



MAX PLANCK INSTITUTE
FOR COMPARATIVE PUBLIC LAW
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Ineffectiveness of Administrative Punishments: Legal Consequences Under a Multi-Level Perspective.

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In the 20th century, the majority of western countries have adopted administrative punitive systems. Administrative sanctions have been seen by States mainly as means to reduce the amount of work of criminal courts. As a consequence, the (supposed) effectiveness of administrative punishments was, eventually, conceived of as resulting from the reduction of guarantees that characterized administrative proceedings compared to criminal ones.

The evolution of the supranational legal environment changed this *status quo*. On the one hand, the European Union, which has no competence in criminal matters, is asking for an effective administrative punitive system in order to protect its interests. On the other, the ECtHR clearly stated that although Member States have a margin of appreciation in the design of the punitive system, this discretion cannot imply a reduction of the guarantees that the Convention provides to individuals. In order to address this problem, the Strasbourg Court has created the substantive notion of "punitive sanction". This notion prevents Member States from eluding the conventional guarantees in the presence of a substantial "punitive sanction".

In this presentation, I would like to address a series of questions concerning the dilemma of granting the effectiveness of administrative sanctions without diminishing the guarantees for the individual. First of all, some issues about legal theory arise: Is effectiveness a descriptive or, rather, a prescriptive concept? Can it be qualified as a legal principle? If so, what are the legal consequences of its violation?

On the one hand, violations can be carried out by legislative powers and remedies should be found both at the supranational and at the constitutional level. In this perspective, it is interesting to address whether the rationality test and/or the proportionality test can allow for the enforcement of the effectiveness principle. On the other hand, violations can also arise at the moment of the application of the sanction by an administrative body. On this side, two main issues emerge: firstly, the role, if any, played by the administrative discretionary powers in order to assure the effectiveness of the sanction and, secondly, the features that the judicial control on those powers should present.

The answers to these questions can lead us to rethink the notions of subsidiarity between criminal and administrative punishments, challenging the "dogma" of the perfect parallelism.



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