

Administrative sanctioning systems in the EU Member States: a general overview

Dr. Carole M. Billiet

AEAJ Workshop in Riga (Latvia) on 7-8 September 2017, 'Administrative sanctions – orders and execution measures – in case of environmental infringements'

1. Administrative sanctions: a general typology
2. Administrative sanctions in the EU Member States (MS): the EU substratum
3. Administrative sanctioning systems in the EU MS: features and issues
4. Some final points

1. Administrative sanctions: a general typology

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- “Administrative sanction”?
 - A reaction of an administrative authority to a law infringement
 - A law infringement is an explicit legal condition to use the competence
 - Using a unilateral binding administrative decision
 - Burdening the person to whom it is addressed (‘something unpleasant’)
- Three types
 - Situational – acting on the factual situation created by the law infringement
 - Orders: cessation orders (‘stop!’), regularization orders (‘do this, do that’)
 - Administrative action payed by the offender (‘I cleaned up your mess, here is the bill’)
 - Right-depriving –acting on rights, typically rights conferred by whatever authorization, for instance an environmental permit
 - Suspension & withdrawal
 - But also: rights to access to a profession, public tenders, ...
 - Monetary – hurting the purse of the offender
 - Administrative fines
- Some generally remedial >< other generally punitive
 - Situational & Right-depriving >< monetary

2. Administrative sanctions in the EU Member States (MS): the EU substratum

2.1. Actual sanctioning policy : a public law enforcement approach

2.2. Administrative sanctions: EU legislation

2.2.1. A quick overview

2.2.2. Impact on actual enforcement and judicial control

2.1. Actual sanctioning policy : a public law enforcement approach

- 'Public law enforcement' (PLE) approach? A sanctioning system build on criminal & administrative law
- The PLE approach in actual EU environmental sanctioning policy
 - Criminal sanctioning track: today all 28 EU Member States have legislation providing criminal penalties for 9 categories of serious environmental offences
 - Outcome of 'Directive 2008/99/EC on the protection of the environment through criminal law' (Eco-crime Directive), which had to be implemented by 26 December 2010
 - Logic: *ultima ratio*, additional to something else
"Experience has shown that the existing systems of penalties have not been sufficient to achieve complete compliance (...). Such compliance can and should be strengthened by the availability of criminal penalties, which demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law" (cons. 3).
 - EC Communication COM(2011) 573 final 'Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law', 10 and 11: *"If EU action is required, the EU legislator needs to decide whether criminal sanctions are necessary or whether common administrative sanctions are sufficient."*

(...)

“The efficiency of the sanction system must be considered (...). The type of sanction that is considered to be the most appropriate to reach the global objective of being effective, proportionate and dissuasive should be chosen. An administrative sanction can often be decided and executed without delay, and lengthy and resource demanding procedures can thereby be avoided. Administrative sanctions may for this reason be considered in areas where, for example, the offence is not particularly severe or occurs in large numbers as well as in areas where administrative sanctions and procedures are suitable for other reasons (e.g. complex economic assessments). In many cases, administrative law also provides for a broader range of possible sanctions, from fines and suspension of licences to exclusion from entitlement to public benefits, which can be tailored to the specific situation. In many cases, administrative sanctions may therefore be sufficient or even more effective than criminal sanctions.”

2.2. Administrative sanctions: EU legislation

2.2.1. A quick overview

- Adding facts to policy statements: the EU built up a scattered, discrete but quite relevant layer of administrative sanctions from the early days of EU environmental law onwards, within regulations and directives
- Directive 78/176/EEC on waste of the titanium dioxide industry
 - Art. 8.1 (a) and (b): *“The competent authority in the MS (...) shall take all appropriate steps to remedy one of the following situations and, if necessary, shall require the suspension of discharge, dumping, storage, tipping or injection operations”* if (a) monitoring results show that authorization conditions are not met ; (b) acute toxicity test show that toxicity limits are infringed.
- Actual EU Environmental law – a few examples
 - Situational
 - Right-depriving
 - Situational or right-depriving
 - monetary

➤ *Situational sanctions*

- Industrial Emissions Directive 2010/75/EU, Art. 8.2, al. 1, (b) and (c) : *“In the event of a breach of the permit conditions, MS shall ensure that (b) the operator immediately takes the measures necessary to ensure that compliance is restored within the shortest possible time; (c) the competent authority requires the operator to take any appropriate complementary measures that the competent authority considers necessary to restore compliance”*
- Regulation 1013/2006 on shipments of waste, Art. 24.3, al. 1: *“If an illegal shipment is the responsibility of the consignee the competent authority of destination shall ensure that the waste in question is recovered or disposed of in an environmentally sound manner: (a) by the consignee (...)”*
- Directive 1999/13/EC on the limitation of emissions of volatile organic compounds, Art. 10 (a) and (b): *“MS shall take the appropriate measures to ensure that, if it is found that the requirements of this Directive have been breached: (a) the operator (...) takes measures to ensure that compliance is restored within the shortest possible time; (b) <non-compliance + immediate danger to human health> operation of the activity is suspended”*

➤ *Right – depriving sanctions*

- Directive 2009/31/EC on the geological storage of carbon dioxide, Art. 11.3, (b) and (c): *“The competent authority shall (...) as a last resort, withdraw the storage permit (...) (b) if <self-reporting or environmental inspections> show non compliance with permit conditions (...); (c) if it is aware of any other failure by the operator to meet the permit conditions”*
- EMAS-Regulation n° 1221/2009, Art. 29.3: *“The accreditation or licence shall be suspended or withdrawn until assurance of the environmental verifier’s compliance with this Regulation is obtained, as appropriate, depending on the nature and scope of the failure or violation of legal requirements”*

➤ *Situational or right-depriving sanctions – See Directive 78/176/EEC*

➤ *Monetary sanctions*

- Directive 1999/32/EC on the reduction in sulphur content of certain liquid fuels (repealed 2016), Art. 11.2: *“The penalties determined must be effective, proportionate and dissuasive and may include fines calculated in such a way as to ensure that the fines at least deprive those responsible of the economic benefits derived from their infringement and that those fines gradually increase for repeated infringements.”*
- Directive 2006/21/EC on the management of waste from extractive industries, Art. 14: possibility to forfeit the mandatory guarantee, imposed to make sure that the obligations under the permit issued, including after-closure provisions, are complied with.

2.2.2. Impact on actual enforcement and judicial control

Specific sanctioning obligations in regulations

Art. 288, al. 2 TFEU: *“A regulation shall have general application. It shall be binding in its entirety and directly applicable in all MS.”*

Prohibition to copy, yet additional MS-law to give regulations full effect is quite common, e.g. to nominate competent authorities.

Examples mentioned above: limited discretion; obligation to sanction.

One authority cannot hide behind the inactivity of another.

Administrative courts: law applicable in the assessment of the legality of the use made of (lack of) discretion and in a decision about eventual injunctions to issue

Specific sanctioning obligations in directives

Art. 288, al. 3 TFEU: *“A directive shall be binding, as to the results to be achieved, upon each MS to which it is addressed, but shall leave to the national authorities the choice of form and methods.”*

“as to the results to be achieved”: ECJ, reaches out to factual situation – reality has to match results aimed at

Examples mentioned above: (lack of) discretion in choice to enforce, in choice of the sanction contents / the type of sanction

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Backdrop: the general obligation to sanction developed by the ECJ

'The Greek Maize Case' (ECJ 21 September 1989, Commission of the EC against the Hellenic Republic, C-68/88), building on the principle of sincere cooperation:

"23. It should be observed that where Community legislation does not specifically provide any penalty for a infringement or refers for that purpose to national laws, regulations and administrative provisions, Article [4.3 of the TEU] requires the MS to take all measures necessary to guarantee the application and effectiveness of Community law.

24. For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.

25. Moreover, the national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws."

3. Administrative sanctioning systems in the EU MS: features and good practices

3.1. Dominant features

3.1.1. Administrative sanctioning toolkits contain punitive and remedial sanctions

3.1.2. Administrative sanctioning is the stronghold of PLE

3.2. Good practices

Useful source: implementation study Eco-crime Directive, national reports (2012 and 2013-2016). See http://ec.europa.eu/justice/criminal/criminal-law-policy/environmental-protection/index_en.htm

3.1. Dominant features

3.1.1. Administrative sanctioning toolkits contain punitive (minimally fines) and remedial sanctions

YES, both punitive and remedial administrative sanctions

Austria, Belgium (Federal State, Brussels-Capital Region, Flemish Region Walloon Region), Bulgaria, Cyprus, Czech Republic, Estonia, Greece, Italy, Latvia, Lithuania, The Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, UK

NO, remedial administrative sanctions only

Denmark, Finland, Croatia, Ireland, Luxembourg, Malta

France? Hungary?

3.1.2. Administrative sanctioning is the stronghold of PLE

Today, administrative sanctioning is the stronghold of PLE and as such matters tremendously to environmental law enforcement

- Some countries barely have a criminal sanctioning practice
 - Austria, Czech Republic, Latvia
- Some countries rely on administrative penalties to punish legal persons, traditionally key offenders in environmental crime
 - Bulgaria, Germany, Latvia and Sweden
- Administrative sanctioning is equipped with a wide array of sanctions, with a remedial sanctioning tradition
- Administrative sanctioning is systematically operated, at least partially by specialized enforcement actors
 - A guarantee of two key assets: expertise and prioritization

3.2. Good practices

- Codification of administrative sanctions
 - Portugal (2006, amended 2009)
 - Issue: scattered and inconsistent sanctions
- Pimping the toolkit, allowing for a cost-effective and proportionate sanctioning response
 - UK, England and Wales (reforms 2007-2010)
 - Issue: lack of means (manpower, budgets, ...) and lack of action due to disproportional sanctioning options
- Systematic talking with the key actor of criminal enforcement
 - Romania: collaboration protocol 1469/SB/21 March 2006
 - Issue: ineffective information gathering and transmission and ineffective task-divisions
- A system approach at PLE-level: utterly clear priority rules
 - Belgium, the Flemish Region, environmental enforcement law reform of 2007-2009
 - Issue: cluttering each others action paths, damaging effective criminal as well as effective administrative sanctioning responses to environmental offences

4. Some final points

1/ Administrative sanctions are an essential building block of EU environmental enforcement policy

a/ in ongoing policy developments

b/ in a well-established legislative tradition

‘The Hidden Face of the Moon’?

2/ Specific administrative sanctioning obligations stipulated in Regulations and Directives are a source of sanctioning duties at the level of MS. They create (Regulations) or ‘coat’ (Directives) two choices: the discretion to act (or not) against the offences aimed at and the discretion in the choice of the type of sanction.

3/ Administrative sanctions deserve attention and care, also at the judicial level, because of their crucial position in environmental law enforcement

4/ Some EU MS demonstrate Good Practices that could give inspiration to other MS *de lege ferenda*

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