



Administrative fines imposed by the Bank Guarantee Fund – analysis under financial law

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Abstract

This study discusses the issues of the legal status of administrative fines. The authors deemed it desirable to apply various investigation methods in this area of research, such as a review and analysis of the established line of judicial decisions (legislative acts, court decisions, official documents) and a comparative analysis. For this reason, the second part of the study discusses the issues in question (synthetically) while taking into consideration the French, German and Danish legal orders.

The majority of the research was also devoted to an analysis of the legal status of the Bank Guarantee Fund (hereinafter: BGF or Fund) and to a discussion of types of administrative fines imposed by the Fund. An analysis and review of the law in force was used as a primary tool in this research area. The underlying goal of this research was to establish the legal status of administrative fines imposed by the BGF and their types, assuming that these penalties mainly play a preventive and repressive function. These issues have a practical and theoretical importance, since they may be used at the stage of law-giving and law-application, and also in scholarly investigations.

The study takes into account the legal status as of 23 April 2023.

Keywords

administrative fine, Bank Guarantee Fund, public finances

Introduction

Legal measures introduced in a given legal act should be effective, thus they must serve to implement the goals intended by the legislator (Hyżorek, 2019, 265). This is why the functions of administrative sanctions should derive from the functions of public administration and administrative law, the aim of which is to protect the public interest and the common good (Wincenciak, 2008, 256). Therefore, they are universal values, essential for any branch of law.

Administrative fines are a frequently applied tool for disciplining entities with various legal statuses. The legal structure, functions and kinds of this sanction are not uniformly outlined in the European Union Member States, thereby the period that is the subject of research may be analysed from a comparative law perspective.

Not only the sanctions addressed here, but also punishments *in genere* perform various functions, but the financial burden inscribed in them validates their main focus on the repressive and preventive function. The modelling of an entity's future behaviour is mainly the domain of the preventive function of administrative fines, where it will be strongly correlated with the educational and protective function (protection of the common good, public security, legal order, etc.).¹ In the context of the repressive nature of administrative fines, an assumption was made that it may not be a dominant function and the burdensomeness of these punishments should not be excessive, which means it should not be disproportionate to the violation noted.

Administrative fines may be imposed by various administrative bodies. The Polish legal order, for example, accommodates the BGF, which became a public finances sector unit only on 1 January 2022. The dynamics of changes in this area prove the validity of the problems analysed, and also the significance and importance of the issues discussed for the practice and theory of law. Scholars in administrative law notice an increase in the number of cases where administrative bodies impose administrative fines, which in turn raises concerns about a return to criminal and administrative law adjudication carried out by administrative bodies outside the sphere of administrating justice. It must be emphasised in this context that administrative fines are only a side area of “repression by means of economic sanctions”. Meanwhile, increasingly often, they act as a tool for influencing the behaviour of addressees of administrative law standards and are more severe than fines prescribed in criminal law (Bąkowski, 2017, 379).

It needs to be emphasised that the BGF has had the power to impose administrative fines on obliged entities since 2016. These entities are those identified in the Act on the Bank Guarantee Fund, the deposit guarantee scheme and compulsory restructuring (hereinafter: BGF Act),² most of all on banks and cooperative savings and credit unions. These sanctions are imposed on members of bodies of these institutions. The provisions of the BGF Act in terms of these financial penalties are not coherent, uniform or comprehensive. When assessing the legal nature of these financial penalties, we must point to the aim of issuing such sanctions. The relevant literature recognises that the fines imposed by the BGF have the nature of administrative sanctions (Gryber, 2022, 140), and their application results directly from the act.

The legal status of administrative fines and their types from the perspective of regulations of the Polish law

In the Polish legal order, an administrative fine (Article 189b of Act of 14 June 1960 Code of Administrative Proceedings (hereinafter: CAP)³ shall be understood as a monetary sanction specified by statute and imposed by the public administration authority by way of a decision as a result of an infringement of law. This infringement consists of a failure to comply with an obligation or in a breach of a prohibition imposed on a natural person, a legal person or an

¹ Judgment of the Polish Supreme Court – Chamber of Labour, Social Insurance and Public Matters of 27 October 2015, III SK 3/15, p. 191.

² Dz. U. (Journal of Laws) of 2022 item 2253.

³ Dz. U. (Journal of Laws) of 2022 item 2000 as amended.

organisation unit that does not hold the status of a legal person. This punishment was given the attribute “administrative” because the competences to impose it were vested in bodies of public administration (Sławińska-Tomtała, 2015, 10). In the legal definition of the punishment discussed, the legislator focused on the statutory form of its regulation and the pecuniary character. The essence of an administrative fine, therefore, lies in a disadvantageous change in a legal position of the addressee of an obligation under administrative law, which was not performed or was performed inadequately (Kruk, 2013, 164) and involves a financial burden. An administrative fine is a sanction imposed by an administrative body in the systemic and functional sense and where this body acts within its authority (Stankiewicz, 2017, 267–268); judgment of the Polish Constitutional Tribunal (hereinafter: CT) of 20 June 2017, P 124/15, “Orzecznictwo Trybunału Konstytucyjnego” Series A, 2017, item 50). A definition of an administrative fine is not fully correct, given that the Polish legislator uses the term “sanction” in Article 189b CAP, which is not normatively defined. One must bear in mind that the principles of a democratic state ruled by law resulting from Article 2 of the Constitution of the Republic of Poland of 2 April 1997⁴ are used as a springboard to derive the principle of good legislation, which gains particular importance, especially in the case of repressive provisions. This is why we must demand that the legal definition of “administrative fines” meets the standard of correctness, precisions and clarity, especially that regulations of special statutes often have a repressive character. The correctness of a provision means its correct construction from the linguistic and logical point of view. It is a basic condition that allows assessing the provision in the context of the remaining criteria, namely clarity and precision. Clarity of a provision must be understood as its comprehensibility for its addressees. These addressees have the right to expect the rational legislator to create legal norms that will not raise doubts as to the content of obligations imposed and rights granted. Clarity of a provision must be linked to its precisions, which should manifest itself in concretising obligations and rights. Thus, the content of a provision should be obvious and should allow for it to be applied in practice and undisturbed.⁵

The legal definition of an administrative fine allows the identification of at least a few criteria for its categorisation. They may be financial penalties examined from the point of view of the branch of law to which they belong. By doing so, we may identify financial penalties in administrative law, financial law (public finances, banking and tax law), economic law, environmental law, medical law, etc.

We may also identify other financial penalties depending on the entity that imposes them and the entity on which they are to be imposed (the punished party). In the first of these criteria we may identify administrative fines, which are imposed by the bodies of the public finances sector’s units (e.g. Minister of Finance, Act of 22 May 2003 on obligatory insurance, on the Insurance Guarantee Funds and the Polish Motor Insurers’ Bureau⁶ and at this particular moment in time we need to classify the BGF in here too) and entities from outside the public finances sector (e.g. President of the National Bank of Poland, Article 151(1)(2) and 151(2)(1) of the Act of 1 March 2018 on counteracting money laundering and financing terrorism, hereinafter Money Laundering Act⁷).

⁴ Dz. U. (Journal of Laws) no. 1997 no. 78 item 483 as amended.

⁵ Judgement of the CT of 3 December 2009, Kp 8/09, “Orzecznictwo Trybunału Konstytucyjnego” Series A, 2009 no 11, item 164.

⁶ Dz. U. (Journal of Laws) of 2022 item 2277 as amended.

⁷ Dz. U. (Journal of Laws) of 2022 item 2277 as amended.

As results from the statutory definition, administrative fines may be imposed on natural persons, e.g. a ship's captain (Article 110(1–3) of the Act of 5 August 2015 on work at sea⁸, legal persons (e.g. banks – Article 147 of the Money Laundering Act) and units that do not have legal personality (e.g. limited partnerships – Article 152(1) Money Laundering Act).

These fines may become state revenue (Article 33 of the Act of 25 August on biocomponents and liquid biofuels⁹, revenues of budgets of local government units (Article 9xb of the Act of 13 September 1996 on keeping communes clean and in order)¹⁰, and revenues of other units of the public finances sector (e.g. The Labour Fund, Article 106(2) of the Act of 20 April 2004 on the promotion of employment and labour market institutions¹¹) and revenues of other entities (e.g. fines included in Article 71(1a)(2) of the Act of 6 November 2008 on the rights of the patient and the Patients' Rights Ombudsman¹² are revenues of a relevant regional chamber of doctors).

The above criteria for the division of administrative fines in the Polish legal order serve as an example. We may also identify fines by taking into consideration the decision-making freedom of the entity that imposes the fine or lack thereof (punishments imposed obligatorily and voluntarily), the absolute and relevant specification of these punishments (fixed fines and fines that fall within certain brackets, specified by percentage, etc.), and also the currency in which the fine is expressed (fines expressed in PLN and equivalents of other currencies (Euro)/units of account (SDR)).

The status of administrative fines in selected countries of the European Union

The further discussion on systemic regulations in selected countries of the European Union focuses on the French, German and Danish legal orders. At the same time, the authors intend to signal the diversity of how this subject matter is regulated, not to analyse the legal orders of these countries in detail.

The French system has developed in a different way to the Polish one and its characteristic feature is the absence of codification of regulations that address administrative sanctions, thus various administrative punishments are regulated in numerous detailed statutes (Peters & Spa-pens, 2015, 127). Initially, the concept, which was intended to lift the burden of the judiciary by vesting adjudication of certain cases in regulatory (administrative) bodies, inspired doubts. A threat of “punishing without adjudicating” was cited (Fondation pour le droit Continental: 2007, 1), addressed also under the so-called “extra-judicial justice” (Delvoive, 1984, 16), which may be associated with the “violation of the principle of division of power” (Conseil d'État, 2017, 3). Ultimately, it was concluded that administrative bodies may impose the discussed sanctions on the condition of ensuring the right to justice to the entities punished.¹³ Contrary to solutions found in the Polish law, the French legislation lacks a legal definition of an administrative sanction and clear criteria that would allow a differentiation between an administrative

⁸ Dz. U. (Journal of Laws) of 2022 item 1694 as amended.

⁹ Dz. U. (Journal of Laws) of 2022 item 403 as amended.

¹⁰ Dz. U. (Journal of Laws) of 2022 item 2519 as amended.

¹¹ Dz. U. (Journal of Laws) of 2023 item 735.

¹² Dz. U. (Journal of Laws) of 2022 item 1876 as amended.

¹³ French Constitutional Council: Decision no 88-248), DC (Conformity Decisions) of 17.01.1989, DC, www.conseil-constitutionnel.fr/decision/1989/88248DC.htm, vol. 27

and criminal repression. There is no definition of an administrative fine either. Despite these shortcomings, fines are an effective and universal administrative sanction applied in numerous French legislative acts. These sanctions may be imposed unilaterally by administrative bodies, not only on natural persons, but also on other institutionalised entities, such as companies or legal persons (Delmas-Marty & Teitgen-Colly, 1994, 187) for unlawful acts, because sanctions are a consequence of a specific violation of law. These sanctions have been attributed a repressive character, though their certain impact is noticed (Huteau, 2015, 230). Just like in Poland, in France too, the principle of specificity is also gaining a special significance. It accommodates the requirement of a clear and precise specification by the legislator of types of administrative torts punishable by a fine. By doing so, the legislator wants to rule out arbitrary rulings issued in the course of administrative proceedings (Philip & Favoreu, 1984).

Contrary to the legal measures in place in Poland, the issues associated with imposing fines in the German legal order for committing “administrative misdemeanours” (*Ordnungswidrigkeiten*) fall under administrative criminal law, in which they play an important role, too (Pache, 1994, 24), constituting – from the financial law point of view – proceeds of various budgets (the federal budget, the budget of federal states and local budgets alike). The Act on Regulatory Offences is an important legal act in Germany from the substantive point of view (Act of 24 May 1968, proclaimed on 19.02.1987¹⁴, amended by the act of 09.12.2019¹⁵ effective as of 17 December 2019, hereinafter: OWiG). Actions intended to pursue liability for confirmed violations of the law, punishable by fines, must be in line with the general principles outlined in the statute (Peters & Spapens, 2015, 160). OWiG accommodates general regulations, procedural regulations, special rules concerning regulatory offences and final regulations. OWiG’s special rules address selected categories of administrative offences, including, for example, those associated with violations of government orders and prohibitions, with violations of public order, and with the violation of the obligation of supervision of operations and enterprises. What is important, these acts were clearly distinguished from major crimes (*Verbrechen*) and summary offences (*Vergehen*) (Szumiło-Kulczycka et al., 2016, 20). In section 1 of the OWiG, it was concluded that regulatory offences shall be unlawful and reprehensible (punishable) acts, which may be punished by imposing a regulatory fine. OWiG also names other types of punishments, for example, forfeiture of the benefits that the perpetrator has obtained from committing the regulatory offence or confiscation of objects. A financial penalty discussed here may be imposed not only against natural persons, but also legal persons and units that do not have legal personality (Noak, 2012, 330–331). This set-up may be considered similar to the one applied in the Polish legal order. At the same time, a financial penalty is a legal consequence of an order-related misdemeanour and does not only serve repressive purposes, but also preventive and educational ones (Noak, 2012, 329). This punishment is called *Geldbuße* (regulatory fine) and was clearly separated from a fine called *Geldstrafe* (criminal fine). A financial penalty should exceed the economic benefit that the perpetrator achieved as a result of an order-related misdemeanour.

Denmark is an example of a country in whose legal order different rules – when compared with Poland – for imposing pecuniary penalties have been adopted. It has regulated the possibility of imposing a fine (*bøde*), which is a sanction typical of criminal law. This penalty cannot be imposed by administrative bodies and it is imposed by courts. This results from a strong rooting of the principle of tri-separation of powers in this country and the perception of

¹⁴ BGBl (Federal Law Gazette) I p. 602.

¹⁵ BGBl (Federal Law Gazette) I p. 2146.

threats resulting from excessive expansion of the model of criminal sanctions, which could be imposed by administrative authorities.¹⁶ The Danish legal order lacks a basis to differentiate between administrative unlawful acts and non-administrative unlawful acts. Nevertheless, this does not mean that misdemeanours should be equated with major crimes, because the principles expressed in provisions relevant to the general criminal law will also be applicable to unlawful acts that may be considered administrative misdemeanours. We must point to the fact that apart from the fine (*bøde*), the Danish legal order increasingly allows the application of a sanction called *bødeforelæg* (fine proposal) [*administrative bødeforelæg (administrative fine proposal)*]¹⁷, or *administrative bøder (administrative fine)*¹⁸, which may be a legal structure similar to financial penalties in the above-mentioned legal orders. These sanctions are not imposed by courts, but by administrative bodies. What is important, these solutions are applied by way of an exception and, if the guilty person does not accept the penalty imposed or when they do not pay it in time, the case is transferred to court. The sanctions discussed play various functions; repressive, preventive, motivational, educational and informational.

To sum up, the analysis here shows it is possible to identify at least three ways of regulating the financial penalties imposed by bodies of public administration in the functional approach in the EU. The first category is made up of countries in which there is no distinction between administrative sanctions and criminal sanctions, though in some cases the possibility to impose financial penalties by specific administrative (regulatory, special) bodies has been regulated. Such solutions are applied in, for example, Denmark. In the second group of countries, a dispersed system of administrative functions emerges. The model of imposing these sanctions is not internally uniform and administrative violations are addressed in numerous acts of law without procedural principles and guarantees associated with their application being codified. It is found in, for example, France, Spain and Greece. The last method of regulating the issues discussed is the model seen typically in, for example, Germany, Portugal and Italy (Commission of the European Communities, 1994, 12–13). These countries have created and codified a system of application of administrative sanctions. We may see that they strive to achieve, in one legislative act, precise and uniform regulation of fundamental substantive law and procedural issues that refer to administrative sanctions. This allowed a differentiation between unlawful acts as understood in criminal law and administrative offences.

The legal character of the Bank Guarantee Fund

The Fund is the only institution in Poland which covers two basic areas in its scope of activity: a guarantee of deposits and compulsory restructuring. Given the personal scope of operation of various entities (banks, cooperative savings and credit unions and brokerage houses), it needs to be concluded that the scope of operation of the BGF goes beyond the banking market, accommodating entities in the cooperative savings, credit unions and capital markets. We may therefore talk about a special role of the BGF in the financial market.

¹⁶ Danish Ministry of Industry, Business and Financial Affairs. Danish Parliamentary Commission for Finances 2019-20, L 58, Annex 3, Public Consultation Notice of 22 November 2019, p 29. Online: <https://www.ft.dk/samling/20191/lovforslag/158/bilag/3/2110557.pdf>

¹⁷ Danish Ministry of Justice. Guidance on law quality, p. 212. Online: <https://bit.ly/3JomSFN>

¹⁸ Danish Ministry of Finance. Finance act for the financial year 2020, p. 101. Online: <https://fm.dk/media/17674/fl20a.pdf>

When we address the Fund's legal character, we must take into consideration the regulation of the BGF Act and the Act of 27 August 2009 on public finances (hereinafter as PFA).¹⁹ Under the former legislation, the BGF is not a state-owned legal person or another state-owned organisational unit. It is, however, a legal person that performs specific tasks. Pursuant to Article 9 PFA, the BGF is a unit of the public finances sector (hereinafter: PFS unit). The above leads to a conclusion that the BGF's legal status has a complex nature because its assessment is affected not only by the legal qualification, but also a special role it plays on the financial market, because the BGF is a link in the network of the state's financial security. The basic tasks that it carries out involve ensuring the functioning of the obligatory deposit guarantee scheme and running compulsory restructuring. The aim of the activity of the BGF was specified in Article 4 of the BGF Act as taking action for the stability of the national financial system. The order to act expressed in this way is both a fundamental value and an axiological basis for other content expressed in the BGF Act (Sura, 2013, 69).

Legal scholars and commentators have been discussing its legal character since the beginning of the operation of the Fund, in 1995. We must agree with the position expressed by legal scholars and commentators who claim that an entity that has a separate position in the sphere of public law cannot be a state-owned legal person (Kulesza, 2000, 7). It is worth emphasising that the BGF's rights and obligations, imposed by statute, are carried out in the public interest. The Fund always acts in its own name towards all entities with which it is legally bound (Sura, 2013, 119). The literature also recognises that the BGF may be given the attribute of authority (Kulesza, 2000, 7–8). Transferring some responsibilities of the State to the Fund was justified by the desire for them to be performed effectively and correctly (Janku, 2012). Moreover, the authority-related function of BGF towards the aforementioned entities mainly involves ensuring security by guaranteeing the safety of the deposits gathered (Kowalewska, 2021, 45).

Given the beginnings of the functioning of the BGF, legal scholars and commentators have also noticed that it is a foundation-type institution governed by financial law because it has been granted legal personality and because part of the State Treasury has been transferred to the Fund and because of the scope and nature of tasks vested in it (Mojak & Żywiecka, 2018, 313). We may also encounter a view that the Fund is a passive entity of financial law, and at the same time an entity of the state's financial administration, which does not act in the interest of the State Treasury (Nadolska, 2019, 26). It has been emphasised in the literature that the Fund is an administrative entity *sensu stricto* (Sura, 2013, 266; Bińkowska-Artowicz, 2015, 136).

Classifying the BGF as one of the public finances sector units was crucial in the assessment of its legal character. It is worth noting that an analysis of the statutory catalogue of PFS units leads to the conclusion that they are not uniform and are based on non-uniform criteria, which triggers interpretation doubts and may hinder the differentiation of individual units (Rutkowska-Tomaszewska, 2012, 100). Gathering public funds is necessary for the state and other entities to finance tasks aimed at the fulfilment of public needs, such as public security, national defence, environmental protection, administration, education and health care (Majchrzycka-Guzowska, 2011, 14). As a rule, PFS units are entities that perform public tasks and are financed from public funds (Sawicka, 2010, 37). When it comes to the BGF, the financing that it allocates to performing its tasks does not come from the state budget but from payments (contributions) by entities in the financial market, such as banks, branches of foreign banks, cooperative savings and credit unions and investment companies. Without a doubt, the BGF has

¹⁹ Dz. U. (Journal of Laws) of 2022 item 1634 as amended.

a specific financing system based on contributions as *quasi* public levies (Kowalewska, 2021, 73). It is down to the fact that the Fund plays a particular role of a link between private law and public law. Its classification with PFS units, and at the same time acknowledging its competences and responsibility for maintaining stability in the financial market, make it, despite this legal classification, an entity with special, if not hybrid, features and attributes.

Given the above, we must most of all point to the degree to which the BGF can be classified as a PFS unit. The legislator ruled out the application of the Public Finances Act to the scope regulated in Articles 35, 42(2), 92 and 93 PFA. Moreover, when it comes to the BGF, there are rules other than those resulting from the Public Finances Act for locating available funds (pursuant to Article 315 of the BGF Act); the application of the Act on managing state-owned property is also excluded. What also needs to be emphasised is the fact that there are different rules for drawing an annual draft of the BGF's financial plan, which is transferred to the Minister competent for financial institutions and the Minister competent for finances, but it is an annex to the Budget Act. The effect of classifying BGF as a PFS unit also confers certain financial privileges that allow the possibility of obtaining subsidies and loans from the state budget.

Types of financial penalties imposed by the BGF

The BGF's right to apply financial sanctions in the form of financial penalties is associated with an essential area of its operation, issuing so-called resolutions. Pursuant to the provisions of the BGF Act, the Management Board of the Fund is entitled, in specific cases, to impose financial penalties both on national entities and members of bodies of certain financial institutions (members of management boards, supervisory boards of these entities, members of an administrative body of a European company or a director of a branch of a foreign bank) (Ofiarski, 2021, 18). Positive premises for imposing these financial penalties are neither in competition nor mutually exclusive, so we may see an admissible situation where, in the same period, a national operator or another financial institution and a natural person who is a member of their bodies may be punished (Ofiarski, 2021, 18–19). The aim of fines imposed by BGF is to ensure correct performance of obligations imposed by the statute which demonstrates, most of all, their preventive character.

Financial penalties imposed by the BGF are an element of applying administrative law, which is manifested by issuing administrative acts that include an order to pay concrete sums to the benefit of the State Treasury (Nowicki & Peszkowski, 2015, 11). Looking at the regulation of financial punishments in the BGF Act, we may identify three levels of administrative punishments (Gryber, 2022, 146):

- a) repressive – for failure to fulfill an obligation,
- b) preventive, which takes the form of influencing the obliged entity,
- c) securing – its adequate amount eliminates undesirable behaviours.

Pursuant to the content of Article 79 of the BGF Act, the Fund may impose a fine when:

- 1) a domestic entity fails to provide information about so-called essential changes, namely information necessary to develop, update and assess the feasibility of resolution plans,
- 2) a domestic entity fails to perform the duty referred to in Article 78(2) that involves cooperation in the development and updating of the resolution plan.

In such situations, the Fund may impose a financial penalty, by way of a decision, of up to 10% of the revenue reported in the latest audited financial statement and, in the absence of such a statement, a fine of up to 10% of the projected revenue determined on the basis of the economic and financial situation of the entity but not more than PLN 100,000,000.

It needs to be highlighted that the legislator stipulated the possibility to raise the so-called financial penalty. However, this may only take place where it is possible to determine the amount of benefits gained by the national entity as a result of failure to provide information or failure to perform duties. The Fund may impose a fine against this entity of up to double the value of benefits gained by it. The financial penalty referred to in Article 79 of the BGF Act constitutes state revenue. The collection of amounts due resulting from the decision to impose the aforementioned financial penalty is regulated in regulations on enforcement proceedings.

Article 79 of the BGF Act and the related Article 78 apply only to a domestic entity that is subject to the developed resolution plan. Moreover, it is worth noting that the amount of the penalty referred to above was determined on the basis of Article 138(3)(3) of the Banking Law with the added total threshold of the fine (Medyński, 2017, 204).

The BGF Act (Article 85) gave the Fund an entitlement to issue recommendations (after asking the opinion of the Financial Supervision Authority). Financial penalties were stipulated to enforce the application of these recommendations by the entity to which they were directed. The recommendations may apply to handing over action plans to remove obstacles in the implementation of resolution plans. The entity to which these recommendations are issued has one month to apply them. These recommendations may be examined not in their non-binding character, but as an authority-carrying act, realised by way of administrative discretion (Gryber, 2022, 150).

The fine under Article 95 of the BGF Act depends on the income earned according to the last audited financial statements of up to 10% of this income. In the absence of a statement, a fine is imposed of up to 10% of the projected revenue determined on the basis of the economic and financial situation of the entity, but not more than PLN 100,000,000.

It must be pointed out that this fine may be imposed in each case of failure to adhere to the recommendations in time. It is therefore possible for fines to be imposed multiple times in every time the resolution plan must be supplemented, but only once for each case of issuing recommendations to this plan (Medyński, 2017, 223–224). The punishment described above is a tool that forces cooperation, and so plays a special role. Still, the fact that it is imposed on an entity under restructuring, that is an entity at risk of insolvency, may trigger some reservations. The financial penalty referred to in Article 95 of the BGF Act constitutes state revenue. Collection of amounts due resulting from the decision to impose the aforementioned penalty proceeds on the basis of the provisions of the Act on enforcement proceedings in administration.

A special type of financial penalty can be found in Article 175 of the BGF Act, which mainly regulates the procedure of reviewing the BGF's decisions on taking over rights attached to shares in the entity under restructuring by the acquiring entity. The inspection is carried out by the Financial Supervision Authority. It may also file an objection against the acquiring entity under Article 25h of the Act of 29 August 1997 Banking Law.²⁰ When such a notice of objection is submitted, the Fund may, by way of an administrative decision, order the entity to sell the rights attached to shares. In this decision, the BGF prescribes when entity is obliged to have disposed of the rights. Failure to do so is punishable by a fine of up to PLN 10,000,000. The role of the BGF in terms of applying this fine only involves filing a request at the Financial Supervision Authority for such a fine to be imposed, but without the Fund's initiative no punishment can be ordered. Even though the BGF does not impose it, this penalty also constitutes state revenue and its collection is done pursuant to provisions of the Act on enforcement proceedings in administration.

²⁰ Dz. U. (Journal of Laws) of 2022 item 2324 as amended.

Fines under Article 336 of the BGF Act are imposed on a member of the management board or the supervisory board of a domestic entity, an administrative organ of a European company or a director of a branch of a foreign bank who fails to perform their obligation to prepare or present financial statements or other reports and information related to preparation and conduct of resolution to the Fund, or does so in an unreliable or untimely manner.

The upper threshold of the fine was set at EUR 5,000,000. Relevant literature points to the severity of this fine, most likely because it is expressed in a currency other than the Polish zloty (Błachnio-Przych, 2017, 599). This means that this responsibility expressed in the provision must be treated as repressive responsibility (Burzyński, 2008, 111).

The legislator did not refer to the basis of the sanctioned obligation in Article 336 of the BGF Act, which must be queried. It makes it difficult to specify the relation of this provision to other sanction-involving regulations (Błachnio-Parzych, 2017, 595). Certainly, one may take into consideration Article 330(1) BGF Act in this case because it is the article that provides a general basis of information-related obligations that the BGF requires. At the same time, in Article 336 BGF Act the legislator refers to the preparation and presentation (two different/separate acts) to BGF:

- 1) financial statements,
 - 2) other reports,
 - 3) information
- related to the preparation and conduct of resolution.

The fine referred to is imposed in the event of failure to perform an obligation and in the event that the obligation is indeed performed, but it is done in an unreliable and untimely manner. The attribute of “unreliability” was not defined by the legislator. When invoking the relevant literature, we may point out that an “unreliable” manner means one that is uncertain, and suggests that it is not in line with the truth (Kardas, 2016, 640).

In Article 336 BGF Act, the legislator uses the phrase “may impose”, thus applies so-called “administrative discretion”. The Fund was granted a choice; in other words, The BGF enjoys “discretionary power” in this regard. The discretionary power, as a consequence of phrases such as “the authority may”, should not be interpreted by legal scholars too broadly, as a choice between action and passivity. The discretion is an element that closes the decision-making process (Zimmermann, 2013, 208–209).

The legislator set up a penalty in Euro, thus we must also invoke the content of Article 340 of the BGF Act stipulating that amounts in EUR shall be converted into PLN as per the average exchange rate announced by the National Bank of Poland on the last working day before issuing the decision to impose a financial penalty. Determining financial penalties in EUR in an act raises doubts as to compliance with the principle of *nulla poena sine lege certa* (expressed in Article 42(1) of the Constitution of the Republic of Poland).

The principles of imposing financial penalties by the BGF have been laid down in Article 339 of the BGF Act. They mainly involve an obligation to inform and post information on appropriate websites and automating information on imposing a financial penalty.

In the event of issuing a decision to impose a fine referred to in Article 79(1), Article 95(6), Article 175(6), Article 335, Article 336 and Article 338, the Financial Supervision Authority or the Fund, respectively, shall immediately notify the European Banking Authority of imposing the fine, and if a request to have the case re-examined or a complaint at the administrative court has been filed, the FSA or the Fund shall also inform on how to file the request to have the case re-examined or a complaint at the administrative court and on the outcome of proceedings before the authority that re-examines the case or the administrative court. Where the decision

on imposing a financial penalty referred to in Article 79(1), Article 95(6), Article 175(6), Article 335, Article 336 and Article 338 is final, the Financial Supervision Authority or the Fund, respectively, shall immediately post on their website information on imposing the penalty, including the details of the provisions of the law that were violated, along with the name and surname of the persons or name (business name) of the company against which the penalty was imposed. The Polish Financial Supervision Authority or the Fund, respectively, publish information on imposing penalties referred to in Article 339(2) without disclosing identifying information where:

- 1) the penalty was imposed against a natural person and disclosing their name and surname would be a measure disproportionate to the gravity of the violation;
- 2) disclosing the name (business name) of the entity or the name and surname of the person would pose a risk to the stability of financial markets or would pose a risk to pending criminal proceedings or proceedings for fiscal offences;
- 3) disclosing the name (business name) of the entity or the name and surname of the person would cause disproportionate damage to this person or entity.

Conclusion

The discussion on fines, their functions and the purpose of their stipulation and application is still flourishing, even in the international approach. We may notice an occurrence of a certain expansion of the Polish legal system with new administrative fines, which must raise concerns about the excessive involvement of the bodies of public administration in the justice system.

Comparative research leads to a conclusion that there is a uniform concept of law associated with imposing administrative fines in the European Union, and individual EU Member States specify special goals of these sanctions differently. Standards of democratic countries of Europe have allowed fines to be imposed by administrative bodies, but it is always done with respect to standards of a specific normative procedure. At the same time, we may notice that administrative sanctions and criminal sanctions permeate individual legal orders and this permeation affects different levels of their application. In each of the countries analysed, a repressive and preventive impact of financial penalties is noticed, whereby it is reasonable to conclude that they are their main objectives. These sanctions are, at the same time, an expression of disapproval of unlawful behaviour (Herlin-Karnell, 2014, 2) and serve to protect public interests (Herlin-Karnell, 2016, 305). The fact that the legislator, wanting to lift the burden off the judiciary, authorises bodies of public administration to adjudicate less complicated cases and those less harmful to the public interest deserves approval.

The analysis of the Polish, German, French and Danish legal order leads to a conclusion that there are essential advantages of introducing a possibility of adjudication of certain cases by administrative bodies and it is a commonly applied measure. We however need to remember that such vesting of the adjudication in administrative (regulatory) bodies significantly accelerates processing a given case, which results also from the fact that these bodies hold specialist knowledge and other practical skills that carry special significance in assessing the facts of the case. Entrusting the imposition of certain fines to the BGF also deserves credit in this regard.

The provisions of the BGF Act lack comprehensive provisions referring to the rules of imposing financial penalties. Where the Fund applies such financial penalties, Chapter IV of the Code of Administrative Proceedings applies, which refers to ordering and imposing administrative fines (Ofiarski, 2021, 20). The BGF, when ordering such fines, pursuant to Article 95 of the BGF Act, issues decisions that take many elements into account, for example the gravity

and period of violation, the degree of liability of entities, the damage caused and effects of the violation on financial stability and the financial market.

We must also note that imposing financial penalties as part of the activity of the institution responsible for guaranteeing deposits and resolving violations is only a developing task. The specific characteristics of the operation of the BGF, despite being classified as a PFS unit, is based mainly on a special positioning of the Fund (in the public and private sector at the same time) and on polarising its activities. This will certainly affect the modelling of the practice of imposing such type of punishments. At the moment, these are theoretical reflections since the Fund has not yet imposed these fines against any entity of the financial market.

In conclusion, it is worth emphasising that the legislator's creation of a basis for the BGF to impose financial penalties increases efficiency of operation of the Fund as a body that affects repair processes of the entities of the financial market and mainly as a resolution authority.

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