

TOMASZ BRZEZICKI

Nicolaus Copernicus University in Toruń

*brzoza@umk.pl*

ORCID: 0000-0003-1048-1402

BARTŁOMIEJ CHLUDZIŃSKI

Nicolaus Copernicus University in Toruń

*bartekch@umk.pl*

ORCID: 0000-0001-9483-7976

## **Selected procedural aspects of the repayment of funds allocated for the implementation of programmes financed with European funds**

**Wybrane aspekty proceduralne zwrotu środków  
przeznaczonych na realizację programów finansowanych  
z udziałem środków europejskich**

**Abstract.** The funds earmarked for the implementation of programmes financed with European funds are refunded on the basis of the conditions set out in Article 207(1) of the Act on Public Finance and the Code of Administrative Procedure. The refund decision is of a binding nature and is a consequence of the proper conduct of the investigation procedure. This is not an administrative sanction.

However, the refund is always linked to economic problems, which means that the authority is obliged to carry out the investigation correctly.

**Keywords:** conditions for refund; decision; administrative procedure; scope of investigation procedure.

**Streszczenie.** Zwrotu środków przeznaczonych na realizację programów finansowanych z udziałem środków europejskich następuje na podstawie przesłanek zawartych w przepisie art. 207 ust. 1 ustawy o finansach publicznych oraz Kodeksu postępowania administracyjnego. Decyzja zwrotowa posiada charakter związany i jest konsekwencją prawidłowego przeprowadzenia postępowania wyjaśnianego. Nie jest to sankcja administracyjna. Zwrot środków jest jednak zawsze związany z dolegliwościami o charakterze ekonomicznym, co oznacza obowiązek organu do prawidłowego przeprowadzenia postępowania wyjaśniającego.

**Słowa kluczowe:** przesłanki zwrotu środków; decyzja; postępowanie administracyjne; zakres postępowania wyjaśniającego.

## **1. Introductory remarks – reasons for the refund of co-financing**

The conditions for repayment of funds intended for the implementation of programmes financed with co-financing from European funds are regulated by Article 207(1) of the Act of 27 August 2009 on Public Finance<sup>1</sup>. The infringements referred to in this provision should be equated with the concept of “irregularity” within the meaning of Article 2(7) of Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down the general provisions of the European Regional Development Fund, the European Social Fund, and the Cohesion Fund, and repealing Regulation (EC) No 1260/1999<sup>2</sup>.

In the light of that provision, an irregularity means any infringement of the provisions of Community law resulting from an act or omission

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<sup>1</sup> Consolidated version, Dz.U. [Polish Journal of Laws] of 2017, item 2077 with subsequent amendments, hereinafter: PFA.

<sup>2</sup> [2006] OJ L 210/25 with subsequent amendments.

by an economic operator which has, or might have, the effect of prejudicing the general budget of the European Union by an unjustified item of expenditure financed by the general budget.

Both the European Commission and the CJEU adopt a broad interpretation of the condition of an infringement of Community law, including an infringement of EU law and national law. The adoption of such a broad interpretation of a breach of law means that irregularities in the use of funds also occur when a national provision laying down requirements relating to the spending of funds from the Union budget, adopted in areas not covered by Union law or laying down requirements more stringent than those resulting from Union law, has been breached<sup>3</sup>.

This approach leads to the conclusion that “any deviation from the contractual provisions or any breach of Union and national law which has, or might have, the effect of prejudicing the general budget may be regarded as an irregularity”. Thus, any irregularity which may potentially result in the payment of funds that should not have been received under the terms of the contract or the law is treated as an irregularity<sup>4</sup>.

Thus, the identification of an infringement of either EU or national law and the classification of that infringement as an irregularity gives rise to obligations established by EU law and involving the detection of irregularities, including the obligation for the Member State to recover sums wrongly spent<sup>5</sup>.

Under the provisions of Article 207(1) of the PFA, funds intended for the implementation of programmes financed with European funds are to be refunded in the event of three types of irregularity, firstly if they have been misused.

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<sup>3</sup> Judgment of the Voivodeship Administrative Court in Kraków of 21 March 2018, I SA/Kr 143/18, Central Database of Decisions of Administrative Courts (CBOSA) at: [www.orzeczenia.nsa.gov.pl/cbo/query](http://www.orzeczenia.nsa.gov.pl/cbo/query).

<sup>4</sup> Judgment of the Voivodeship Administrative Court in Opole of 11 March 2014, II SA/Op 514/13, the judgment from which the cassation appeal was dismissed by a judgment of the Supreme Administrative Court of 22 July 2015, II GSK 1541/14, CBOSA.

<sup>5</sup> Cf. judgment of the Voivodeship Administrative Court in Olsztyn of 27 February 2018, I SA/Ol 806/17 and judgment of the Voivodeship Administrative Court in Warszawa of 9 March 2018, VIII SA/Wa 538/17, CBOSA.

The misuse of funds is payment for the performance of tasks other than those for which the funds were allocated, i.e. tasks which are outside the material scope of the project for which the funds have been assigned. Expenditures not directly related to the implementation of the project, which do not contribute to the achievement of the objective set out in the funding agreement, and are not in conformity with the purpose for which they were granted cannot be considered eligible<sup>6</sup>. In the literature it is recognised that “the assessment of compliance of the use of funds from the co-financing with the purpose of the project is carried out by comparing the object set out in the application for co-financing with the effect achieved by the beneficiary. It is not only an analysis of the scope of particular categories of expenditure from the point of view of their correctness of spending in accordance with the original purpose, but also a verification of whether the beneficiary has achieved the project implementation indicators, i.e. output and result indicators”<sup>7</sup>.

Secondly, the funds are recoverable if they have been used in breach of the procedures referred to in Article 184 of the PFA. The procedures set out in Article 184 of the PFA are those resulting from international agreements or other procedures governing the use of European funds. The concept of “other procedures” gives rise to some controversy in the literature on the subject<sup>8</sup>. However, it seems that this term should be understood not only as procedures defined by generally applicable legal norms, but also as provisions of the contract concluded as a result of the selection of a given project for co-financing. In view of the wording of Article 184 of the PFA, these procedures should be understood broadly, i.e. as the entirety of all procedures (established at Community and national level),

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<sup>6</sup> As e.g. the judgment of the Voivodeship Administrative Court in Wrocław of 19 July 2017, III SA/Wr 284/17, CBOSA.

<sup>7</sup> W. Miemiec, *Przesłanki determinujące zwrot środków przeznaczonych na finansowanie programów realizowanych przez JST z udziałem bezzwrotnych środków europejskich*, „Finanse Komunalne” 2012 No 1–2, p. 36.

<sup>8</sup> Cf. Ł.M. Wyszomirski, *Zwrot środków europejskich przez beneficjenta*, „Zeszyty Naukowe Sądownictwa Administracyjnego” 2013 No 1, p. 82.

including the provisions of the project financing agreement under which European funds are disbursed<sup>9</sup>.

Thirdly, and finally, the necessity of recovery of funds occurs when funds are collected unduly or in an excessive amount. The funds collected in an excessive amount are funds received in an amount higher than specified in separate regulations or an agreement, or higher than necessary to finance the subsidised task, in particular an advance not used up in full by the beneficiary. Undue funds, on the other hand, are funds granted without a legal basis, e.g. on the basis of a document certifying an untruth, granted to a beneficiary who is excluded from the possibility of receiving funds, which reimburse expenditures incurred before the eligibility date or previously reimbursed from public funds<sup>10</sup>.

The conditions resulting from the provision of Article 207(1) of the PFA are of an objective nature. If they are identified, the authority does not examine the fault or intention of the beneficiary, its good or bad faith. It does not matter whether the reasons resulting in the obligation to return the funds were dependent on the beneficiary. The PFA does not provide for such circumstances as the occurrence of fault or its type, or the extent to which third parties participate in situations leading to the repayment of funds<sup>11</sup>.

The assessment of the beneficiary's behaviour should be made on the basis of a standard created for a specific case and derived from the binding regulations of the EU and national law as well as non-normative regulations (e.g. a subsidy agreement), taking into account the circumstances of an individual case<sup>12</sup>.

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<sup>9</sup> Cf. judgment of the Voivodeship Administrative Court in Gliwice of 27 February 2018, IV SA/Gl 868/17 and judgment of the Voivodeship Administrative Court in Gliwice of 12 March 2018, IV SA/Gl 815/17, CBOSA.

<sup>10</sup> Judgment of the Voivodeship Administrative Court in Warszawa of 6 September 2017, V SA/Wa 2262/16, CBOSA.

<sup>11</sup> Judgment of the Voivodeship Administrative Court in Opole of 8 March 2018, II SA/Op 143/17, CBOSA.

<sup>12</sup> Cf. K. Bieluci, E. Lemańska, J. Siemieniako, *Szkoda jako przesłanka zwrotu środków europejskich przez beneficjenta*, „Zeszyty Naukowe Sądownictwa Administracyjnego” 2017, No 3, p. 80.

If the irregularities referred to above are found, the authority acting as the body referred to in Article 207(9), (11) and (11a) of the PFA or the institution which has signed a co-financing agreement with the beneficiary requests the beneficiary to return the funds or to agree to deduct the amount to be recovered from the subsequent payments. The refund should take place within 14 days from the date of delivery of the request. After this period has expired without effect, the authority in question shall issue a decision specifying the amount to be recovered, together with interest at the rate specified for tax arrears and the date on which interest is to be charged, as well as the manner in which the funds are to be recovered. The funds are to be repaid within 14 days from the date of delivery of the final decision to the beneficiary, to the bank account indicated therein<sup>13</sup>.

## **2. The character of the refund decision**

Recovery is effected by means of an administrative act which takes the procedural form of an administrative decision. It should be noted that such a decision is declaratory in nature, as the obligation to reimburse the co-financing arises by the operation of law when the conditions referred to in Article 207(1) of the PFA were updated<sup>14</sup>. At the same time, the decision in question is a decision of a related nature. Therefore, the institution of administrative discretion does not apply. This nature of the decision affects the substance of the investigation procedure in the case concerning the reimbursement of European funds by the beneficiary.

The provision of Article 67 of the PFA contains a reference from which it follows that the provisions stipulated in Article 60 of the PFA including receivables from the reimbursement of funds intended for the implementation of programmes financed with the participation of European funds not regulated by this Act, are subject to the provisions of the Act

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<sup>13</sup> Cf. Article 207(1), (8) and (9) PFA.

<sup>14</sup> Judgment of the Voivodeship Administrative Court in Warszawa of 28 June 2017, V SA/Wa 1926/16 and judgment of the Voivodeship Administrative Court in Kraków of 10 September 2015, I SA/Kr 1029/15, CBOSA.

of 14 June 1960 on the Code of Administrative Procedures<sup>15</sup> and proper provisions of Section III of the Tax Ordinance of 29 August 1997<sup>16</sup>. Hence, the provisions of the Code of Administrative Procedure apply to proceedings aimed at issuing decisions on the reimbursement of funds intended for the implementation of programmes financed with the co-financing from the European funds<sup>17</sup>.

This means that a refund decision, in addition to the basic formal requirements, should meet the requirements resulting from the general rules of administrative proceedings, while the issuance of a substantive decision should be preceded by the initiation of administrative proceedings.

Proceedings are instituted *ex officio* in the case of material and legal prerequisites resulting in the repayment of funds. The date of instituting proceedings pursuant to Article 61(4) of the CAP is the date of service of the notice on the party to the case. Notification is the duty of the authority; its execution allows the party to actively participate in the proceedings.

A repayment decision may not be issued without a separate procedure allowing the beneficiary to submit a statement of reasons to the authority competent to take a decision pursuant to Article 207 of the PFA<sup>18</sup>. In other words, in the course of the procedure, an investigation should be carried out in order to establish the specific facts constituting the basis for repayment.

### **3. The scope of the investigation**

In the course of the investigation procedure, the circumstances that could give rise to an obligation to repay funds are analysed. With reference to the abovementioned provision of Article 207(1) of the PFA, it can be concluded that the purpose of the investigation is to determine whether irregularities have occurred in the spending of the funds received. As has

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<sup>15</sup> Consolidated version, Dz.U. of 2017, item 1257, hereinafter: CAP.

<sup>16</sup> Consolidated version, Dz.U. of 2018, item 800.

<sup>17</sup> Cf. judgment of the Voivodeship Administrative Court in Kraków of 9 October 2012, III SA/Kr 1536/11 and judgment of the Supreme Administrative Court of 18 May 2017, II GSK 4503/16, CBOSA.

<sup>18</sup> R. Poździk, *Decyzje o zwrocie środków unijnych w praktyce wdrażania regionalnych programów operacyjnych*, „Samorząd Terytorialny” 2013, No 7–8, p. 112.

already been pointed out, these irregularities consist in the misuse of European funds in breach of procedures arising from international agreements or other procedures governing the use of European funds, or where these funds have been unduly or excessively collected.

However, it should be stressed that the essence of the investigation procedure is not only the demonstration of irregularities in the disbursement of funds, but also the demonstration that the disbursement was of an eligible nature resulting in damage to the general budget (see Article 2(7) of Regulation (EC) No 1083/2006).

It is also important to assess whether a given expenditure under the received co-financing constitutes eligible expenditure. This has been pointed out in the case law arguing that “eligibility of expenditure is an objective category, independent of the circumstances related to the actions taken by the beneficiary or the managing authority, so that regardless of the moment in which the fact of co-financing of an expenditure which was not eligible expenditure is revealed, the obligation to refund the co-financing arises, because the procedure adopted in the operational programme implementation system was infringed”<sup>19</sup>.

In view of the above, it should be concluded that a mere infringement of the procedures applicable to the use of funds from the European Union budget does not automatically imply an obligation to reimburse them. It is necessary to assess the effects of this infringement in the context of the rules relating to the performance of the contract, the purpose for which the contract was concluded, and the applicable legal provisions.

In the context of the discussed issue, it is important that the assessment of collected evidence is made on the basis of the principle of free assessment of evidence, which is expressed in Article 80 of the Code of Administrative Procedure. It consists in the assessment of all collected evidence in accordance with the principles of logical reasoning and life experience.

In this respect, the changes to the general administrative procedure as from 1 June 2017 should be noted.<sup>20</sup>

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<sup>19</sup> Voivodeship Administrative Court in Lublin in the judgment of 5 April 2018, III SA/Lu 630/17, CBOSA.

<sup>20</sup> Act of 7 April 2017 amending the Act – Code of Administrative Procedure and certain



First of all, attention should be paid to the principle of settling doubts in favour of the party defined in the provision of Article 7a (1) of the Code of Administrative Procedure, pursuant to which, if the subject of administrative proceedings is to impose an obligation on a party or to limit or withdraw a right on that party, and in case doubts remain as to the content of the legal norm, such doubts are settled in favour of the party which received the funds, unless the disputed interests of parties or third parties, over which the outcome of the proceedings has a direct influence, are contradictory to that principle. The principle in question has been further clarified in the provision of Article 81a(1) of the CAP, according to which if the subject matter of the administrative proceedings is to impose an obligation on a party which received the funds or to limit or withdraw such a party's rights, and in this respect doubts as to the facts remain unremovable, these doubts are resolved in favour of the said party which received the funds.

In this respect, the possibility of mediation should also be considered. In accordance with the principle of amicable settlement of disputes formulated in Article 13(1) of the CAP, mediation may be conducted in cases whose nature allows for it. In accordance with the views expressed in the literature and case law, the "nature of the case" argues in favour of mediation if the regulation of a substantive law rule raises doubts as to its interpretation, if there is an element of administrative discretion in the case, and in the case of imprecise concepts<sup>21</sup>. At the same time, it should be noted that the explanatory memorandum to the Act of 7 April 2017 amending the CAP indicated that the cases in which there is mediation potential are cases where: multiple parties exist; a settlement agreement can be reached; the authority intends to issue a decision against the addressee and may expect an appeal, and in cases in which an appeal was filed against the first instance ruling<sup>22</sup>.

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other acts (Dz.U., item 935).

<sup>21</sup> B. Adamiak, J. Borkowski, *KPA. Komentarz*, Warszawa 2017, p. 110 and pp. 496–497, as well as judgment of the Voivodeship Administrative Court in Rzeszów of 18 January 2018, II SA/Rz 1225/17, CBOSA.

<sup>22</sup> Justification of the bill of 7 April 2017, 8th term, VIII<sup>th</sup> cadency, Sejm paper No 1183, p. 36.

*Prima facie* it seems that, owing to the nature of the case involving the refunding of European funds, mediation cannot be applied. As already indicated, the refund decision is of an interlinked nature – there is no element of administrative discretion. On the other hand, however, mediation in administrative matters does not have to be conducted solely in the context of administrative discretion. It seems that other forms of discretionary power may also be the justification for mediation. The discretionality is understood as a legally permissible form of freedom of public administration at all stages of the application of the law<sup>23</sup>. In the proceedings under consideration, the use of mediation should first of all be considered in the second phase of law application, i.e. in establishing certain facts to be proven. As has already been said, the authority must assess a series of different circumstances in this respect, making use of the free assessment of evidence which ensures a certain degree of discretionary power. In so doing, the authority formulates its assessment as to the existence of irregularities. This key issue (the occurrence of irregularities) for the whole procedure may be the subject of disputed assessments between the authority and the beneficiary, which would argue in favour of applying the principle of an amicable settlement of the dispute and referral of the case to mediation. Moreover, in principle, the decision concerning the refund is in principle unfavourable to the beneficiary, and therefore the body must expect an appeal, which, in the opinion of the authors of mediation in the Code of Administrative Procedure, supports its application.

Only the clear findings of the investigation showing that irregularities have occurred in the disbursement of the funding received determine the obligation to reimburse the said funding. The calculation of the reimbursement is of a technical nature and consists in making appropriate calculations. With regard to this part of the process, mistakes can be only of

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<sup>23</sup> Cf. A. Błaś, J. Jendrośka, *Granice dyskrecjonalnych uprawnień administracji publicznej* [in:] Z. Niewiadomski (ed.) *Administracja publiczna u progu XXI wieku. Prace dedykowane Prof. zw. dr hab. Janowi Szreniawskiemu z okazji Jubileuszu 45-lecia pracy naukowej*, Przemyśl 2000, p. 88, as well as M. Jaśkowska, *Uznanie administracyjne a inne formy władzy dyskrecjonalnej administracji publicznej* [in:] R. Hauser, A. Wróbel, Z. Niewiadomski, *System prawa administracyjnego. Instytucje prawa administracyjnego*, Warszawa 2015, pp. 227–228 and 266–267.

an accounting nature. However, the correct outcome of these mathematical operations is not subject to further discussion.

The decision on refund should be implemented by the party in receipt of the funds on a voluntary basis, without the need for administrative coercion, as provided for in the regulations on enforcement proceedings in the administration<sup>24</sup>. Therefore, the principle of persuasion expressed in Article 11 of the CAP becomes particularly important in this process. As emphasised in the case law of administrative courts, “Article 11 of the CAP obliges the authority to explain the legitimacy of the premises which it follows in resolving cases. The principle of persuasion will not be fulfilled if the authority silently disregards certain evidence gathered in the case, or the declaration or explanation of the party, or does not refer to facts relevant to the case or circumstances raised by the other party. The reasons for the decision, including a reference to a party’s requests and statements, are to be set out in the statement of reasons for the decision”<sup>25</sup>.

#### **4. The elements of the decision on repayment of funds**

The recovery decision is optionally issued if the entity obliged to repay the funds within 14 days from the date of service of the call for funds, in the event of irregularities, fails to repay the funds or does not agree to a reduction in subsequent payments (Article 207(8) of the PFA).

The competent authority referred to in Article 207(9) of the PFA issues a decision determining the amount to be recovered, the date on which interest is to be charged, and the manner of repayment of the funds. In addition, the decision issued contains a notification of the sanction resulting from Article 207(4)(3), subject to (7) of the PFA (the sanction consists in exclusion from the possibility of receiving funds).

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<sup>24</sup> Act of 17 June 1966 on enforcement procedures in administration (consolidated version, Dz.U. of 2018, item 1314).

<sup>25</sup> Judgment of the Voivodeship Administrative Court in Kraków of 11 May 2018, III SA/Kr 212/18, CBOSA.

The above provision is a special regulation in relation to the provision of Article 107(1) of the CAP. This means that apart from the elements listed in the PFA, each decision should include: the designation of the public administration body, the date of issue, the designation of the party or parties, the indication of the legal basis, the decision, the factual and legal justification, instructions as to whether and in what manner the appeal against the decision is to be made, the right to withdraw the appeal and the consequences of withdrawing the appeal, the signature with the first and last name and the official position of the employee of the body authorised to issue the decision, and if the decision was issued in the form of an electronic document – a qualified electronic signature, and in the case of a decision against which an action may be brought before a common court, an objection to a decision or a complaint to an administrative court – a note on the admissibility of bringing an action, objection to a decision, or complaint and the amount of the fee on the action or entry of the complaint or opposition to a decision, if they are of a permanent nature, or a basis for calculating a fee or entry of a relative nature, as well as the possibility for a party to apply for exemption from costs or grant the right to assistance. None of the provisions of the PFA excludes in this respect the general provisions of the administrative procedure relating to the elements of the decision.

It should also be noted that in the event of a recovery procedure being initiated, a substantive recovery decision is not issued when the funds were repaid before the decision was taken (Article 207(10) of the PFA). In such a situation, i.e. when the proceedings have already been initiated, and following its initiation the beneficiary has repaid the funds, the proceedings should be discontinued as unfounded pursuant to Article 105(1) of the CAP, as there is a clear legal basis which prevents a substantive decision on the case.

Depending on the authority issuing the recovery decision, it is possible to file an appeal or a request for a re-examination of the case on the basis of Articles 207(12) and (12a) of the PFA.

The final recovery decision is subject to review by the administrative court.

## **5. Conclusions**

The decision on repayment of funds is not an administrative sanction in the strict sense. An administrative sanction is the “negative (unfavourable) consequences for legal entities which do not comply with the obligations arising from legal norms or acts of the application of the law”, imposed by way of an act of application of the law by a public administration body, resulting from an administrative and legal relationship.

An administrative sanction is any consequence of failure to comply with, or incorrect performance of, a particular obligation which should be imposed by the authority responsible for supervising the performance of the obligation in question. Judicature, on the other hand, assumes that sanctions are usually of a repressive nature, but often also serve as an economic incentive.

In administrative law, sanctions play a very important role as, by announcing the negative consequences in the event of a breach of obligations arising from administrative acts, they ensure that those acts are respected and effectively implemented. As a result, sanctioning norms motivate the addressees of these norms to adopt a legalistic approach. The literature points out that in order for administrative acts to be effective, they should, in principle, be accompanied by sanctions. The administrative authority must have the means to carry out its will through administrative coercion, otherwise effective (efficient) administration would not be possible<sup>26</sup>.

In the case of a recovery decision, we are faced with a situation in which the beneficiary has misused the funds granted and is obliged to repay them. The said decision is therefore bound by an administrative order issued by the competent authority when the statutory requirements are fulfilled. In this respect, the need to carry out an administrative enquiry before issuing a substantive decision comes to the fore.

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<sup>26</sup> More broadly M. Szydło, *Charakter i struktura prawna administracyjnych kar pieniężnych*, „*Studia Prawnicze*”, 2003, vol. 4, pp. 123–125; M. Lewicki, *Pojęcie sankcji prawnej w prawie administracyjnym*, „*Państwo i Prawo*”, 2002, vol. 8, p. 75.

It should be stated that without a procedure which respects the general principles of administrative procedure, it is not possible to rule on the merits of the case.

Thus, the reimbursement is always linked to certain economic hardships, which further accentuates the obligation of the authority to carry out the investigation procedure correctly.

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