



**Seminar organized by the Supreme Court of the Republic of Slovenia
and ACA-Europe**

Administrative Sanctions in European law

Ljubljana, 23–24 March 2017

Answers to questionnaire: Germany



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Answers by the Federal Administrative Court of Germany

In a general remark it is to be stated beforehand that in the German legal system administrative sanctions are mostly a response to „regulatory offences“, which are considered being related to or even – in a wider sense – part of penal law. Therefore, they underly principles vastly known to penal law such as *ne bis in idem* and *nulla poena sine lege*. Another consequence is that administrative sanctions do not underly the jurisdiction of the administrative courts, but form part of the competence of the penal courts, which are part of the „ordinary“ jurisdiction. Yet, the administrative jurisdiction is competent to decide on some administrative sanctions which have their legal founding in directly applicable European Union law, such as for example regulations in the law of agricultural subsidies. If the term of administrative sanctions is understood in a very broad way, it may include all measures of law enforcement which fall within the competence of administrative authorities. These measures, aimed at the restoration of legality or the prevention of further infringements of the law, may be subject to proceedings before the administrative courts.

Thus, not every question can be answered. The answers given may partly be *ultra vires*; they may also not cover the problems presented to their full extent.

Part I – The notion of administrative sanctions

I-Q1 – *Are the definitions of administrative sanctions (sanctions for minor offenses) and criminal sanctions precisely regulated at the national level? How is the notion of “administrative sanctions” defined in your administrative practice and case law? How does it differ from the notion of “criminal sanctions”? Is the principle of legality (i.e. the necessity of a legislative act, “no crime without law”, etc.) of the incrimination applicable to administrative sanctions?*

German law determines certain acts to be a criminal offence or a regulatory offence to both of which certain principles of criminal law apply. There is no abstract definition of a criminal offence or even an administrative sanction in the law.

The jurisprudence also does not provide for a definition of administrative sanctions. Where there has been a necessity to distinguish between criminal and administrative sanctions the Federal Administrative Court refers to the purpose of a sanction, whether it is restrictive or preventive (Judgement of 20.2.2014 – 7 C 6.12 – NVwZ 2014, p. 939). In other cases the Court has followed the jurisdiction of the ECJ and the ECHR in the cases C-374/87 – Orkem –, C-2388/99 – Limburgse Vinyl Maatschappij – and C-489/10 – Bonda – (see Judgement of 19.9.2013 – 3 C 25.12 – Recht der Landwirtschaft 2014, p. 137).

If a measure is considered a criminal sanction the principle of *nulla poena sine lege* applies. Apart from that any incriminatory act of state requires an authorization in the law.

Ancillary questions:

With respect to the above question, does your administrative practice and jurisprudence follow ECHR case law (Cases Engel, 5101/71, 5354/72, 5102/71, 5370/72, [1976] ECHR 3, 5100/71, (1976), Jussila, 73053/01, Grande Stevens, 18640/10, 18647/19, 18663/10 in 18698/10)? Do you also apply the approach of the CJEU (for instance in the case Schindler Holding, T-138/07)? Are the ECtHR and CJEU jurisprudence (including EU Charter on Fundamental Rights) applied at the same time?

Is there any statutory-based solution given in this respect by the national legislator or by the administrative authorities?

Do you have examples in practice or case law where the jurisprudence of the EU law is found to be compatible with jurisprudence of the ECtHR (for instance, cases C-210/00 Käserei Champignon Hofmeister GmbH or C-489/10, Łukasz Marcin Bonda). Do the teachings of the CJEU, and in particular its definition of administrative and criminal sanctions, fit within the framework of ECtHR decisions?

How is the EU law requirement -according to which sanctions need to have a deterrent effect- applicable?

The requirement of a deterrent effect in European Union law is to be applied directly by the competent authorities and courts. It is especially relevant to the practice of authorities where the European Union law leaves the dimension of a sanction within the discretion of the competent authorities.

What distinction does your national legal system make between administrative sanctions and other administrative measures to restore compliance with the law? (e.g.: the closure of an exploitation of a waste management facility that was operating without a license v. an administrative fine?)

There may be preventive and punitive acts at the same time. Both follow their own rules and purposes.

I-Q2 - *Are procedural requirements regarding administrative sanctions equally or similarly regulated in the case of criminal sanctions (how far-reaching is the principle of legality, what is the role of the principle of proportionality)?*

The principle of legality and the principle of proportionality are structural principles emanating from the rule of law. They affect the entire legal order. They are thus applicable with criminal and administrative sanctions as well.

Ancillary questions:

With respect to the above question, does your national law offer any regulatory solutions and what is the role of direct applicability of the jurisprudence of the ECtHR and the CJEU?

What are the administrative procedural requirements that are the closest to the ones applicable to criminal sanctions (e.g.: mandatory representation or assistance by an attorney (Cf. “Salduz-doctrine” Salduz v. Turkey, 36391/02), legal help, procedural time limits (including “reasonable time”), the possibility of requiring an oral hearing, burden of proof, competence of courts, legal remedies, application of the principles of reasonability, equality, presumption of innocence, prescription/prohibition of retroactivity, the principle of « retroactivity in mitius », the prohibition of self-incrimination, the principle of the right to appeal, etc.)?

I-Q3 – *Have unwanted consequences ever accrued from the decision of the ECtHR (e.g.: Grande Stevens, No. 18640/10, 18647/19, 18663/10 in 18698/10) (such as decreasing the effectiveness of separated regimes – administrative and criminal- because the administrative sanction, which has the characteristic of criminal sanction, prevents criminal procedure; in line with the principle ne bis in idem)?*

Ancillary questions:

How is the principle ne bis in idem understood in your legal system, taking into account CJEU interpretation (case C-617/10, Fransson) and ECtHR interpretation of Art. 4 of Protocol No. 7 (ECHR (GC) Zolotoukhine/Russia, No. 14939/03)?

Are national courts faced with cases where individuals, subject of administrative sanctions, would like to exclude criminal sanctions and criminal procedures (including in other EU Member states) in order to avoid dual trial? Does your system accept double penalty for non-nationals? (e.g.: criminal punishment for a criminal offense and administrative expulsion at the end of (or during) the sentence (accompanied with a residence ban)?)

A double penalty is not allowed under the principle of *ne bis in idem*. Yet, a criminal sanction and an expulsion may be imposed in parallel procedures. This is possible since the expulsion is not considered a sanction in the criminal sense, but a preventive act to grant public order and security.

Is it possible, in your legal system, that an individual be sanctioned with both - the

administrative and the criminal sanction, and if so, does the criminal sanction take into account the administrative one (i.e. is the administrative sanction considered a part of the criminal sanction)? What role does the EU Charter of Fundamental Rights and the ECHR principle ne bis in idem play in this respect?

Criminal and administrative sanctions are independent of each other, if the latter has no criminal (punitive) character. In this case both can be applied at the same time. The measure of a criminal sanction may consider other consequences the accused may have to bear.

Part II – The system of authorities competent to impose administrative sanctions

II-Q1 – *Is your legal system “unified” or “dual” when it comes to authorities competent to impose administrative sanctions? More specifically: Are the administrative authorities that are competent to adopt administrative sanctions only responsible for their enforcement? Or is it a system where administrative bodies are competent for both the enforcement and the regulation of certain areas of law? (e.g.: in areas like competition or financial transactions, are the authorities that are competent for the regulation of these areas also competent to adopt administrative sanctions in case the rules are not respected?) Or is it a third, mixed, system in which both solutions coexist? And finally, at enforcement level, can the official who discovers an infringement impose an administrative sanction?*

In general, the authority competent for a certain subject-matter is also responsible for the enforcement of its rules on an administrative level, as long as the law does not contain a deviating stipulation. Criminal and regulatory offences, to which the principles of penal law such as *nulla poena sine culpa* apply, remain within the competence of the general prosecuting authorities, which have no specific relation to the subject-matter involved.

II-Q2 – *Does your legal system allow for only one, or several levels of jurisdiction in procedures regarding administrative sanctions? What role is given to the national courts (and to the highest administrative court if it is competent to decide issues of fact and not only issues of law, like a court of cassation) when deciding on administrative sanctions? Do courts only have a supervisory role (i.e. a judicial review, a competence to annul) or are they also competent to reform or adopt (alone) the administrative sanctions?*

As to regulatory offences the legal system provides for two levels of jurisdiction. The decision of the district court may be appealed before a higher court. These courts are competent to alter the sanction imposed upon the accused. In case of a (true) administrative sanction the regular course of instances of the administrative jurisdiction applies. The administrative court as well as the court of appeal are competent to decide on matters of fact and of law, whereas the Federal Administrative Court only decides on matters of law.

II-Q3 – *Is the court's judicial review of administrative sanctions based solely on the legality of the decision, or also on factual questions/circumstances? If there is certain discretion given to the administrative authorities? Can the courts review the discretion exercised by the administrative*

authorities too? (See CJEU C-510/11 P, *Kone and others v. Commission*, as well as *Menarini*, No. 43509/08 of the ECtHR).

If the law leaves the decision on an administrative sanction at the discretion of the competent authority, the courts will in principle have to respect the margin of discretion. Yet, the procedural law provides for a limited control of discretionary decisions which enables the court i.e. to assess the limits of the discretionary margin, the abidance by the purpose of the discretionary rule and the abidance by general principles such as the principle of proportionality.

Part III – Specific questions

III-Q1 - What kind of liability is provided by your national legal system for administrative sanctions: fault-based liability or strict liability? Does your legal system require a fault of the individual as a condition for the administrative sanction (See: CJEU C-210/00 *Käserei Champignon Hofmeister GmbH*)?

The fault-based liability applies where criminal or regulatory offences are involved. Only in the field of (true) administrative sanctions strict liability may be provided for as i.e. in ECJ, C-210/00 – *Käserei Champignon Hofmeister GmbH* – recital 44. As a matter of fact, the question of fault-based and strict liability may be considered the dividing line between poenal (criminal and regulatory) sanctions and (true) administrative sanctions.

III-Q2 – Is it the nature of the administrative act relevant for its judicial review? Is it possible that a judicial review is impeded by the nature of the decision leading to the administrative sanction (when, for example, the act is not considered an administrative act)?

The nature of the act is relevant as to the question of whether the penal jurisdiction or the administrative jurisdiction is competent. In no case will the nature of the act impede legal proceedings. The latter is provided for by the Constitution (Art. 19 § 4).

III-Q3 - What kind of non-financial (non-pecuniary) sanctions are known in your legal system (for instance, the prohibition to pursue one's business or certain professional activities, the deprivation of the ownership, the duty perform certain works, etc.)? More specifically, in matters of urban planning, can an order to restore the site to its original state lead to the demolition of a construction? (case of ECtHR *Hamer/Belgium*, No. 21861/03).

The penal law does not provide for such sanctions. It only knows the deprivation of personal freedom, financial sanctions and in cases where the breach of street traffic rules is involved the temporary prohibition to drive a vehicle. Yet, in administrative law, with a view to restoring legality or preventing further infringements of the law, all the aforementioned sanctions (including, as a last resort, the demolition of a building) are provided for by the law – depending on the relevant subject-matter.

Ancillary questions:

When provided, do non-financial sanctions have to be in causal relation to the (administrative) offence?

Can the sanctions, which are administrative sanctions in their nature, be used in the private law sphere (e.g.: a person not respecting the duty of the alimony: could he/she be sanctioned with the deprivation of his/her car)?

The breach of the duty of alimony may lead to a criminal charge. Therefore regular criminal sanctions will apply.

In your legal system, can administrative sanctions encroach upon ownership rights (Art. 1 of the first protocol ECHR – for instance, freezing of assets, substantive financial penalties, etc.)?

The freezing of assets is only known as a criminal sanction.

III-Q4 – Are there cases in your national system where the organization of the authorities competent to adopt administrative sanctions is based on EU law requirements? This question could, for instance, refer to the leniency program that exists in EU competition law, which allows for the severity of the administrative sanction to depend on the party's ability and willingness to produce evidence, and requires a system where the same authority that hears the case also adopts the sanctions.

III-Q5 – Have your national administrative authorities, or even courts, been faced with the request to apply the jurisprudence of the CJEU and to reopen/change already final administrative decisions on administrative sanctions? Do national rules of administrative procedure (or even rules on court reviews) allow such re-openings of cases?

The re-opening of cases could be possible, although no single case seems apparent.

III-Q6 – Is it possible for the administrative authorities and offenders to negotiate on an administrative sanction (in order to reach a deal), similar to “plea bargaining” in certain criminal procedures? If so, is this a general rule or is it only possible in specific cases? In case a deal is reached, what is its status when a court reviews the case? What is the position and role of the court in such cases?

In criminal matters the law only allows plea bargaining in a very narrow margin. In administrative cases the binding force of the law prevents the authorities to conclude arrangements the law does not provide for. Within the legal margin authorities are free to convene with the parties involved.

Part IV – Additional information (if needed)

In this section, you can add any information on the topic of administrative sanctions in your national legal system that you deem appropriate and that hasn't already been covered in this questionnaire.