



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

**Administrative Sanctions in European law**

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**Answers to questionnaire: Spain**



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## Part I The notion of administrative sanctions

### I-Q1

Administrative sanctions, as well as criminal sanctions are precisely regulated in Spanish national law. Both criminal and administrative infractions are described in detail in national legislation. In fact, this regulation is constrained by the principle of prior definition which is contained in the constitutional level, specifically in article 25 of the Spanish Constitution of 1978.

The main difference that exists between them is contained in article 25.3 of the Spanish Constitution, and consists in the strict ban on the Administration imposing sanctions implying deprivation of freedom. This article states: "The Civil Administration may not impose penalties which directly or indirectly imply deprivation of freedom". Thus, the most perceptible difference between them is the severity or the penalty. Nevertheless, in the concrete sectoral legislation we may find certain higher fines than those which are contained in the criminal legislation. Finally, both legislations, criminal and administrative, include for certain infractions penalties, implying measures such as deprivation of rights or even expulsion of non-citizens from national territory, if we consider penalties established in aliens law.

The principle of legality is applicable to administrative sanctions according to article 25 of the Spanish Constitution, which states that nobody can be punished or sanctioned for an act which before it was committed was not determined by the law to be a crime or an administrative offence. In addition, this principle is also contained in administrative law, in particular in that regulating the administrative procedure.

#### **Ancillary questions:**

Spanish judges and courts follow usually case-law issued by the European Court of Human Rights and the Court of Justice of the European Union in this particular matter. Most particularly, the case-law contained, between others, in *Case Engel* concerning the common punitive nature of both criminal and administrative punitive regulations has been implemented by national Courts in Spain. As a consequence, principles inspiring regulation of criminal offences, sanctions and procedure, such as legality, prior definition or presumption of innocence are, in general, applicable in the administrative punitive field, according to the national case-law.

Spanish judges and courts, according to the European system of multilevel protection of fundamental rights, brought out by the EU Charter on Fundamental Rights and the

European Convention on Human Rights, apply at the same time the jurisprudence issued by European Court of Human Rights and the Court of Justice of the European Convention on Human Rights.

There is not any direct statutory solution in order to ensure the application of case law issued by the European Courts. However, a recent legal reform carried out in the organic law on the judiciary establishes a judicial review of final in case of violation of human rights recognized by the ECHR declared by judgment of the ECtHR. In addition, Act 29/1998, governing contentious-administrative jurisdiction, establishes that the appeal eventually lodged before the Supreme Court -Court of cassation- may be based on the infringement or on the misinterpretation of the case-law issued by the Court of Justice of the European Union regarding European law.

Spanish courts and judges have mainly followed the case-law of the ECtHR in tax matters, specifically in some cases concerning surcharge for late tax payment. More precisely, the judgement dated March 30, 2011, issued by the National High Court -Audiencia Nacional- and confirmed by the Supreme Court, applies the case law contained in case Jussila 73053/01 and, therefore, considers surcharges as a near concept of a sanction in order to apply certain principles of criminal and administrative punitive law such as the principle of liability. However, we don't have examples in practise or case law of simultaneous apply in this matter of case law doctrine of both Courts of Luxemburg and Strasbourg.

In Spanish administrative punitive law, principle of proportionality is expressly provided in article 29 of Law governing Public Sector dated October 1, 2015 and the deterrent factor is taken into consideration by taking into account different circumstances, such as gravity of the offence, repetition of the offence, damages caused or recidivism in a period of one year. In addition, the sanction imposed could not be more beneficial for the offender than the compliance with the rule. In conclusion, according to the domestic law, sanctions should have a deterrent effect at the same time that they should respect the principle of proportionality.

Administrative sectoral legislation provides not only disciplinary proceedings, infractions and sanctions, but also measures to restore legality and to repair consequences unwanted by the law. That is the case, for instance, of building and environmental law. According to Spanish case-law, there are major distinctions between them, with regard to both procedural and substantive aspects. More specifically, Spanish courts have highlighted the difference between the legal authority to impose sanctions and the consequences of failing to comply with the law. The Supreme Court has issued several judgements in this sense (Judgements dated 19 February 2002 and 19 May 2000, among other decisions), in which the Court has emphasized this distinction. In particular, stating that this restoring measures are not subjected to principles of criminal and administrative punitive law, such as legality, culpability or *ne bis in idem*. In this same sense has stated also the Constitutional Court in decision dated 21, November 2000.

## I-Q2

According to a traditional case-law in Spain, principles that inspire criminal sanctions are to be applied to administrative sanctions. Indeed, both the Supreme Court and the Constitutional Court have highlighted, in countless judgements and decisions, that principles inspiring criminal law also apply administrative sanctions, as long as they are both manifestations of the punitive power of the State. More particularly, Spanish Supreme Court of justice has stated that the exercise of public punitive powers must comply with constitutional principles regarding this matter, such as legality, prior description, culpability, presumption of innocence and the right against self-incrimination. In addition, Spanish courts often mention in their judgements articles 6 and 7 of the European Convention of Human Rights and the case-law issued by Court of Strasbourg initiated by *Engel* in 1976. Nevertheless, there are certain nuances in this matter, also admitted by the Constitutional Court, such as the presumption of veracity of acts of denunciation issued by public authorities.

### **Ancillary questions:**

Spanish Law governing Public Sector dated October 1, 2015 contains the regulation of principles according to which the punitive power of the State must be exercised with regard to administrative sanctions. More precisely, it sets the principles of legality, non-retroactivity of un-favourable sanctioning regulations, prior definition, culpability and proportionality of sanctions to be imposed.

As we have already said, Spanish courts usually follow in this matter the case-law issued by the ECtHR and the CJEU, together with the case-law of the Constitutional Court. On the other hand, legal reforms recently undertaken have increased the direct applicability of this case law. Indeed, since 2015, misunderstanding or breach of case law issued by the CJEU may found an appeal before de Supreme Court and trigger a preliminary ruling before the Court of Luxembourg. Moreover, regarding the case law issued by the ECtHR, it has become, in practice, an essential reference for Spanish courts and judges. Besides, as we have pointed out previously, a judgement issued by the ECtHR may provoke a judicial review by the Supreme Court of an unassailable and enforceable judgement, in case of violation of human rights stated by the Court of Strasbourg.

On one side, as we have already mention, Law governing Public Sector establishes, at that regulatory level, a wide range of principles and rights deriving from Criminal law and doctrine that apply to all administrative sanction procedures. On the other side, case law issued by the Constitutional Court (Judgement dated May 15, 2014, among many others), which is binding for inferior courts, as stated direct applicability of this principles to the administrative sanctions. This includes not only substantive principles, such as prior definition or legality, but also the essential procedural principles, such as the right to a defence, the right to legal representation, with certain conditions, the right to be informed of the nature and grounds for the charges, the right of unchangeability of the facts complained, the right to evidence or the right against self-incrimination.

### **I-Q3**

Firstly, the statutory solution to this problem provided by Law governing Public Sector establishes that no sanction could be imposed for the facts that have already been sanctioned, no matter if it is a criminal or an administrative sanction.

Secondly, according to Spanish legislation and practice, in the case that the facts present the appearance of a criminal offence, the administrative procedure should be suspended until the facts are tried by a criminal court. Thus, this should prevent from a dual response of the punitive power of the State, as according to article 14.7 of the International Covenant on Civil and Political Rights, article 4 of Protocol nº 7 of the European Convention on Human Rights, and case law issued by the ECtHR and the Spanish Constitutional Court, no postjudgement procedure should be followed even if the previous procedure finishes by a judgement of acquittal.

Finally, in the case that, anyway, there is an administrative sanction prior to a criminal judgement for the same facts, after a fluctuating body of case law, nowadays, even if the administrative sanction previously imposed should not prevent the criminal sanction, as there is a legal preference for this latter, the case law considers that the amount of the administrative sanction must be taken into account to set the gravity of the criminal penalty.

In conclusion, the effectiveness of separated punitive regimes should not be affected by the case law issued by the ECtHR regarding the principle of *ne bis in idem*.

### **Ancillary questions:**

The principle *ne bis in idem* is not set out, specifically, at the constitutional level. Nevertheless, the Constitutional Court has stated that it is implicitly provided as closely linked

to the principles of legality and prior definition contained in article 25 of the Constitution of 1978.

Spanish Courts and judges follow the case law issued by the CJEU and the ECtHR regarding the principle *ne bis in idem* provided by Article 4 of Protocol nº 7 especially in tax matter. Thus, according to this case law, there is a twofold aspect of this principle: One substantive aspect, which stipulates that no one could be punished twice for the same facts and on the same basis; and one procedural aspect, according to which the principle is not confined to this right as it is extended to the right not to be prosecuted or tried twice, even if the first decision was a decision judgement of acquittal.

Besides, Spanish Supreme Court (Judgements dated 11 April 2014 and 24 February 2016), among others) has stated, following the case law issued by the Court of Justice of the European Union (case C-617/10 *Fransson* and case 17/10 *Toshiba Corporation*), the compatibility between tax surcharge and administrative sanctions, as they are of a distinctly different nature.

Finally, Spanish Courts admit double penalty (criminal and administrative) when they are imposed on different bases. For example, it is admitted dual punishment for civil servants having committed a criminal offense, as after a judgement of conviction they could suffer an administrative penalty (e.g. expulsion from service), as it is taken into account the special connection of the convict with the public service.

As we have already mention, individuals having been subjected to administrative sanctions would want to exclude a criminal procedure. According to Spanish case law, in spite of having been fluctuating in this matter, it is possible to follow a criminal procedure after an administrative sanction even if the facts sanctioned in the administrative procedure are included in some way in the facts subject to a criminal procedure (e.g. drink driving and personal injuries). In this case, according to existing jurisprudence, the administrative sanction must be taken into account to impose the criminal sanction.

Spanish alien legislation establishes (article 57 of the Law on Foreigners dated 11 January 2000) an administrative sanction of expulsion from national territory to be imposed, after following an administrative procedure, in the case of having been imposed a criminal conviction involving a penalty of deprivation of liberty of more than one year.

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

### **II-Q1**

In Spanish legal system, authorities competent to impose administrative sanctions are also responsible for their enforcement. Administrative acts that finish an administrative procedure have enforceability and the administrative authority responsible for its issuing is also competent for its execution, according to the Administrative Procedures Act.

On the other hand, authorities that are competent to adopt administrative sanctions are, in general, not competent for the regulation in the matter. Indeed, according to the Law governing Public Sector, dated 1 October, 2015, the competence for issuing sanctioning regulations remains in the sphere of competence of the government – Council of Ministers-. Nevertheless, in some sectoral regulation, the Council of Ministers is sometimes competent to impose the most severe penalties.

According to Law governing Public Sector, the official who discovers an infringement is only competent to lodge a complaint before the authority responsible for opening the procedure, whereas it is a different authority who has the competence to impose a sanction at the end of the procedure. In conclusion, the official discovering and infringement is never competent to impose directly a sanction.

### **II-Q2**

In general terms, Spanish legal system allows two levels of jurisdiction, first instance and appeal, providing that the amount of the sanction is over thirty thousand euros. If it does not reach that amount there is only one level of jurisdiction. The last level of jurisdiction, in other words, cassation before the Supreme Court, is only possible when the Court appreciates in the case an interest for cassation -*writ of certiorari*- , which is rather exceptional in administrative sanction matter.

National administrative courts, when facing appeals against administrative decisions, are competent to decide not only issues of fact but also issues of law. In other words, they are competent for a full review of the administrative decision. On the other hand, generally speaking, the Supreme Court, when facing an appeal, is only competent to decide issues of law. Finally, in general terms, national courts have only a supervisory role and they are not competent to adopt or impose a sanction. Exceptionally, national case law admits that Courts may lower a sanction on the same basis of facts and infraction; in other words, without changing the factual basis or the legal qualification of the offence.

## **II-Q3**

As we have already mention, the court's judicial review of administrative sanctions in first instance and appeal is not only based on the legality of the decision, but also on the factual questions. As punitive power of the State is based on principle of legality, administrative authorities have only limited discretion when imposing a sanction. In fact, according to case law, they have only a margin of discretion to impose the concrete amount of a sanction, which is, anyway, subjected to judicial review.

Accordingly, we can conclude that, even in areas with great complexity, the review of the cases by the Spanish Courts, provided we are considering punitive matter, involves both the law and the facts, challenging, if necessary, the evidence. Another understanding of this issue could not be in accordance with the requirements of the principle of effective judicial protection established in article 24 of the Spanish Constitution of 1978. In conclusion, the review made by Spanish Courts when facing an appeal in administrative sanction matter is in compliance with case law issued by the Court of Justice of the European Union in case *Kone* (C-510-11) and by the European Court of Human Rights in case *Menarini*.

## **Part III Specific questions.**

### **III-Q1**

According to article 28 of Law governing Public Sector, the liability provided by national law is a fault-based liability. In other words, punishable liability can only be based in wilful misconduct or negligence. Strict liability is not provided in the national sanctioning legal system. Thus, a fault of the individual, natural or legal person, is always required when imposing an administrative sanction.

### **III-Q2**

According to the national legal system, an administrative act imposing a sanction, as far as it is a final act of an administrative procedure, is always subjected to judicial review. There are not "political acts" in this matter exempted from this review. In fact, possible administrative acts imposing sanctions issued by the Council of Ministers are subjected, in case of appeal, to the review of the Administrative Chamber of the Supreme Court.

### **III-Q3**

Article 29 of Law governing Public Sector dated 2015 provides not only financial sanctions, but also non-financial ones. Accordingly, sectoral regulation provides different kind of sanctions, such as deprivation of rights, deprivation of the ownership, confiscation of assets, warnings, suspension of administrative concessions. More specifically, in matter of urban planning, sanctioning regulations provide expressly demolition of constructions as a measure of restoring sites to their original state, in case of unauthorized or illegal constructions.

#### **Ancillary questions:**

Non-financial sanctions provided by the law are subjected to the principle of prior definition and legality and they do not have to be in causal relation to the administrative offence. In other words, the quality or amount of the sanction is usually in relation to the seriousness of the offence, but they do not have to be necessarily in causal relation to it.

Infringements in the private law sphere may imply measures of the same nature of the administrative sanctions. That could be the case not only of financial measures but also of consequences of different nature, such as seizure of property or deprivation of assets.

In Spanish legal system, some administrative sanctions may imply deprivation of ownership rights or property. That is the case, for example, of sanctions in matter of smuggling.

### **III-Q4**

Spanish legislation in the matter of free competition (Defense of Competition Act, dated 3, July 2007) provides a leniency program such as that existing in EU competition law. According to this program, moral persons having committed an infringement in this matter (e.g. participation in a cartel) may obtain a reduction of the sanction in case of making the complaint or providing evidence.

### III-Q5

As far as judgements issued by the Court of Justice of the European Union may have a retroactive effect, according to article 267 of the Treaty on the Functioning of the European Union and case law issued by the Court (C-137/94 case *Richardson*; C-291/03 case *MyTravel*), even if it can be exceptionally limited or nuanced by the Court, Spanish Courts and administrative authorities have faced the review of final administrative decisions in the case of tax setting incompatible with EU law, according to case law of the CJEU.

Article 106 of Law on the General Administrative Procedure, dated 1 October 2015, as it established the former law on the matter, provides the possible review of final administrative acts in case of an act regarded as null and void. Besides, as we have already mention, a recent reform carried out in the Organic Law of the Judiciary, dated 2015, has established the possible judicial review of a final and enforceable judgment, in case of violation of human rights assessed by the Court of Strasbourg.

### III-Q6

In contrast to the criminal procedure, where it is provided in some cases for minor offences, the “plea bargaining” is not provided, as a general rule, in the administrative sanction procedure, as it is strongly governed by the principle of legality. Nevertheless, for some minor administrative infractions, such as traffic offences, it is possible to benefit from a reduction in the amount of the sanction in case of advanced payment. In that case, the administrative procedure finishes by a non-appealable final act.

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