

The distinction between supervisory decisions, administrative measures and administrative sanctions

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The rationale of the distinction between supervisory decisions, administrative measures and administrative sanctions

1. The need to establish which authority is competent (ECB/NCAs) and which safeguards apply to each kind of decisions
2. SSMR provides for general rules (Article 6) on the allocation of supervisory tasks/decisions based on the status of significant or less significant of the credit institution concerned
3. and special ones (Article 18) on the allocation of sanctioning decisions based - besides the status of the credit institution concerned - on some additional criteria: (i) the nature of the infringed law: EU law/national law; (ii) the nature of the sanction: pecuniary/non-pecuniary; (iii) the status of the addressee: legal person/natural person)

The rationale of the distinction between supervisory decisions, administrative measures and administrative sanctions

1. Administrative measures addressed to credit institutions are not specifically mentioned in Article 18 SSMR and are therefore subject to the general rule on the allocation of competences under Article 6 SSMR
2. ECB may not adopt non-pecuniary sanctions under Article 18 SSMR, but may only ask NCAs to apply them
3. Establishing whether a decision is an administrative measure or a non-pecuniary sanction has therefore an impact on the allocation of competences within the SSM

The rationale of the distinction between supervisory decisions, administrative measures and administrative sanctions

1. Safeguards granted by EU/national law to the addressees of an ECB/NCAs decision gradually increase as we move from supervisory decisions to sanctions (particularly those having criminal nature)
2. Supervisory decisions (statement of reasons; right to be heard/access to files: Article 22 SSMR); whether additional safeguards applicable to the administrative measures; administrative sanctions: culpability, right to remain silent, principle of separation, ne bis in idem/proportionality
3. Establishing whether a decision is a supervisory decision, an administrative measure or an administrative sanction impinges on the safeguards applicable to its addressee

The first step: the distinction between supervisory decisions and administrative measures and sanctions

1. The criteria under Article 65 CRD IV
2. Unlike the supervisory decisions, administrative measures and sanctions may be adopted only where a previous violation of CRR/national law transposing CRD IV has been committed
3. Unlike the supervisory decisions, administrative measures and administrative sanctions need to be (not only proportionate and effective but also) dissuasive
4. What about the withdrawal of the banking license under Article 18 CRD IV?
5. What about the removal under Article 16(2)(m) SSMR?

The second step: the distinction between administrative measures and administrative sanctions

1. Apart from the pecuniary administrative penalties, the wording of Articles 66(2) and 67(2) gives no criteria for distinguishing between administrative measures and (non-pecuniary) sanctions
2. As administrative measures and sanctions are definitively provided for in national law transposing CRD IV, ECB should follow the (maybe different) qualifications under national law
3. This criterion is in line with the ECB obligation to apply national law transposing EU law (Article 4(3) SSMR) but may impair the equal treatment of credit institutions (Article 1 SSMR)

The second step: the distinction between administrative measures and administrative sanctions

1. Alternatively, ECB could follow the criterion established by the case law of the CJEU based on the aim – reparatory or punitive - of the decision: case C-489/10, *Bonda*, § 40)
2. This criterion, while ensuring the uniform application of the ECB forms of reaction to previous violations, may be not compliant with the ECB obligation to apply national law transposing EU law
3. Nevertheless, the principle of the primacy of EU law should oblige the ECB to apply national law in accordance with EU law (recital 34 SSMR)

The second step: the distinction between administrative measures and administrative sanctions

1. The application of the second criterion (aim of the decision) may lead to the following qualifications
2. Public statement: negative reputation effect on the offender; punitive aim; sanction
3. Cease and desist order: order requiring to cease the conduct and desist from its repetition; aim of restoring the public interest harmed by the offender; measure
4. Withdrawal of the authorisation (under Article 67(2) CRD IV): both reparatory and punitive aim; but such a reaction to the unlawful behaviour is too severe to consider the aim of the withdrawal as reparatory
5. Temporary ban: from exercising functions in institutions; restores governance arrangements/measure; punishes the offender as the ban is extended to institutions in general/sanction

The second step: the distinction between administrative measures and administrative sanctions

1. Suspension of voting rights: reparatory or punitive aim, depending on the circumstances of the case
2. Two kind of violations: under 66(1)(c) and (d)
3. Under 66(1)(c): the shareholder acquires/increases its stake without notifying in writing the competent authority during the assessment period or acquires/increases its stake against the opposition of this authority
4. The “suspension” here is only aimed at impeding the exercise of the voting rights by a shareholder that the supervisory authority had no the opportunity to scrutinise or that the supervisory authority considered as not fit and proper
5. As the purpose of the suspension is to restore the public interest harmed by the offender the decision should be considered as a measure.

The second step: the distinction between administrative measures and administrative sanctions

1. In the second case (provided for under letter d) of Article 66(1)) the qualifying shareholder disposes of/reduces its stake without notifying in writing the competent authority
2. In the event of a partial disposal not notified to the authority the suspension is only aimed at punishing the offender for non-compliance with the rules on notification
3. Thus the decision should be considered as a penalty.

The second step: the distinction between administrative measures and administrative sanctions

1. The uncertain nature of the periodic penalty payments (adopted by the ECB in case of a continued infringement): whether administrative measures or sanctions
2. EU regulation 2532/98 as amended by regulation 2015/159; Article 129 SSMFR
3. Two alternatives depending on the aim of the decision: administrative measures, where adopted with a view to compelling the addressee to comply with an ECB regulation or decision; administrative penalties, where adopted with a view to punishing the offender
4. In the first case: they cannot be adopted after the infringement has been terminated; accumulation or bis in idem?

A third step: criteria for identifying sanctions having *coloration pénale*

1. Due to the severity of the fine the offender risks incurring, the ECB/NCAs penalties under SSMR and national law transposing CRD IV may be considered as having *coloration pénale*
2. ECtHR: *Engel*, § 82; *Zolotukhin*, § 53 ff.; CJEU: *Bonda*, § § 36 ff.