecuniary administrative penalties." On the other hand, Article 189a § 2 CAP provides for subsidiarity of code regulations, which is reflected in the application of the provisions of the Code when other regulations do not envisage solutions within the scope regulated in the CAP provisions. Moreover, the possibility of applying, by analogy to pecuniary administrative penalties, substantive law[16] provisions of Part III TL[17] (Article 67 para. 1 APF), where there are, inter alia, regulations concerning limitations (Chapter 8), interest for default (Chapter 6), and concessions (Chapter 7a), has not been outright excluded. Chapter 7a TL, however, is not applicable to pecuniary administrative penalties because the provisions of Part III TL are applicable by analogy only to cases concerning, inter alia, pecuniary administrative penalties that

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[14] A. Wyszomirska, *Siła wyższa*, http://www.gazetaprawna.pl/encyklopedia/prawo,hasla-,345402,sila-wyzsza.html (accessed 7.7.2018).

[15] See the Supreme Administrative Court judgment of 18 March 1999, I SA/Po 1565/98, LEX No. 37217; see the Supreme Administrative Court judgment of 18 August 2016, II OSK 2913/14, LEX No. 2142399.

[16] *Art. 67*, [in:] P. Walczak (ed.), *Ustawa o finansach publicznych. Komentarz dla jednostek samorządowych*, 2017, https://legalis.pl (accessed 7.6.2018); M. Bitner, *Art. 67*, [in:] W. Misiąg, *Ustawa o finansach publicznych*, 2017, https://legalis.pl/ (accessed 7.6.2018).

[17] Act of 29 August 1997: Tax Law, consolidated text, Dz.U. of 2018, item 800, as amended; hereinafter TL.

are not regulated in APF (Article 67 para. 1 APF). However, Article 64 APF provides an independent basis for the same concessions that are regulated in the Code of Administrative Procedure.[18] Thus, within the scope of concessions, Article 64 APF has priority over Article 189k CAP. Comparing the provisions of the Tax Law, the Act on public finance and the Code of Administrative Procedure, one can notice that they are not identical. For example, unlike CAP, APF stipulates a possibility of cancelling an amount *ex officio* (Article 64 para. 1(1) APF). Taking into account the circumstances of the introduction of Article 67 para. 2 APF (the introduction of the provision together with the provisions on pecuniary administrative penalties to CAP), one can suppose that the legislator's intention was to exclude the application of the TL provisions to pecuniary administrative penalties, i.e. the TL provisions that have their counterparts in Part IVa CAP. However, the edition of Article 67 APF in conjunction with Article 189a § 2 CAP does not unequivocally allow stating that. Moreover, it is intriguing why the legislator decided to make a double reference to the application of the CAP provisions in relation to pecuniary administrative penalties: first in Article 67 para. 1 APF and second in Article 67 para. 2 APF. Reference to the application of CPA made in Article 67 para. 1 APF concerns proceedings, i.e. it means an obligation to apply provisions concerning instigation of proceedings, evidence taking, decisions, rulings, invalidation of final decisions, exclusion of an employee and exclusion of an administrative body in relation to pecuniary administrative penalties.[19] The question why there is a separate reference to the application of CAP to pecuniary administrative penalties made in Article 67 para. 1 APF remains without answer. Assuming that the legislator is rational, it is necessary to state that it was a thought-out decision. Thus, it was due to the consideration that the provisions of Part IVa CAP include substantive law regulations, thus the reference under Article 67 para. 1 APF to the application of CAP would not be applicable therein. It is possible to hypothesise that reference under Article 67 para. 2 APF concerns the substantive law issues. A question about the sense of introducing the CAP provisions on administrative penalties that correspond to the provisions of APF and TL still remains unanswered. If Article 189a § 2 CAP excludes the application of Part IVa CAP in relation to the issues regulated in separate provisions, i.e. the provisions of Part III TL and APF, the CAP provisions are not applied in this scope automatically. Thus, are these a dead letter? It is necessary to look for a rational solution to the presented problem in cases where the provisions of special acts ("trade-related" ones) exclude the application of TL,[20] do not exclude the application of Part IVa CAP and do not contain regulations analogous to the issues regulated in

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[18] See D. Gregorczyk, *Administracyjne kary pieniężne w nowelizacji Kodeksu postępowania administracyjnego,* [in:] A. Gronkiewicz, A. Ziółkowska (eds), *supra* n. 13, p. 388.

[19] *Art. 67*, [in:] P. Walczak (ed.), *supra* n. 16; M. Bitner, *Art. 67*, [in:], W. Misiąg, *supra* n. 16.

[20] In case the special provisions excluded the application of APF, they would also exclude the application of Part III TL by analogy to pecuniary administrative penalties because TL is applicable with the reference made in Article 67 para. 1 APF. It should be noted that the special provisions excluding the application of TL exclusively, not excluding the application of Part IVa CAP and not containing regulations concerning the issues regulated in Part IVa CAP, do not mean that all the provisions of Part IVa CAP are applicable. For example, Article 64 APF is applicable instead of Article 189k CAP.

Part IVa CAP. For example, one can quote Article 93 para. 7 and Article 94 para. 9 of the Act of 6 September 2001 on road transport,[21] and Article 281 para. 3 of the Law on environment protection[22].

One can take different stands. First, Article 67 para. 2 APF is a provision excluding the application of not only the TL provisions but also the APF provisions in relation to pecuniary administrative penalties. However, the opinion seems to be too far-reaching, in particular, because of the subsidiary nature of the provisions of Part IVa CAP. Second, only those TL provisions that have no counterparts in CAP should be applied to pecuniary administrative penalties. The CAP provisions are, in fact, better adjusted to pecuniary administrative penalties and they can be directly applied, while the TL provisions are developed for the purpose of tax dues and not administrative penalties. That is why, their application by analogy is difficult. Moreover, taking into account the circumstances of adding Article 67 para. 2 APF (together with the introduction of the provisions on administrative penalties to CAP) as well as the edition of Article 67 para. 1 and Article 67 para. 2 APF, one can consider a possibility of giving primacy to the application of Part IVa CAP in relation to administrative penalties. Article 67 para. 1 APF concerns "dues referred to in Article 60 APF", i.e. inter alia revenue obtained by the state and self-government budgetary units based on separate provisions (Article 60(7) APF), which contain pecuniary administrative penalties. Article 67 para. 2 APF refers directly to pecuniary penalties. Such justification, however, seems to be insufficient to unequivocally state that the TL provisions should give primacy to the CAP provisions.

Attention should still be drawn to the fact that Part III TL covers regulations that have no counterparts in Part IVa CAP. In those cases, there are no doubts concerning the possibility of applying the provisions of Part III TL. The doubts can arise only in connection with the interpretation of the application by analogy of those provisions in relation to pecuniary administrative penalties.

Taking the above into account, one can state with no doubt only that in the collision between the provisions concerning administrative penalties laid down in CAP, TL and APF, the Code of Administrative Procedure should give primacy to the provisions of the Act on public finance concerning concessions (Article 189k CAP should give primacy to Article 64 APF). It seems that in the case of limitation of the imposition and execution of an administrative penalty, the CAP provisions (Article 189g CAP) should be applied and not the TL or APF provisions. In case the running of the limitation period is suspended (Articles 189h and 189j CAP), the provisions of Part III TL applied by analogy should be given primacy. The interest for default should be calculated in accordance with Article 189i APF. The above-presented statements require justification.

The statute of limitations was regulated in the Tax Law before the introduction of Part IVa to the Code of Administrative Procedure. In the adjudication practice and literature of the time, there were different stands on the possibility of applying

[21] Consolidated text, Dz.U. of 2017, item 2200, as amended.

[22] Act of 27 April 2001: Law on environment protection, consolidated text, Dz.U. of 2018, item 799, as amended.

the limitation applicable to the imposition of tax dues to administrative penalties. According to the dominating approach, the provisions were not applicable; thus, there were no cases of limitation to the imposition of administrative penalties. The current legal state leaves no doubt that the possibility of imposing administrative penalties is subject to the statute of limitations. Therefore, it cannot be recognised that after the CAP amendment, the solution to the collision between the TL and CAP provisions concerning limitation is primacy given to the former. This is so because they have never been applied to administrative penalties. Therefore, Article 189g § 1 CAP constitutes the legal basis for limitation to the imposition of administrative penalties (in the absence of special regulations). The correctness of this stand can be supported by an explanation that by introducing the provisions on pecuniary administrative penalties to CAP, the legislator took into account the fact that an individual and his/her legal situation in the field of relationships with administrative bodies constitute the main and also central point of the whole study of administration. Solutions prescribed in the Code of Administrative Procedure were introduced, inter alia, because of the necessity to soften the harmfulness resulting from administrative penalties. Declaring the application of primarily the TL provisions to calculate the limitation period would result in the adoption of a solution less favourable for a party. This is due to Article 70 § 1 TL,[23] which stipulates: "Due tax is subject to limitation after five years from the end of calendar year when the payment deadline expired." On the other hand, the provision of Article 189g CAP stipulates: "A pecuniary administrative penalty cannot be imposed in case the time of five years has passed from the date of the infringement of law or the occurrence of the consequences of the occurrence of law." Thus, it is more favourable for a party. The so-called zero-year is not laid down. Taking into account the *in dubio pro libertate* principle (doubts interpreted to the benefit of a party) and the fact that the TL provisions concerning limitation are strictly adjusted to tax dues, while administrative penalties are absolutely not such ones, it should be recognised that in the case the issues of limitation are not regulated in trade-related acts, Article 189g CAP (and not analogous TL provisions) should be applied. The situation with limitation in administrative penalties execution is similar. Article 189g § 3 CAP should be applied.

[23] Recognising that the TL provisions should be given primacy in respect of pecuniary administrative penalties, only Article 70 § 1 TL in conjunction with Article 67 para. 1 APF in conjunction with Article 189g § 3 CAP might be applicable. It should be noted that there is an opposite opinion, according to which limitation of the penalty for the occupation of a road lane should be based on Article 68 § 1 TL in conjunction with Article 67 para. 1 APF; compare M. Węgrzyn, *Przedawnienie administracyjnej kary pieniężnej za zajęcie pasa drogowego bez zezwolenia*, Nowe Zeszyty Samorządowe Opinie Prawne No. 6, 2016, p. 75. However, it should be noted that Article 189g § 1 CAP can be compared to the solutions adopted in Article 68 § 1 TL and Article 70 § 1 TL. The statute of limitations concerning the right to determine tax dues (Article 68 § 1 TL) is binding only for the dues that come into being as a result of a delivered tax decision (Article 21 § 1(2) TL). The statute of limitations in relation to tax dues (Article 70 § 1 TL) is applicable not only to those dues (Article 21 § 1(2) TL), but also to liabilities that come into being as a result of an event to which Tax Law links the liability (Article 21 § 1(1) TL). Thus, the regulation adopted in Article 189g § 1 corresponds to the regulation in Article 70 § 1 TL.

The Code of Administrative Procedure regulates the limitation period (Article 189g CAP) as well as interruption or suspension of the running of limitation (Article 189h and Article 189j CAP). The issues are also reflected in the TL provisions (Article 70 §§ 2–8 and Article 70a–Article 70d TL). It is justified to ask a question about primacy concerning the application of the provisions on interruption or suspension of the running of limitation. Taking into account that the solutions adopted in Part III TL are different from and more detailed than those in CAP, one should assume the primacy of TL (not CAP) provisions.

Since the CAP amendment, introducing inter alia Article 189i CAP, entered into force, in the absence of different regulations, interest for default should be calculated. The introduction of this provision causes that even if the provisions of other statutes do not stipulate the necessity of calculating interest, at present it is obligatory. Thus, a problem arises with the interpretation of transitional provisions. In accordance with them, the CAP provisions in the wording before the amendment entered into force should be applied in administrative proceedings instigated and not concluded with the issue of a final decision or ruling before the date the amendment entered into force. There are no doubts that if proceedings concerning the imposition of an administrative penalty had been instigated and concluded before the amendment to CAP entered into force (1 June 2017), interest for default in penalty payment should not be calculated (unless special provisions stipulate otherwise). However, it is not clear whether the transitional provision is also applicable to execution proceedings. It seems that it is not. Thus, in case of failure to timely pay an administrative penalty due before the CAP amendment entered into force, the creditor is obliged to calculate interest from the moment the CAP amendment entered into force until the due amount is paid.

Before the CAP amendment, pecuniary administrative penalties amount did not depend on the circumstances of the conduct for which the statute stipulated a sanction. This changed on 1 June 2017. Now, a public administration body imposing a pecuniary administrative penalty is obliged to take into account a series of factors that might have a softening or aggravating influence on the amount of penalty pursuant to Article 189d CAP. The directives on a penalty amount that make it possible to weigh the painfulness of a sanction to a perpetrator cannot be applied in every case. Such body can take the decision on the amount of penalty when the provisions regulate the size of penalties as relatively fixed (framework ones, not exactly fixed). This concerns the phrasing like "An administrative penalty shall be from PLN 100 to PLN 50,000".

In comparison with the solutions known in criminal law, the new transitional provision was introduced to CAP, in accordance with which: "If in the course of issuing a decision concerning a pecuniary administrative penalty, a statute in force is different from the one in force at the time of the infringement of law for which a penalty is to be imposed, the new statute shall be applied; however, the statute that was in force before shall be applied if it is favourable to a party" (Article 189c CAP).

The imposition of an administrative penalty, regardless of whether it was before the amendment or takes place now, does not depend on guilt; it is objective in nature.[24] It does not depend on a perpetrator's awareness, either.[25]

In order to protect entities against negative consequences of prompt and single payment of a pecuniary administrative penalty that is too high in relation to their current financial resources, Article 189k CAP was introduced which lays down a possibility of granting pecuniary administrative penalty concessions. It is based on an arbitrary decision and its application requires that the party concerned should file a respective motion. The granting of a concession requires that it must be justified by a grave public interest or a grave interest of a party. It should be highlighted that an administrative body that has imposed a pecuniary administrative penalty can grant a concession at the stage of its execution and not in the course of taking a decision on its imposition. Article 189k CAP is applicable to administrative penalties that are not subject to the Act on public finance or the Tax Law. Developing the provision, the legislator assumed that granting concessions should not constitute interest-free credit.[26]

3. LEGAL NATURE OF A PENALTY FOR THE OCCUPATION OF A ROAD LANE AFTER THE CAP AMENDMENT

The occupation of a road lane for the purpose that is not related to the road construction, reconstruction, repair, maintenance and protection requires a permission issued by the road manager in the form of an administrative decision. The permission is not required in case an adequate civil law contract referred to in Article 22 paras 2, 2a and 2c APR[27] has been entered into.

The prohibited interference into a road lane is connected with the necessity of raising a penalty for the occupation of a road lane (Article 40 para. 12 APR). The time limit for its payment is 14 days from the date when the decision establishing the amount acquires validity in law (Article 40 para. 12 APR). The penalty is ten times higher than the fee for the occupation of a road lane. The fee for the occupation of a road lane is a calculation of the number of square metres of the occupied area multiplied by the rate per 1 m² of a road lane and the number of days of the

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24 M. Jabłoński, *Komentarz do art. 189b k.p.a.*, [in:] M. Wierzbowski, A. Wiktorowska (eds), *Kodeks postępowania administracyjnego. Komentarz*, https://legalis.pl/ (accessed 7.6.2018); compare D. Gregorczyk, *supra* n. 18, p. 385: the author, commenting on Article 189f CAP, states that in this case the basis for administrative liability is changed from an objective into subjective one.

25 Judgment of the Voivodeship Administrative Court in Gliwice of 14 May 2015, II SA/Gl 117/15, LEX No. 1733621; compare the judgment of the Voivodeship Administrative Court in Szczecin of 26 May 2011, II SA/Sz 89/11, LEX No. 1607058.

26 M. Niezgódka-Medek, M. Szubiakowski, *Przepisy dotyczące kar administracyjnych (art. 260g–260n)*, [in:] Z. Kmieciak (ed.), *Raport zespołu eksperckiego z prac w latach 2012–2016. Reforma prawa o postępowaniu administracyjnym*, Warszawa, Naczelny Sąd Administracyjny, 2017, p. 240.

27 Act of 21 March 1985 on public roads, consolidated text, Dz.U. of 2017, item 2222, as amended; hereinafter APR.

occupation.[28] The fee for the occupation of 1 m^2 of a road lane is determined by the Minister of Transport in the form of a regulation concerning roads managed by the General Director for National Roads and Motorways (Article 40 para. 7 APR). For roads managed by the local self-government units, the rate per 1 m^2 of the road lane occupation is determined by the decision-making body of the self-government unit in the form of a resolution (Article 40 para. 8 APR). A penalty for occupation of a road lane is fixed (it is definitely determined).

It is hard to ignore the aspect of continuity of a permit to occupy a road lane, which is temporary in nature. When a party wants to prolong the period, a new successive application is required. The law does not prescribe the possibility of renewing the former permit.[29] In fact, when the permit expires and a party awaits a new one, the occupation of the road lane is not allowed. Remaining within the area, a party commits a prohibited act. Before the introduction of general provisions on pecuniary administrative penalties to the Code of Administrative Procedure, an administrative body was obliged to impose a penalty covering the period. At present, an administrative body should consider the possibility of abandoning the imposition of a pecuniary administrative penalty for the occupation of a road lane, in accordance with Article 189f § 1(1) or Article 189f § 2 CAP. Although in fact a party occupies a road lane illegally at the time between the expiry of the former permit and the issue of a new one, obtaining a new permit can be recognised as stopping the infringement of law, which allows the application of the above-mentioned CAP provisions. The regulations can also be applied to factual situations taking place before the introduction of the general provisions on administrative penalties to the Code of Administrative Procedure. In accordance with the transitional provision, in relation to administrative proceedings instigated and not concluded with a final decision or ruling before 1 June 2017, the provisions of the Code of Administrative Procedure in the former wording are applied; however, the provisions on mediation are applied to those proceedings.[30] Thus, the date of instigating penal administrative proceedings is decisive. Therefore, although the infringement of law and the taking of evidence took place before the CAP amendment, in case penal administrative proceedings started after that date, it is possible to apply Article 189f § 1(1) or Article 189f § 2 CAP.

There is no doubt that Articles 189c, 189e and 189f CAP are applicable to a penalty for the occupation of a road lane.

Making comments on Article 189c CAP, attention should be drawn to the fact that adopting the criminal law principle of applying a new statute or the one that is more favourable to a perpetrator laid down in Article 4 § 1 CC,[31] and not taking

[28] The detailed method of calculating the amount of the fee for the occupation of a road lane is laid down in Article 40 paras 4–6 APR.

[29] Judgment of the Voivodeship Administrative Court in Warsaw of 17 April 2008, VI SA/Wa 1290/07, LEX No. 511411.

[30] Article 16 of the Act of 7 April 2017 amending the Act: Code of Administrative Procedure and some other acts, Dz.U., item 935.

[31] Act of 6 June 1997: Criminal Code, consolidated text, Dz.U. of 2017, item 2204, as amended; hereinafter CC; the principle is also expressed in Article 24 para. 1 of the Act of

into account the specifics of administrative law, the legislator confined themselves to the statute-like legal acts and did not recognise that the wording of legal acts of a different rank is decisive when determining the amount of an administrative penalty, e.g. it can be a resolution or a regulation establishing the rates for the occupation of a road lane. Based on the literal interpretation of the provision, it should be recognised that the change of the rate per 1 m^2 of a road lane in the course of the proceedings concerning the imposition of a penalty for the occupation of a road lane continues to result in the application of the rates that were binding on the date of issuing the decision, even if they were higher than the rates at the time of the infringement of law.[32] In accordance with case law, the concept of "statute" should be interpreted as the whole legal state within the sense of substantive law that determines the legal situation of a perpetrator.[33] In conclusion, it should be assumed that a resolution (or a regulation) determining the rates for the occupation of 1 m^2 of a road lane is included under Article 189c CAP.

The introduction of Article 189e CAP should be recognised as the legislator's good move. In the legal state before the amendment, there were bizarre situations in which, e.g. as a result of a strong wind, a house roof was blown onto a road lane. What is natural, a party did not have a permission to exclusively occupy a road lane, thus an administrative body was obliged to impose an administrative penalty for the occupation of the road lane. In the current legal state, if an administrative body has evidence confirming the occurrence of force majeure before the instigation of penal administrative proceedings, it should not instigate the proceedings at all. In case a body establishes that a road lane was unlawfully occupied as a result of force majeure in the course of penal administrative proceedings, the whole administrative proceedings should be discontinued, in accordance with Article 105 in conjunction with Article 189e CAP.

The provision of Article 189f can be applied, e.g. to frequent cases of real property sale. It happens that sellers of real property have a permit to occupy a road lane, e.g. for the purpose of placing technical infrastructure devices there, although these are not connected with the need to manage roads or traffic needs. The buyer who does not apply for an adequate permit occupies the road lane illegally. Before the introduction of the provision, the abandonment of the imposition of a penalty for the occupation of a road lane was not possible. In the current legal state, if it is evident that a party is unaware, this can constitute grounds for such a decision. Moreover, in doubtful situations, first-instance bodies taking a decision on imposing a penalty for the occupation of a road lane should justify it by explaining that

17 December 2004 on liability for the infringement of public finance discipline, consolidated text, Dz.U. of 2017, item 1311, as amended.

[32] Compare the judgment of the Voivodeship Administrative Court in Warsaw of 10 October 2014, VI SA/Wa 1203/14, LEX No. 1553865, where the Court noted that the application of the new law introducing higher rates for the occupation of a road lane in relation to the plaintiff, in the absence of adequate transitional provisions, constituted the violation of the *tempus regit actum* principle.

[33] See the Supreme Court judgment of 1 July 2004, II KO 1/04, LEX No. 121666; the Supreme Court judgment of 4 July 2001, V KKN 346/99, LEX No. 51679; the decision of the Court of Appeal in Katowice of 16 October 2013, II AKa 607/13, LEX No. 1422457.

they considered the possibility of abandoning the imposition of a penalty but they did not find grounds for that. In case of a dispute concerning the lawfulness of an administrative decision before a higher-instance body, such an element of justification can strengthen the stand adopted by the first-instance body. If the first-instance body imposed an administrative penalty in a doubtful situation and did not present the above-mentioned justification, the second-instance body could quash the decision and refer it for re-examination, due to the fact that the first-instance body did not examine whether there were grounds for abandoning the imposition of a penalty.

Because of the subsidiary nature of the regulation included in Part IVa CAP, not all the provisions of the Code are applicable to the penalty for the occupation of a road lane. Article 40d para. 3 of the Act on public roads stipulates a five-year limitation period for the obligation to pay a penalty for the occupation of a road lane starting from the end of a calendar year when the penalty should be paid. This norm constitutes a separate provision within the meaning of Article 189a § 2 CAP, which decides on non-application of Article 189g § 3 CAP in this respect. On the other hand, the Act on public roads does not contain a special provision determining the time limit for adjudicating in the case concerning the imposition of a penalty. Therefore, for reason of general comments on administrative penalties already made, it should be recognised that the application of Article 189g § 1 CAP is possible in this case. Article 189i CAP cannot be applied because of the separate regulation of the issue of interest for default in the payment of a due administrative penalty in Article 40d(1) APR. Article 189k CAP is not applicable to a penalty for the occupation of a road lane, either, because of the regulation of the issue of concessions in the execution of a pecuniary administrative penalty in Article 64 APF. Due to the fact that a penalty for the occupation of a road lane is a definitely fixed penalty, the provisions on determining pecuniary administrative penalties (Article 189d CAP) cannot be applied to it. The only possibility to be considered is the application of Articles 189h and 189j CAP. It seems that in the case of the interruption of the running of the limitation period (Articles 189h and 189j CAP), primacy should be given to the provisions of Part III TL applied by analogy.

4. CONCLUSIONS

Evaluating the introduction of the regulation concerning pecuniary administrative penalties to the Code of Administrative Procedure, one can have mixed feelings. On the one hand, the legislator decided to add Part IVa CAP in order to limit automatic and excessively rigorous imposition of pecuniary administrative penalties by the introduction of grounds for moderation of the liability of an individual who commits an administrative tort unintentionally. From this point of view, the regulation should be recognised as accurate. However, the phrasing of the provisions that, in some circumstances, allow evading penal administrative liability carries a risk of abuse of the solutions by entities that tend to infringe and evade law. Parties often

consciously calculate the profitability of violating law with a chance of evading penal administrative liability.

The sphere of the statutory regulation that cannot be evaluated positively is the lack of clarity concerning the application of Part IVa CAP in relation to the regulation of the same matter in separate provisions, in particular in the Tax Law. Based on the literal interpretation of just Article 67 para. 2 APF, one can have an impression that the legislator only aimed at applying the TL provisions to pecuniary administrative penalties because of the introduction of a general solution to CAP. A systemic approach, especially the comparison of the APF and TL provisions with Article 189a § 2 CAP, does not allow unequivocal adoption of such a solution. It indicates a possibility of using a rating based on which a substantive law regulation concerning administrative penalties included in trade-related statutes should be applied first. Next, attention should be drawn to the Act on public finance. Then, it is necessary to take into account the Tax Law provisions. The provisions of the Code of Administrative Procedure should be applied last in the rating. This solution finds support in the course of reasoning based on the criterion of the chronological order of passing legal acts. As the APF and TL provisions had entered into force before the provisions of Part IVa CAP, and taking into account that the CAP provisions are subsidiary, the TL and APF provisions should be given priority. If the criterion of hierarchy of legal acts is adopted as the basis of reasoning, then it turns out that both APF and TL are at the same level.

The adjustment of the provisions of Part IVa CAP precisely to the issue of pecuniary administrative penalties would support the recognition of the Code of Administrative Procedure (not the Tax Law) as a basic act in relation to pecuniary administrative penalties.

The issue of the relation between the statutory regulation of pecuniary administrative penalties and the TL and APF provisions will undoubtedly become the subject matter of administrative and judicial adjudication and a discussion in the doctrine. Article 67 APF in conjunction with Article 189a § 2 CAP are so unclear that it seems that the right solution would be a normative change of Article 67 APF by indicating *expressis verbis* non-application of the TL provisions, and possibly APF (if we assume that the legislator did not want the TL and APF provisions to be applied to pecuniary administrative penalties), to pecuniary administrative penalties, or listing which TL provisions should be granted primacy in the field of administrative penalties. Otherwise, there will probably be considerable adjudicating discrepancies, which may result in the necessity of the Supreme Administrative Court's passing an abstract resolution in the matter. It seems that the solution consisting in the exclusion of application of Part III TL provisions that correspond to the provisions of Part IVa CAP would facilitate the application of law in the field, first of all, because of the adjustment of the Part IVa CAP provisions to the specifics of pecuniary administrative penalties.

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COMMENTS ON STATUTORY REGULATION OF ADMINISTRATIVE PENALTIES

Summary

Due to the repressive nature and painfulness of pecuniary administrative penalties, the legislator decided to regulate general rules of their imposition. The framework regulations in the field were introduced to the Act of 14 June 1960: Code of Administrative Procedure. These are applicable only when separate provisions do not contain special solutions. This causes a critical practical problem concerning the relationship between the general provisions of Part IVa CAP and the provisions of special statutes. The article aims to present the origin of the general provisions concerning pecuniary administrative penalties, to draw attention to the most important aspects of the application of new regulations with the use of examples illustrating a penalty for the occupation of a road lane, and to propose a solution to the conflict in the relationship between the application of the Act on public finance, the Tax Law and the Code of Administrative Procedure in relation to administrative penalties. The phrasing of the provisions is unclear and poses a risk of considerable adjudicating discrepancies, which will create a necessity to pass an abstract resolution concerning this issue by the Supreme Administrative Court. The author uses an analytic-dogmatic and empiric-legal research method in the article.

Keywords: application of penalties, *res iudicata*, amendment to the Code of Administrative Procedure, sanction, obligation

REFLEKSJE NA TEMAT KODEKSOWEJ REGULACJI KAR ADMINISTRACYJNYCH

Streszczenie

Ze względu na represyjny charakter i dolegliwość administracyjnych kar pieniężnych, ustawodawca zdecydował się na unormowanie zasad ogólnych ich wymierzania. Regulacje ramowe w tym zakresie zostały wprowadzone do ustawy z dnia 14 czerwca 1960 r. – Kodeks postępowania administracyjnego. Są one stosowane jedynie wówczas, gdy przepisy odrębne nie zawierają szczególnych rozwiązań. Rodzi to doniosły problem praktyczny, dotyczący relacji między przepisami ogólnymi Działu IVa k.p.a. a unormowaniami ustaw szczególnych. Celem artykułu jest nakreślenie genezy wprowadzenia przepisów ogólnych z zakresu administracyjnych kar pieniężnych, zwrócenie uwagi na najistotniejsze aspekty stosowania nowych regulacji z wykorzystaniem przykładów dotyczących kary za zajęcie pasa drogowego, a także przedstawienie propozycji rozwiązania konfliktu w relacjach między stosowaniem wobec kar administracyjnych ustawy o finansach publicznych, ordynacji podatkowej oraz kodeksu postępowania administracyjnego. Niejasny sposób redakcji przepisów rodzi ryzyko, że dojdzie do rozbieżności orzeczniczych dużych rozmiarów, co spowoduje konieczność podjęcia uchwały abstrakcyjnej w tym zakresie przez NSA. W artykule zastosowano analityczno-dogmatyczną oraz empiryczno-prawną metodę badawczą.

Słowa kluczowe: stosowanie kar, powaga rzeczy osądzonej, nowelizacja kodeksu postępowania administracyjnego, sankcja, obowiązek

REFLEXIONES SOBRE LA REGULACIÓN LEGAL DE SANCIONES ADMINISTRATIVAS

Resumen

Dado el carácter represivo y molesto de sanciones pecuniarias administrativas, el legislador ha decidido establecer reglas generales de su imposición. La regulación marco en este ámbito fue introducida a la ley de 14 de junio de 1960 – Código de procedimiento administrativo. Se aplica sólo cuando las leyes especiales no prevén soluciones particulares. Esto crea un grave problema en la práctica que versa sobre la relación entre la normativa general de la Sección IVa del código de proceso administrativo y la regulación de leyes especiales. El objetivo del artículo consiste en abordar la génesis de la introducción de la normativa general relativa a sanciones pecuniarias administrativas, aspectos más importantes de aplicación de nueva regulación utilizando ejemplos de sanciones por haber ocupado un carril, así como una propuesta de solución del conflicto entre aplicación a las sanciones administrativas de la ley sobre finanzas públicas, ley tributaria y el código de procedimiento administrativo. La forma poco clara de la redacción de las normas crea el riesgo de que habrán discrepancias importantes en la jurisprudencia, lo que causará la necesidad de adoptar acuerdo abstracto en este ámbito por el Tribunal General Administrativo. En el artículo se ha utilizado como el método de investigación el método analítico-dogmático y empírico-legal.

Palabras claves: aplicación de sanciones, cosa juzgada, reforma del código de procedimiento administrativo, sanción, obligación

РАЗМЫШЛЕНИЯ О ПРАВОВОМ РЕГУЛИРОВАНИИ АДМИНИСТРАТИВНЫХ ШТРАФОВ В АДМИНИСТРАТИВНО-ПРОЦЕССУАЛЬНОМ КОДЕКСЕ

Резюме

Принимая во внимания репрессивный характер и потенциально тяжелые последствия административных штрафов, законодатель решил упорядочить общие принципы их наложения. Соответствующие рамочные положение были введены в административно-процессуальный кодекс от 14 июня 1960 г. Положения эти применяются только в том случае, если в других законах не предусмотрены особенные решения. В связи с этим возникает серьезная практическая проблема, касающаяся взаимосвязи между общими положениями раздела IVa административно-процессуального кодекса и особенными положениями других законов. В статье рассматриваются причины принятия общих положений об административных штрафах, обращается внимание на наиболее важные аспекты применения новых положений на примере штрафов за занятие полосы движения, а также формулируются предложения по устранению коллизий, возникающих при применении к административным штрафам Закона «О государственных финансах», налогового кодекса и административно-процессуального кодекса. Неясности в изложении предписаний закона повышают риск возникновения значительных расхождений в судебной практике, что потребует принятия Высшим административным судом абстрактного разъяснения по этому вопросу. В работе использован аналитико-догматический и эмпирико-правовой методы исследования.

Ключевые слова: применение штрафных санкций, принцип *res iudicata*, внесение изменений в административно-процессуальный кодекс, санкции, обязанность

REFLEXIONEN ZUR KODEXREGELUNG VON VERWALTUNGSSTRAFEN

Zusammenfassung

Aufgrund des repressiven Charakters und der administrativen Geldbußen beschloss der Gesetzgeber, die allgemeinen Grundsätze für ihre Anwendung zu normalisieren. Diesbezügliche Rahmenbestimmungen wurden in das Gesetzbuch vom 14. Juni 1960 aufgenommen – Verwaltungsgerichtsordnung. Sie werden nur verwendet, wenn separate Bestimmungen keine speziellen Lösungen enthalten. Dies ist ein wichtiges praktisches Problem in Bezug auf das Verhältnis zwischen den allgemeinen Bestimmungen vom Abschnitt IVa der Zivilprozessordnung und die Bestimmungen spezifischer Gesetze. Ziel des Artikels ist es, die Entstehung der Einführung allgemeiner Bestimmungen im Bereich der Geldbußen zu skizzieren, anhand von Bestrafungsbeispielen für die Besetzung der Fahrspur auf die wichtigsten Aspekte der Anwendung neuer Vorschriften aufmerksam zu machen und Vorschläge zur Lösung des Konflikts im Verhältnis zwischen der Anwendung des Gesetzes über die öffentlichen Finanzen der Verordnung vorzulegen Steuer- und Verwaltungsverfahrenscode. Die unklare Art und Weise der Ausarbeitung von Vorschriften erhöht das Risiko, dass es zu großen Unstimmigkeiten kommt, die eine diesbezügliche abstrakte Entschließung des Obersten Verwaltungsgerichts erforderlich machen. Der Artikel verwendet eine analytisch-dogmatische und empirisch-rechtliche Forschungsmethode.

Schlüsselwörter: Anwendung von Strafen, Ernsthaftigkeit der Beurteilung, Änderung der Verwaltungsverfahrensordnung, Sanktion, Verpflichtung

RÉFLEXIONS SUR LA RÉGLEMENTATION DES SANCTIONS ADMINISTRATIVES DANS LES LOIS

Résumé

En raison du caractère répressif et de la pénalité des amendes administratives, le législateur a décidé de normaliser les principes généraux de leur imposition. Un règlement-cadre à cet égard a été introduit dans la loi du 14 juin 1960 – Code de procédure administrative. Il n'est utilisé que si des dispositions distinctes ne contiennent pas de solutions spéciales. Cela soulève un problème pratique important concernant la relation entre les dispositions générales de la section IVa du Code de procédure administrative et les dispositions de lois spécifiques. L'article a pour objet de retracer la genèse de l'introduction de dispositions générales dans le domaine des amendes administratives, d'attirer l'attention sur les aspects les plus importants de l'application de la nouvelle réglementation en utilisant des exemples de sanctions pour l'occupation de la voie et de présenter des propositions pour résoudre le conflit dans la relation entre l'application de la loi sur les finances publiques, du code des impôts et du code de procédure administrative aux sanctions administratives. La manière peu claire de rédiger le règlement augmente le risque que des divergences à grande échelle se produisent, ce qui nécessitera l'adoption d'une résolution abstraite à cet égard par la Cour administrative suprême. L'article utilise une méthode de recherche analytique-dogmatique et empirico-juridique.

Mots-clés: application de sanctions, chose jugée, modification du code de procédure administrative, sanction, obligation

RIFLESSIONI SULLA DISCIPLINA DELLE SANZIONI AMMINISTRATIVE NEL CODICE

Sintesi

A motivo del carattere repressivo e della gravosità delle sanzioni amministrative pecuniarie, il legislatore ha deciso di disciplinare i principi generali della loro comminazione. Il quadro giuridico in tale ambito è stato introdotto nella legge del 14 giugno 1960 Codice di procedura amministrativa. Viene applicato solamente quando le norme di legge particolari non contengono soluzioni dettagliate. Questo genera un significativo problema pratico, riguardante la relazione tra le norme generali della Sezione IVa del codice di procedura amministrativa e quanto stabilito nelle leggi particolari. L'obiettivo dell'articolo è tratteggiare le genesi dell'introduzione delle norme generali nell'ambito delle sanzioni amministrative pecuniarie, far notare gli aspetti più importanti dell'applicazione delle nuove regolamentazioni utilizzando esempi riguardanti la sanzione per l'occupazione della carreggiata, e anche presentare proposte per la soluzione del conflitto nei rapporti tra l'applicazione, nei confronti delle sanzioni amministrative pecuniarie, della legge sulle finanze pubbliche, il Codice tributario, e del codice di procedura amministrativa. La modalità confusa di redazione delle norme di legge genera il rischio di giungere a divergenze giurisprudenziali di ampia portata, provocando la necessità di una delibera astratta in tale ambito da parte della Corte Suprema Amministrativa. Nell'articolo è stato utilizzata la metodologia di studio analitico-dogmatica ed empirico-giuridica.

Parole chiave: applicazione delle sanzione, autorità di cosa giudicata, riforma del codice di procedura amministrativa, sanzione, obbligo

Cytuj jako:

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