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Administrative Financial Penalty for Failure by The Investor to Fulfil Its Investment Obligations

(Commentary on the judgment of the Provincial Administrative Court in Warsaw of 22 August 2023, VI SA/Wa 8176/22)

Abstract

The commentary analyses the provisions of the Banking Law Act which constitute the legal basis for the Financial Supervision Authority to impose an administrative fine on an investor who has committed an administrative offence in the form of failure to comply with investor obligations. The issue is of significant importance for domestic entities which act as so-called reference shareholders of domestic banks. The Financial Supervision Authority is aware that investor obligations incurred before 21 April 2018 are in fact unenforceable. However, this supervisory authority often expects shareholders of domestic banks to enter into new investor commitments. In particular, an investor may be required to enter into an investment agreement with a domestic bank, under which it undertakes to recapitalise the bank in the event of a threat to its liquidity or solvency.

These considerations are discussed and analysed in the judgment of the Provincial Administrative Court in Warsaw of 22 August 2023 (reference number: VI SA/Wa 8176/22). In the author's opinion, this judgment accelerated the amendment of substantive law, especially with regard to the above-mentioned expectations of the Polish Financial Supervision Authority. One of the consequences of this judgment is the confirmation of the Polish Financial Supervision Authority's awareness that the investor commitments made by investors until 21 April 2018 are currently unenforceable. In addition, the normative solutions concerning the administrative fine imposed by the KNF on an investor in the event of failure to comply with investor obligations were analysed.

Keywords: administrative fine, investor obligation, Polish Financial Supervision Authority, KNF, reference shareholder, administrative sanction, supervision.

JEL Codes: K23, K22, K10

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Introduction

The case law of administrative courts in cases concerning administrative decisions of the Polish Financial Supervision Authority (KNF)[1] is very important for its activities and, at the same time, stimulates normative changes. In this context, an analysis of administrative court judgments in recent months in administrative court cases leads to important conclusions. This applies in particular to cases related to administrative liability and the imposition of administrative sanctions by the KNF. Against this background, one of the most interesting judgments is the judgment of the Provincial Administrative Court in Warsaw of 22 August 2023 (reference number: VI SA/Wa 8176/22[2]). This judgment, which is final[3], had a significant impact on the amendment of the provisions of the Banking Law Act of 29 August 1997[4].

The judgment in question concerned a complaint by a shareholder of a domestic bank against a decision of the Polish Financial Supervision Authority (KNF) of 28 September 2022. Pursuant to this administrative act, the KNF imposed a financial penalty of PLN 20 million on the shareholder in question. The sanction was imposed for what the KNF considered to be the investor's failure to comply with the obligation referred to in Article 25h(3) of the Banking Law since 15 February 2021. The obligation was made on 11 August 2011 and accompanied the notification of the intention to acquire, in particular by this investor, shares in a domestic bank in a number exceeding 50% of the total number of votes at the bank's general meeting and 50% of its share capital.

It is worth noting here that the aforementioned judgment of the Provincial Administrative Court in Warsaw is of significant importance for entities that are so-called reference shareholders. These are shareholders who exceed the 10% threshold in the number of votes at the general meeting or share in the share capital of a domestic bank and, under the procedure set out in Article 25a et seq. of the Banking Law, have incurred so-called investor commitments[5].

In the relations between the supervisor and financial market entities, there is a phenomenon of the Polish Financial Supervision Authority (KNF) asking shareholders who incurred so-called investor commitments before 21 April 2018 to submit – not to the KNF but to the domestic bank – an appropriate investor commitment in the content of the investment agreement. However, for the reason described above, this is not a "refreshment" of investor commitments or

1 Hereinafter: "**KNF**".
2 See also: Judgment of the Voivodship Administrative Court in Warsaw of 22 August 2023; reference number: VI SA/Wa 8176/22; Legalis.
3 See also: Judgment of the Supreme Administrative Court of 13 June 2025, reference number: II GSK 103/24, CBOSA.
4 Consolidated text: Journal of Laws of 2024, item 1646, as amended; hereinafter: **"p.b.**".
5 For more details, see, for example: M. Torończak, *Zobowiązania inwestorskie*, Monitor Prawa Bankowego 2019, No. 9, pp. 46–59.

a "confirmation of their validity". Literally, the point is for the reference shareholder of a domestic bank to commit to recapitalising that bank in the event of a liquidity or solvency problem.

Administrative financial penalty for breach of investor commitments incurred before 21 April 2018

The judgment of the Provincial Administrative Court in Warsaw of 22 August 2023 (reference number: VI SA/Wa 8176/22) concerned an investor's complaint against the decision of the Polish Financial Supervision Authority (KNF) of 28 September 2022, pursuant to which the KNF imposed a financial penalty of PLN 20 million on the shareholder in question, as it found that the shareholder had failed to comply with an investor commitment made on 11 August 2011. Since 15 February 2021, the Commission had been trying, unsuccessfully, to enforce this commitment. The investor refused to fulfil the commitment, probably on the grounds that it was unenforceable, and also pointed out that the KNF did not have the power to compel the investor to fulfil this commitment.

In fact, the KNF imposed an administrative fine on the investor on the basis of the provision of Article 25n(5a) of the Banking Law, which was only introduced into the legal system on 21 April 2018. (pursuant to the provisions of Article 5(5) of the Act of 1 March 2018 amending the Act on Trading in Financial Instruments and certain other acts[6]). The imposition of an administrative fine on the investor by the Polish Financial Supervision Authority was therefore based on the legal basis of Article 25n(5a) of the Securities Act, which was not in force at the time when the investor incurred the obligation in question. There was also no other provision that could constitute a basis for enforcing administrative liability for breach of an investor obligation.

Pursuant to Article 25n(5a) of the Banking Law, in the wording in force on the date of the Commission's decision in question: *If an entity referred to in Article 25(1) or the founder of a domestic bank has acquired or taken up shares or rights attached to shares referred to in Article 25(1) and fails to comply with the obligation referred to in Article 25h(3) or Article 30(1b), the Financial Supervision Authority may, by way of a decision, impose a financial penalty on that entity or founder of a domestic bank up to an amount corresponding to the value of those shares or rights attached to shares. The value of the shares or rights attached to the shares shall be determined on the date of their acquisition or subscription at fair value, as referred to in the Accounting Act of 29 September 1994.* This provision was introduced into the legal system pursuant to the provisions of the Act of 1 March 2018 amending the Act on Trading in Financial Instruments[7]. As a consequence, the rule sanctioning an investor's failure to comply

6 Journal of Laws of 2018, item 685.
7 *Ibidem*.

with the so-called investor obligation was introduced into the legal system only on 21 April 2018.

Analysing the content of Article 25n(5a) of the Act on Public Trading in Financial Instruments, and taking into account the absence of other provisions in this Act indicating the retroactive application of this provision, it should be concluded that it is *strictly* prospective and does not apply retroactively. Therefore, it can be argued that the Provincial Administrative Court in Warsaw correctly pointed out in its justification that *since the submission of the investor commitment referred to in Article 25h(3) of the Banking Law Act of 29 August 1997 resulted in the creation of a legal relationship "in progress" which began under the old law and continued after the amended provisions of the Banking Law came into force, i.e. on 21 April 2018, then for this reason the principle of direct application of the new law should be waived, since there was no important public interest in applying the currently applicable provisions. The principle of continued application of the old law (the old act) should be applied – the intertemporal rule, which requires the application of the existing law to legal relationships that continue after the change in the law. As a consequence, the above rule leads to the continued application of the legal provisions in force on the date of the establishment of the legal relationship, and not to events occurring after that date, which are closely related to it. There is no doubt as to the application of the principle of existing law to a situation where the old provisions remain in force, but in an amended version, and introduce a new legal regulation, previously not in force, after the date of the establishment of the legal relationship. Considering that the act amending the provisions of the Act of 29 August 1997 Banking Law as of 21 April 2018 does not contain transitional provisions concerning the application of sanctioned provisions, the intertemporal rule should be applied, according to which the provisions in force at the time when the party assumed the obligation referred to in Article 25h(3) of the Banking Law will apply in the case. Consequently, the imposition of a financial penalty on the basis of Article 25n(5a) of the Banking Law, which was not in force at the time the party assumed the obligation referred to in Article 25h(3) of the Banking Law, is unfounded*[8].

The position of the Provincial Administrative Court in Warsaw deserves approval, as the Court correctly stated that the provision of Article 25n(5a) of the Public Procurement Law was only introduced into the legal system in 2018. Thus, in accordance with the provision of Article 25n(5a) of the Public Procurement Law the administrative offence triggering the application of the provision in question is the investor's failure to comply with the investor's obligation referred to in Article 25h(3) or Article 30(1b) of the Public Procurement Law. However, this provision is only applicable prospectively. Thus, this provision may only apply to administrative offences which amounted to the investor's failure to comply with the investor's obligation in accordance with the provisions of the Act of 1 March 2018.

[8] For more details, see: Judgment of the Voivodship Administrative Court in Warsaw of 22 August 2023; reference number: VI SA/Wa 8176/22; Legalis.

Consequently, the provision of Article 25n(5a) of the Public Procurement Law cannot apply to legal relationships that arose before the entry into force of the regulation contained therein. There is no legal basis for such action. Therefore, the position of the Provincial Administrative Court in Warsaw should be shared, according to which *the principle of a democratic state ruled by law implies that public authorities should act with care for citizens' trust in the state and protect their interests in the course of their activities, and thus, in justified situations, depart from the principle of direct application of a new act, which is the case here. Consequently, the authority [KNF] applied a provision of law which entered into force on 21 April 2018, i.e. after the Party had undertaken the obligation referred to in Article 25h(3) of the Banking Law on 11 August 2011. Since the provision of Article 25n(5a) of the Banking Law was not in force at that time, the breach of the obligations referred to in Article 25h(3) of the Banking Law before 21 April 2018 was not subject to the penalty specified in that provision*[9].

The principle of trust in public authorities is based on constitutional norms. It should be noted that the principle of a democratic state ruled by law, established in Article 2 of the Constitution of the Republic of Poland, gives rise to the rule of citizens' trust in the state and the law enacted by that state. This principle gives rise to specific obligations in all spheres of state activity. The protection of trust is implemented directly in two fundamental areas of administrative activity. Firstly, in the area of stabilising relations established by an official statement of an administrative body, and in particular by a final administrative decision. Furthermore, the protection of trust is materialised in the sphere of compensation for losses incurred in a citizen's property as a result of the revocation or amendment of such statements[10]. From the principle of protection of trust[11], it is therefore possible to derive a standard of certainty in the sphere of law

[9] *Ibidem.*

[10] See more: Judgment of the Supreme Administrative Court of 6 June 2023, reference number: I GSK 883/22; Legalis; see also: Judgment of the Supreme Administrative Court of 6 October 2021, reference number: I FSK 1797/18; Legalis.

[11] The Supreme Court's case law aptly points out that: *One of the principles derived from the principle of a democratic state ruled by law (Article 2 of the Constitution of the Republic of Poland) is the principle of citizens' trust in the state. This principle is related to the legal security of the individual. It is expressed, inter alia, in the application of the law in such a way that it does not become a trap for citizens and that they can conduct their affairs in the confidence that they will not be exposed to legal consequences that they could not have foreseen at the time of making decisions and taking actions, and in the belief that their actions taken in accordance with the applicable law will also be recognised by the legal order in the future. The legal security of individuals associated with legal certainty enables the predictability of the actions of state authorities and the forecasting of one's own actions. Therefore, one of the components of the principle of a democratic state ruled by law is the principle of citizens' trust in the state, which is also expressed in the possibility for citizens to expect state authorities to correctly apply the applicable provisions of law, since, pursuant to Article 7 of the Constitution of the Republic of Poland, public authorities act on the basis of and within the limits of the law;* see also: Supreme Court Judgment of 18 July 2024, reference number: II NSNc 389/23; LEX; Supreme Court judgment of 5 October 2023, reference number: II NSNc 140/23; LEX; see also: Judgment of the Voivodship Administrative Court in Wrocław of 12 January 2023, reference number: III SAB/Wr 581/22; Legalis; Judgment of the Supreme Administrative Court of 30 September 2021, reference number: I FSK 1461/17; Legalis.

enforcement[12], which can be formulated as a requirement for state authorities to act in such a way that all their actions, including decisions issued in individual cases[13] in the field of public administration, are a logical and natural result of the processes of governance in an efficiently administered state[14]. The legal confirmation of the above is the position, according to, that: *the above rules of conduct for administrative bodies are supplemented by the principle of citizens' trust in state authorities, expressed in Article 8 of the Code of Administrative Procedure, according to which public administration bodies are obliged to conduct proceedings in a manner that inspires the trust of its participants in public authorities. This principle is extremely important from the point of view of so-called social justice in procedural terms, as it means that the authority conducting the proceedings is obliged to justify its actions and explain their basis*[15]. One of the foundations of the principle of a democratic state ruled by law is therefore that legal entities should act in trust of public authorities and should not be burdened with the negative consequences of actions that are inconsistent with the provisions of[16], taken by public administration entities, such as the Polish Financial Supervision Authority (KNF)[17]. The principle of protecting trust in the state, including trust in public administration entities, derived from Article 2 of the Polish Constitution, indicates that the state should not derive financial benefits from erroneous, unlawful actions of an authority[18]. In the latter context, it should be noted that, in accordance with the established case law of the Constitutional Tribunal (TK)[19]: *as an essential component of the constitutional principle of a democratic state ruled by law, the principle of citizens' trust in the state and the law it enacts is based on legal*

[12] See also: Judgment of the Supreme Administrative Court of 12 December 2022, reference number: II GSK 468/22; Legalis.

[13] See also: Judgment of the Voivodship Administrative Court in Białystok of 19 July 2017, reference number: I SA/Bk 506/17; Legalis.

[14] See also: Judgment of the Voivodship Administrative Court in Warsaw of 17 June 2020, reference number: VI SA/Wa 1/20; Legalis.

[15] See also: Judgment of the Voivodship Administrative Court in Warsaw of 27 October 2020, reference number: VI SA/Wa 42/20; CBOSA; Judgment of the Supreme Administrative Court of 8 February 2023, reference number: I GSK 1796/22; Legalis; Judgment of the Supreme Administrative Court of 31 October 2022, reference number: I GSK 565/22; Legalis; Judgment of the Supreme Administrative Court of 20 September 2022, reference number: I GSK 1758/21; Legalis; Judgment of the Supreme Administrative Court of 10 December 2021, reference number: I GSK 1083/21; Legalis; Judgment of the Supreme Administrative Court of 23 August 2023, reference number: II OSK 2964/20; Legalis.

[16] *Argumentum ex* Article 7 of the Constitution of the Republic of Poland.

[17] See also: Judgment of the Voivodship Administrative Court in Gliwice of 4 September 2009, reference number: III SA/Gl 404/09; Legalis; Judgment of the Supreme Court – Civil Chamber of 20 March 2009, reference number: II CSK 602/08; Legalis.

[18] See also: Judgment of the Supreme Administrative Court of 17 November 2023, reference number: I GSK 20/20; CBOSA; see also: Judgment of the Supreme Court – Extraordinary Control and Public Affairs Chamber of 28 March 2023, reference number: II NSNc 85/23; Legalis; see also: Judgment of the Voivodship Administrative Court in Olsztyn of 16 February 2023, ref. no. II SA/Ol 49/23; Legalis.

[19] See also: Constitutional Tribunal Judgment of 14 June 2000, reference number: P. 3/00; the judgment is available at: http://www.trybunal.gov.pl/OTK/teksty/otkpdf/2000/p_03_00.pdf; Constitutional Tribunal judgment of 25 June 2002, reference number: K. 45/01; the judgment is available at:http://www.trybunal.gov.pl/OTK/teksty/otkpdf/2002/K_45_01.pdf

certainty[20]. The above is also confirmed by the established case law of the Supreme Court[21], according to which: *the principle of citizens' trust in the state, resulting from the principle of a democratic state governed by the rule of law that implements the principles of social justice, is expressed, inter alia, in the possibility for citizens to expect state authorities to correctly apply the applicable legal provisions.* […] *According to the understanding of the principle of citizens' trust in the state and the law it enacts, as adopted in the case law of the Constitutional Tribunal, constitutional protection must be afforded not only to citizens' trust in the letter of the law, but above all to the manner in which it is interpreted in the practice of law enforcement by state authorities.*

Furthermore, the case law of the Supreme Administrative Court (NSA) emphasises the principle of non-retroactivity of the law (*lex retro non agit*) as one of the fundamental principles of interim law, from which it is possible to deviate only in exceptional situations, if this is justified by the need to protect important constitutional values. The NSA stated that *[in] a democratic legal order, the law should, in principle, apply prospectively and not retroactively, in the sense that it should link the legal effects specified therein to events occurring after its entry into force. The lex retro non agit principle is addressed primarily to the legislator and prohibits it from enacting legal norms that would apply to events and situations that took place and were completed before the entry into force of those norms*[22]. *This principle is not absolute and may be waived, but only in exceptional cases where it is necessary to protect constitutional values other than legal certainty and citizens' trust in the state, which are threatened by a deterioration in their legal situation as a result of the imposition of certain obligations on them with retroactive effect. Even if we assume that the general principle is the direct effect of the law, this principle alone does not give rise to a presumption that, in the absence of a specific statement by the legislator, a provision, especially a substantive law provision, may be applied retroactively*[23]. Hence, the limits of its application in time are determined by the principle *of lex retro non agit*[24]. The Supreme Administrative Court also stated that *in the event of a conflict as to whether the existing or the new provision applies to a case, it is assumed that the existing provision applies if the legal relationship whose content was directly determined by that provision arose (changed or expired) under its rule*[25].

[20] See also: A. Kluczewska-Rupka, *Zasada pewności prawa w działaniu administracji Unii Europejskiej oraz jako zasada ogólna prawa Unii Europejskiej*, Studia Prawa Publicznego 1(5)/2014, p. 161; M. Baran, *Zasada pewności prawa a zasada legalizmu unijnego – uwagi na tle orzecznictwa TS*, European Judicial Review 5/2011, p. 13; cf. also: Judgment of the Supreme Administrative Court of 13 May 2021, reference number: I FSK 1841/19; Legalis.

[21] See also: Judgment of the Supreme Court of 24 May 2023, reference number: II NSNc 160/23; LEX.

[22] See also: Judgment of the Supreme Administrative Court of 26 October 2017, reference number: II GSK 24/16; CBOSA; see also: Judgment of the Supreme Administrative Court of 24 November 2024; reference number: III OSK 2836/21; CBOSA; Judgment of the Supreme Administrative Court of 13 June 2025, reference number: II GSK 103/24; CBOSA.

[23] See also: judgments of the Constitutional Tribunal of 9 June 2003, reference number: SK 12/03, OTK No. 6/A/2003, item 51, and of 23 July 2013, reference number: P 36/12, OTK No. 6/2013, item 82.

[24] See also: Constitutional Tribunal judgment of 12 May 2009, reference number: P 66/07, OTK no. 5/A/2009, item 65.

[25] *Ibidem*.

It should be recalled that on 11 August 2011 the provision of Article 25n of the Banking Law did not contain a sanctioning norm (similarly, on that date, there was no such norm in the systematics of the Banking Law) which could constitute the basis for the substantive right of the Polish Financial Supervision Authority to impose an administrative financial penalty on an investor due to the investor's failure to fulfil its so-called investor obligations. The provision of Article 25n of the Banking Law was therefore a classic example of a *lex imperfectae* norm, i.e. a norm whose observance was not secured by a sanction of administrative liability and an administrative financial penalty.

The consequence of the above is that the hypothetical application by the KNF of the sanctioning norm of Article 25n(5a) of the Banking Law to an investor in a domestic bank who incurred a so-called investor obligation before 21 April 2018 would lead to the retroactive application of this norm. Such action would violate the principles of a democratic state governed by the rule of law. It would violate the fundamental principle of interim law, i.e. the principle of non-retroactivity (*lex retro non agit*)[26]. In this context, the Provincial Administrative Court in Warsaw rightly pointed out that: *in administrative court judgments, it is rightly and consistently pointed out that the lack of a clear position on the part of the legislator as to which provisions should apply to events that took place before the new provisions came into force* […] *does not mean that there is a "normative gap", as it should be filled by interpretation by the authorities applying the law, but the rule in this respect cannot be the automatic application of the provisions of the new Act to legal situations (events) that took place before the date of entry into force of the new Act. The question of whether priority should be given to the principle of continued application of the existing provisions or to the principle of direct application of the new Act must be decided on a case-by-case basis, depending on the specific case and the nature of the provisions subject to change; the effects that the adoption of one or the other principle may have must also be taken into account (cf. resolution of the seven-judge panel of the Supreme Administrative Court of 10 April 2006, ref. no. I OPS 1/06, ONSAiWSA of 2006, no. 3, item 71)*[27].

In the case examined by the Provincial Administrative Court in Warsaw, the shareholder incurred the so-called investor obligation on 11 August 2011. This obligation was still in force when the provisions amending the Banking Law came into force, i.e. on 21 April 2018. On the date of the creation of this obligation, the provision of Article 25n of the Banking Law did not include sanctions in the form of an administrative fine, and paragraph 1 provided only for a follow-up supervisory measure in the form of a prohibition on exercising voting rights/an order to sell shares in a domestic bank[28]. The legal basis

[26] See also: Judgment of the Voivodship Administrative Court in Warsaw of 22 August 2023; reference number: VI SA/Wa 8176/22; Legalis; see also: Judgment of the Voivodship Administrative Court in Warsaw of 4 January 2022, reference number: VI SA/Wa 2129/21; CBOSA; Judgment of the Voivodship Administrative Court in Warsaw of 15 July 2021, reference number: VI SA/Wa 179/21; CBOSA.

[27] For more details, see: Judgment of the Voivodship Administrative Court in Warsaw of 22 August 2023; reference number: VI SA/Wa 8176/22; Legalis.

[28] See, for example: M. Torończak, *Decyzja z art. 25n ust. 1 ustawy – Prawo bankowe*, Monitor Prawa Bankowego 2015, No. 4, pp. 62–75; R. Woźniak, *Pozycja prawa akcjonariusza banku krajowego w związku*

for the application of a financial penalty was only introduced on 21 April 2018. Therefore, in the light of the above analysis of the provisions and rules, the Polish Financial Supervision Authority could not apply a sanction in the form of an administrative financial penalty for an administrative offence[29].

Similarly, the position of the Provincial Administrative Court in Warsaw should be shared, according to which: *the submission of an investment commitment by the Complainant resulted in the creation of a legal relationship "in progress", which began under the old law and continued after the amended provisions of the Banking Law came into force. For this reason, it was necessary to depart from the principle of direct application of the new law in this case, as the Authority did not demonstrate in any way that there was an important public interest in applying the currently applicable provisions.* […] *The principle of the continued application of the old law is the opposite of the principle of the direct application of the new law, where the immediate application of the new Act gives rise to an obligation to use the new provisions to assess the effects of events that began before they came into force*[30].

When issuing the administrative decision in question, the Polish Financial Supervision Authority did not take into account the fact that we are dealing here with an administrative financial penalty, and therefore a form of administrative sanction. This implies that the Polish Financial Supervision Authority must fully respect the standards developed in case law regarding the application of administrative sanctions. In this latter context, it is worth noting that case law rightly assumes that the *strictly* punitive nature of the provisions predetermines the manner of their interpretation[31]. The interpretation of administrative law provisions constituting the legal basis for imposing administrative sanctions should be similar to the interpretation of provisions classified as criminal law, with priority given to linguistic

z wydaniem przez KNF decyzji na podstawie art. 25n prawa bankowego, Monitor Prawa Bankowego 2015, No. 2, pp. 86–93.

29 See also: Judgment of the Voivodship Administrative Court in Warsaw of 22 August 2023; reference number: VI SA/Wa 8176/22; Legalis.

30 See also: Judgment of the Voivodship Administrative Court in Warsaw of 22 August 2023; reference number: VI SA/Wa 8176/22; Legalis.

31 The interpretation of law in its application in cases concerning administrative penalties should be carried out in a "restrictive" manner based on a preference for linguistic interpretation (see: Supreme Court judgment of 6 October 2016, reference number: III SK 51/15, Legalis No. 1537675; Supreme Administrative Court Judgment of 1 June 2004, reference number: GSK 30/04, Legalis no. 63945; Supreme Administrative Court Judgment of 27 May 2009, reference number: II GSK 972/08, Legalis no. 326345; Supreme Court judgment of 4 December 2009, reference number: III SK 30/09, Legalis no. 1875710; Supreme Court judgment of 21 September 2010, reference number: III SK 8/10, Legalis no. 412622; Supreme Court judgment of 26 October 2016, reference number: III SK 75/15, Legalis no. 1526381; Resolution of seven judges of the Supreme Administrative Court of 16 May 2016, reference number: II GPS 1/16, Legalis 1445596; P. Wajda, *Przesłanki (dyrektywy) wymiaru administracyjnych kar pieniężnych nakładanych na krajowy zakład ubezpieczeń (część II)*, Wiadomości Ubezpieczeniowe 2020, no. 2, p. 21).

interpretation[32] over any other types of interpretation[33]. As a result, a provision subject to administrative sanctions must be interpreted in accordance with its literal wording. Therefore, when interpreting a sanctioning norm, it is not permissible to use other types of interpretation (e.g. purposive, systemic) to obtain a meaning of the norm that differs from that resulting from linguistic interpretation[34],[35]. In the case law of administrative courts, it is correctly assumed that in the category of cases under analysis, the results of linguistic interpretation can only be overruled in exceptional cases (e.g. in the event of a gross contradiction with the assumption of a rational legislator)[36]. Similarly, the use of broad interpretation[37], analogy[38] or presumptions[39] is excluded here. The Supreme Administrative Court points out that: *norms for which an administrative sanction is provided for must be unambiguous in their content and cannot be subject to interpretative measures leading to an extension*

[32] See also: M. Zirk-Sadowski [in:] *System Prawa Administracyjnego. Wykładnia w prawie administracyjnym*, *Volume 4*, ed. R. Hauser, Warsaw 2015, 2nd edition, pp. 223–226; W. Morawski, *Glosa do wyroku NSA z 4 października 1994 r., SA/WR 929/94*, Przegląd Orzecznictwa Podatkowego 1/1998, p. 93; B. Brzeziński, *Wykładnia celowościowa w prawie podatkowym*, Kwartalnik Prawa Podatkowego 1/2002, p. 18.

[33] See also: Judgment of the Supreme Administrative Court of 1 June 2004, reference number: GSK 30/04; CBOSA; see also: judgment of the Supreme Administrative Court of 30 March 2004, GSK 31/04; CBOSA. Furthermore, the need to use linguistic interpretation is also indicated by the opinion expressed by the Constitutional Tribunal, which emphasised that: *the principle in question [clarity and precision of provisions] is particularly important in the sphere of rights and freedoms. Especially in tax regulations, the legislator cannot, through unclear wording of the provisions, leave the authorities applying them with excessive freedom in determining their subjective and objective scope, and create uncertainty for taxpayers as to their obligations; see:* Constitutional Tribunal Judgment of 9 October 2007, reference number: SK 70/06, Legalis; Constitutional Tribunal judgment of 18 July 2013, reference number: SK 18/09, Legalis; see also: Voivodship Administrative Court in Olsztyn judgment of 9 July 2020, reference number: II SA/Ol 293/20; CBOSA.

[34] See, for example: Judgment of the Supreme Administrative Court of 6 March 2014, reference number: I OSK 653/13; Legalis.

[35] For more details, see: Judgment of the Constitutional Tribunal of 5 May 2004, reference number: P 2/03; LEX; see also: Judgment of the Supreme Administrative Court of 27 May 2005, reference number: II GSK 972/08; CBOSA; see also: Ł. Gajek, *Kary pieniężne w ustawie o radiofonii i telewizji – analiza krytyczna*, Internetowy Kwartalnik Antymonopolowy i Regulacyjny 2019, No. 3 (8), p. 16;

[36] See also: Supreme Court resolution of 21 January 2016, reference number: III SZP 4/15, Legalis no. 1398242; Supreme Court judgment of 6 October 2016, reference number: III SK 51/15, Legalis no. 1537675; Supreme Court decision of 26 October 2016, reference number: III SK 75/15, Legalis no. 1526381.

[37] See, for example: Judgment of the Supreme Administrative Court of 18 April 2019, reference number: I OSK 1750/17; Legalis.

[38] See, for example: Judgment of the Voivodship Administrative Court in Łódź of 23 July 2021, reference number: II SA/Łd 203/21; LEX; Judgment of the Voivodship Administrative Court in Warsaw of 28 November 2019, reference number: IV SA/Wa 1668/19; LEX.

[39] For more details, see: Judgment of the Supreme Court of 24 September 2014, reference number: III SK 59/13, Legalis no. 1079955; Judgment of the Court of Competition and Consumer Protection of 15 April 2019, XVII AmE 92/17, Legalis no. 2252765; Judgment of the Supreme Administrative Court of 22 November 2019, reference number: II GSK 1019/19; CBOSA; see also A. Krawczyk [in:] W. Chróścielewski (ed.), Z. Kmieciak (ed.), *Kodeks postępowania administracyjnego. Komentarz*, Warsaw 2019, Lex/el., commentary on Article 189b, point 3.

of liability[40]. The case law emphasises the inadmissibility of retroactive application of regulations introducing liability for administrative offences[41]. Therefore, the position developed in the case law of the Constitutional Tribunal should be shared, according to which the guarantees contained in Chapter II of the Constitution *apply to all repressive proceedings, i.e. proceedings whose purpose is to subject a citizen to some form of punishment or sanction*. Consequently, Article 42(1), first sentence, of the Constitution of the Republic of Poland, according to which: *Only a person who has committed an act prohibited under penalty of law in force at the time of its commission shall be subject to criminal liability*, should be applied here accordingly (i.e. taking into account its specific nature). The Constitutional Tribunal derives two more specific directives from this. Firstly, the prohibition of sanctioning acts which, at the time of their commission, did not constitute administrative offences (which should be seen as the equivalent of the criminal law principle *of nullum crimen sine lege anteriori*). Secondly, the prohibition of applying sanctions which were not provided for at the time of the commission of the offences (which in turn is equivalent to the criminal law principle *of nullum poena sine lege*)[42]. However, in the case in question, the KNF has, in a sense, disregarded the obligation to apply the principle of *lex mitior retro agit* (the more lenient law applies retroactively) to administrative sanctions, which requires the retroactive application of the provision that is more lenient for the entity violating the regulations. This obligation arises from Article 15(1) of the International Covenant on Civil and Political Rights of 19 December 1966[43]. It is therefore clear that the legal situation in force since 21 April 2018 is not more favourable to an investor who has breached the so-called investor's obligation[44]. On the contrary, the legal situation in force since 21 April 2018 is definitely less favourable to such an investor than the legal situation in force until that date. *De lege derogata refers to* a situation in which a breach of investor obligations incurred before 21 April 2018 was not linked to the KNF's power to impose an administrative fine.

The above considerations lead to the conclusion that the administrative sanction under Article 25n(5a) of the Banking Law cannot be applied in the case of an administrative offence in the form of a breach of so-called investor obligations incurred before 21 April 2018.

[40] See more broadly: Judgment of the Supreme Administrative Court of 27 May 2009, reference number: II GSK 972/08, Legalis no. 326345.

[41] See also: Constitutional Tribunal judgment of 12 May 2009, reference number: P 66/07, Legalis; see also: Supreme Administrative Court judgment of 21 October 2009, reference number: II GSK 487/09; Legalis.

[42] See also: Constitutional Tribunal judgment of 12 May 2009, reference number: P 66/07, Legalis; see also: Supreme Administrative Court judgment of 21 October 2009, reference number: II GSK 487/09; Legalis.

[43] Journal of Laws of 1977, No. 38, item 167.

[44] See also: Judgment of the Supreme Administrative Court of 13 May 2008, reference number: II GSK 104/08; Legalis.

Amendment to Article 25n(5a) et seq. of the Banking Law

The provisions of Article 25n(5a) et seq. of the Banking Law were amended by the Act of 16 August 2023 amending certain acts in connection with ensuring the development of the financial market and the protection of investors in that market[45]. This regulation came into force on 29 September 2023 and changed the model for imposing administrative fines, as well as introducing numerous formal and legal solutions concerning decisions of the Polish Financial Supervision Authority.

When interpreting these provisions, the first step is to point out that their amendment implies the need to assess the application or non-application of their current content to investor obligations incurred between 21 April 2018 and 29 September 2023. Therefore, it is necessary to verify whether the legislator has regulated this issue in the provisions of the Act of 16 August 2023 amending certain acts in connection with ensuring the development of the financial market and the protection of investors in that market. An analysis of the provisions of this Act leads to the conclusion that this issue has not been regulated. Thus, it is necessary to assess the application of the *lex mitior retro agit* principle to the above-mentioned situation. When making this assessment, it should be noted that *de lege derogata* (i.e. until 29 September 2023), the administrative offence referred to in Article 25n(5a) of the Banking Law was punishable by an administrative fine corresponding to the value of these shares or rights attached to shares, with the value of shares or rights attached to shares being determined as at the date of their acquisition or subscription at fair value, as referred to in the Accounting Act of 29 September 1994. The amount of the penalty was determined on the date of their acquisition or subscription at fair value, as referred to in the Accounting Act of 29 September 1994. *De lege lata*, this administrative offence is punishable by an administrative fine of up to 10% of the revenue disclosed in the last approved financial statements, and in the absence of such statements, up to 10% of the projected revenue determined on the basis of the economic and financial situation of the legal person. In the case of natural persons, the penalty may amount to PLN 21,312,000. Bearing in mind that domestic banks operate using financial leverage, it can be assumed that in the case of investors as legal persons, the "old" wording of Article 25n(5a) of the Banking Law will be more lenient. In the case of natural persons, however, the "new" wording of this provision will be more favorable. However, this assessment must be made on a case-by-case basis, i.e. on the basis of the specific facts of the case.

De lege lata, failure by an investor to fulfil an investment obligation which, it should be emphasized, was incurred on or after 21 April 2018, triggers the KNF's powers to impose an administrative financial penalty on the investor in question. When determining the amount (severity) of the administrative fine, the criteria set out in Article 189d of the Code of Administrative Procedure will apply, as well as the principles of proportionality.

[45] Journal of Laws of 2023, item 1723.

The proceedings in the case will be initiated by the KNF, which acts ex officio in this matter. The party to the proceedings will be the investor who incurred an investment obligation on or after 21 April 2018 and subsequently failed to fulfil it, and the competent public administration authority in this case will be the KNF. The subject of these proceedings will be to determine whether the investor failed to fulfil its investment commitment and to impose an administrative financial penalty on it, together with determining the level of its severity. It should be noted here – *argumentum ex* Article 7 in conjunction with Article 77 § 1 of the Code of Administrative Procedure that the burden of proof in this case will rest entirely with the Polish Financial Supervision Authority[46]. This means that the Polish Financial Supervision Authority will be obliged to establish the facts of the case in accordance with the material truth and to collect and assess all the evidence in the case, thereby proving that the investor failed to comply with the investor commitment[47].

The KNF will resolve the administrative case in question by way of an administrative decision, which will be immediately enforceable *ex lege*[48]. This decision will be based on the concept of administrative discretion[49]. This is determined by the

[46] The case law has expressed the position that: *in accordance with the principle of objective truth standardized in Article 7 of the Code of Administrative Procedure, public administration bodies shall take all steps necessary to thoroughly clarify the facts and resolve the case. The authority conducting the proceedings is obliged to collect and examine the evidence in order to establish the facts of the case in accordance with reality. Factual findings that are confirmed by evidence but are incomplete or not fully considered should be treated as arbitrary. The allegation of arbitrariness can only be ruled out by findings made on the basis of all the evidence collected and examined in an exhaustive manner, i.e. when all steps necessary for a thorough clarification of the facts have been taken, as a prerequisite for issuing a convincing decision* (see: Judgment of the Supreme Administrative Court of 23 February 2017, reference number: I OSK 790/15; CBOSA; Judgment of the Supreme Administrative Court of 2 April 2019, reference number: II OSK 3473/18; Legalis; Judgment of the Supreme Administrative Court of 9 October 2018, reference number: II OSK 2505/18; Legalis; Judgment of the Voivodship Administrative Court in Gliwice of 7 November 2019, reference number: I SA/Gl 954/19; Legalis.

[47] Agreeing with the views expressed in case law (see more broadly: Judgment of the Supreme Administrative Court of 27 August 2010, reference number: II OSK 1131/10, Legalis; Judgment of the Voivodship Administrative Court in Warsaw of 29 June 2009, reference number: I SA/Wa 474/09, Legalis) and doctrine (see more broadly: P. Wajda, M.A. Śliwa, *Zasada prawdy obiektywnej (art. 7 k.p.a.) i ciężar dowodu w postępowaniach administracyjnych prowadzonych przez KNF*, Monitor Prawa Bankowego 5/2014, pp. 58–59), it should be concluded that two basic obligations arise for the KNF from the general principle of objective truth. The first obligation concerns determining what evidence is necessary to establish the facts. On this basis, the KNF should, ex officio and on the basis of the relevant substantive law, indicate which circumstances are relevant to the facts of the case from the point of view of those standards.

[48] *Argumentum ex* Article 25n(5b) of the Banking Law.

[49] See, for example: Judgment of the Voivodship Administrative Court in Warsaw of 22 June 2007, reference number: VI SA/Wa 2198/06; Legalis; Judgment of the Supreme Administrative Court of 14 June 2007, reference number: II GSK 35/07, Legalis; Judgment of the Voivodship Administrative Court in Warsaw of 5 September 2019, reference number: VI SA/Wa 964/18, CBOSA; Judgment of the Voivodship Administrative Court in Warsaw of 19 November 2020, reference number: VI SA/Wa 148/20, CBOSA; Judgment of the Voivodship Administrative Court in Warsaw of 27 February 2020, reference number: VI SA/Wa 884/19, CBOSA; Judgment of the Supreme Administrative Court of 16 May 2019, reference number: II GSK 2054/17, CBOSA; see also: Judgment of the Constitutional Tribunal of 20 June 2017, reference number: P 124/15; Legalis.

legislator's use of the phrase "*the Financial Supervision Authority may*" in the wording of Article 25n(5a) of the Banking Law. As a result, the KNF is entitled to refrain from imposing an administrative fine on the investor and to discontinue the proceedings in question[50], even if it is found that the investor has failed to comply with its investment obligation.

An optional element of this decision is the determination by the KNF that the financial penalty referred to in Article 25n(5a) of the Public Offering Act will be payable in monthly instalments[51] and according to the repayment schedule and amounts determined by the Commission[52].

The administrative decision under Article 25n(5d) of the Capital Market Act is a related decision. It is not based on administrative discretion, therefore, in each case where the investor obligation is fulfilled, in the meantime, the KNF will be obliged to issue a decision under Article 25n(5d) of the Capital Market Act.

In a situation where the investor fulfils its investor obligations after the administrative decision under Article 25n(5a) of the Public Offering Act has been issued, but before the deadline for payment of the administrative fine, this will trigger the KNF's obligation to issue an administrative decision under Article 25n(5d) of the Public Offering Act. In such a situation, the KNF will initiate, *ex officio*, the administrative proceedings referred to in Article 25n(5d) of the Banking Law, the purpose of which will be to determine whether the investor's obligation has been fulfilled in the meantime. If so, this fact should be taken into account when cancelling the administrative fine under Article 25n(5a) of the Banking Law. In such a case, the KNF is entitled to cancel the administrative fine in full if it has been paid in a single instalment. The KNF may also remit it in part corresponding to unpaid future instalments if the payment of the administrative fine was spread out in instalments. The burden of proof (i.e. the burden of demonstrating that the investor's obligation has been fulfilled in the meantime) will rest entirely with the KNF.

In the event of non-payment of the administrative fine referred to in Article 25n(5a) of the Banking Law, the KNF is entitled to order a domestic bank, whose shareholder is the investor referred to in Article 25a(5n) of the Banking Law, to transfer to the arrears, together with interest, all payments made by the bank to that shareholder, in an amount corresponding to that penalty together with interest.

De lege lata, we are dealing with a situation in which the investor's performance of its investment obligations – incurred from 21 April 2018 – has been secured by an administrative liability sanction. However, this sanction may only apply to those investment obligations that were incurred from 21 April 2018 onwards, but not earlier. On the other hand, in the case of investor obligations incurred before

[50] *Argumentum ex* Article 105 § 1 of the Code of Administrative Procedure.

[51] See also: P. Wajda [in:] *Prawo bankowe. Komentarz*, ed. A. Mikos-Sitek, P. Zapadka, LEX/el. 2025, Article 25(n); see also: W. Srokosz [in:] J. Dybiński (ed.), *Tom XA. Prawo rynku finansowego. Prawo bankowe. Komentarz*, 1st edition, 2025.

[52] *Argumentum ex* Art. 25n(5c) of the Banking Law.

that date, failure to fulfil them does not result in administrative liability under Article 25n(5a) of the Public Procurement Law.

The legal situation described above means that the Polish Financial Supervision Authority cannot require an investor who entered into an investment commitment before 21 April 2018 to confirm that the commitment is still valid or to resubmit it. This is because there is no proper legal basis in the legal system for submitting such confirmation of the validity of an investment commitment or for resubmitting it. At the same time, the KNF is bound by the constitutional principle of the rule of law/legalism[53]. However, under the current legal situation, the investment commitment of reference investors of domestic banks may only be submitted in the course of the administrative proceedings referred to in Article 25 et seq. of the Banking Law[54]. In this context, and in a situation where the liquidity or solvency of a domestic bank is at risk, as part of the amendment to the investment agreement, the KNF often expects such investors to submit a commitment to recapitalise the bank.

Summary

De lege lata, the enforceability of investor commitments made by reference investors of domestic banks before 21 April 2018 is not secured by an administrative fine, and the KNF cannot enforce these commitments. This situation generates significant systemic risk. It is obvious, as confirmed by practical experience, that an investor will limit or fail to perform its obligations if a domestic bank experiences problems threatening its solvency. This is indirectly confirmed by the administrative decision of the Polish Financial Supervision Authority and the judgment of the Provincial Administrative Court in Warsaw analysed in this study.

In these circumstances, it is reasonable to expect the KNF to intensify its actions against reference shareholders of domestic banks seeking to incur liabilities under investment agreements. In particular, this will apply to cases of trading in shares of a domestic bank, which requires the consent of the KNF pursuant to Article 25 et seq. of the Banking Law.

[53] In accordance with the constitutional principle of the rule of law, public administration bodies may act only to the extent and only using legal forms of action that are based on a specifically indicated provision of law. (For more details, see: Judgment of the Supreme Administrative Court of 27 October 1987, reference number: IV SA 292/87; CBOSA). Public administration bodies may therefore act only within the scope resulting from the authorization clearly specified in the provisions of law (see: M. Wierzbowski, *Charakter prawny stosunków w organizacjach społecznych,* Warsaw 1976, p. 24; S. Fundowicz, *Aksjologia prawa administracyjnego używania* [in:] *Koncepcja systemu prawa administracyjnego. Zjazd Katedr Prawa Administracyjnego i Postępowania Administracyjnego. Zakopane 24–27 września 2006 r.*, (ed.) J. Zimmermann, Warsaw 2007, p. 635; see also: K. Działocha, *Konstytucyjne założenia systemu naczelnych organów państwa,* Państwo i Prawo 10/1987, pp. 99–100; K. Opałek, *Spór o pojęcie praworządności,* Państwo i Prawo 10/1959, pp. 519–520; M. Zieliński, *Obiektywność ustalenia faktów jako element praworządności stosowania prawa*, Ruch Prawniczy, Ekonomiczny i Socjologiczny 1/1979, pp. 31–32).

[54] *Argumentum ex* Article 25h(3) of the Banking Law.

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