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APPLICATION OF THE ADMINISTRATIVE FINES SYSTEM TO FRENCH LABOUR LAW

Key words: administrative fine, appeal, breaches, debtor, labour law, liability, prosecution

Summary

The growing use of administrative fines in labour law warrants an explanatory analysis that considers both legislative and regulatory texts, as well as case law. Following the general legal framework, this recourse to administrative sanctions allows public authorities to save considerable time in enforcing established standards, with a limited risk of litigation.

Introduction

Origin

The administration has the power to punish the perpetrator of an offense by imposing an administrative fine. This is indeed a matter of sanctioning after the fact those who have not complied with the legislation, and not of preventing a potential breach of public order beforehand. This fine does not have a compensatory purpose, as is the case in tax law when a taxpayer is ordered to pay the State an amount corresponding to back taxes. This recourse to administrative fines is unusual. Traditionally, the public authorities sanction violations of the rules they prescribe through criminal penalties handled by the criminal courts. Overriding the objection of a violation of the principle of the separation of powers, the Constitutional Council ruled that the administration could both judge and punish.[1] The legislature has created numerous cases of application.

[1] Cons. const. 17 January 1989, Liberte de communication, No. 88-248 DC.

Cases of application

There are many situations in which administrative fines can be applied. Examples include public service law, which allows for disciplinary action against public officials; tax law, which can impose fines for late tax payments; administrative law, which authorizes independent administrative authorities – such as the High Council for Audiovisual Media or the Competition Authority – to issue fines; and labour law, the subject of this study. The success of administrative fines is well-established. They allow the administration to quickly sanction misconduct while avoiding the inherent difficulties of judicial review. Only challenges to these fines before the administrative courts can cause delays. After examining the general framework of administrative fines in French law (I), we will focus more specifically on their implementation in labour law (II).

1. General Law of Administrative Fines in France

1.1. Origin

The use of administrative fines is not a natural phenomenon. It developed over time, becoming established in the various branches of public law, and subsequently in private law. The result of this development allows for a better understanding of its implementation mechanisms.

1.2. Development, foundation, constitutional case law

It was through its significant 1989 rulings that the Constitutional Council validated the possibility for the administration to sanction an offense by imposing a fine. The Council, however, required respect for the rights of the defence. He thus decided that "neither the principle of the separation of powers, nor any principle or rule of constitutional value, prevents an administrative authority, acting within the framework of prerogatives of public power, from exercising a power of sanction provided that, on the one hand, the sanction that may be imposed excludes any deprivation of liberty and, on the other hand, the exercise of the power of sanction is accompanied by law by measures intended to safeguard constitutionally guaranteed rights and freedoms." The judges of the Constitutional Council added that "a sentence can only be imposed if the principle of legality of offenses and penalties, the principle of necessity of penalties, the principle of non-retroactivity of criminal laws establishing more severe offenses, and the principle of the rights of the defines are respected," and that "these requirements apply not only to sentences handed down by criminal courts but also to any sanction that constitutes a punishment, even if the legislature has entrusted its pronouncement to a non-judicial authority." The administration is therefore not free to act arbitrarily. It must respect fundamental rights relating to the definition of an offense, as well as

the rights of the defence. The introduction of the priority preliminary ruling on constitutionality in 2008 allowed the Council to confirm its approach.[2]

2. European case law

In European law, the term "accusation" in criminal matters, as defined in Article 6 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, is broadly interpreted. It can encompass not only judicial proceedings but also administrative ones.[3] Based on this analysis, the Council of State ruled that tax penalties fall under the scope of criminal law,[4] as do financial sanctions imposed, in particular, by the Financial Markets Authority.[5]

2.1. Procedure

2.1.1. Rights of the defence. A fundamental principle of any democratic state, the rights of the defines were enshrined in administrative law as early as the end of the Second World War.[6] As a general principle of law, it applies independently of any specific legislation, including administrative sanctions. This principle requires respect for the adversarial process, allowing individuals to contest the fine imposed upon them. In practice, the accused must be able to consult the case file and be aware of the charges against them[7] in order to submit oral or written[8] observations, possibly with the assistance of a lawyer. The legislature has since enshrined these rules.[9]

2.1.2. Publicity of proceedings. Applying European case law, the administrative judge requires public hearings for disciplinary proceedings before professional bodies.[10] However, in the absence of specific legislation, this publicity is not required for sanctions imposed by an administrative authority. The possibility of an appeal to the administrative judge, who rules publicly, is sufficient to respect the fundamental principles of procedure.[11]

2.1.3. Reasoning. A fundamental principle of all contentious or administrative proceedings, reasoning limits the arbitrariness of the judge or the administration. It obliges them to explain their decision and allows for verification of the principle of proportionality between the sanction imposed and the alleged facts. Beyond

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2 Cons. const. QPC 25 November 2011, No. 2011-199.

3 ECtHR judgment, 8 June 1976, Engel et autres c. Pays-Bas, No. 5100/71.

4 CE, 31 March 1995, Ministre du budget c/ Auto-Industrie, No. 164008.

5 CE, 24 February 2005, Societe GSD gestions et M.G. No. 269001.

6 CE, 5 May 1944, Dame Veuve Trompier-Gravier : Rec. p. 133.

7 CE, 22 November 1995, No. 171045.

8 CE, 26 March 1982, No. 20569.

9 C. des relations entre le public et l'administration, art. L. 122-1 et L. 122-2.

10 CE, 14 February 1996, Maubleu, No. 132369.

11 CE, 10 May 2004, Credit du Nord, No. 241587.

the right to information that it embodies, reasoning also allows for understanding the sanction and even challenging it. The judge must be attentive to its respect.[12]

2.1.4. Impartiality. A general principle of law, impartiality is a constant in all proceedings. It applies both to the individual making the contested decision and to their environment and any other positions they may hold that could cast doubt on their independence and objectivity.[13] Thus, a member of the sanctions committee of the Financial Markets Authority cannot objectively sit on the executive committee of a banking group whose subsidiary is involved in the proceedings.[14] In doing so, the national judge follows the line of European case law, which deems it "necessary to more precisely define the power to initiate proceedings *ex officio* so as to eliminate the impression that the applicant's guilt has been established from the outset of the proceedings".[15] Accordingly, the same person cannot simultaneously participate in the investigation of a case and in its judgment.[16] The Constitutional Council adopts this analysis.[17]

2.2. Framework

2.2.1. Legality of offenses and penalties. The alleged offenses and the applicable penalties must be defined precisely and exhaustively in advance.[18] This rule applies to both criminal and administrative sanctions. It is therefore the responsibility of the legislature to determine the system of administrative sanctions, including the severity of the penalty and the constituent elements of the offense.[19]

2.2.2. Retroactivity of more lenient criminal law. This principle of the retroactivity of more lenient criminal law has constitutional value. It is binding on judges, particularly administrative judges, who require its respect in matters of administrative sanctions such as tax surcharges[20] or traffic fines[21]. Determining whether a criminal law is more lenient or not is not always straightforward. This is the case, for example, with the repeal of regulations that previously penalized an offense.

2.2.3. Personal liability. Vicarious criminal liability is prohibited. Only the person found guilty must pay the fine in question. The administrative judge affirms that "the constitutional principle of personal responsibility in criminal

[12] CE, 3 May 1961, No. 52312 : Rec. p. 367.
[13] CE, Ass. 4 July 2003, No. 234353.
[14] CE, 30 May 2007, No. 288538.
[15] Cour EDH, 11 June 2009, Dubus c/ France (affaire No. 5242/04).
[16] CE, Ass., 21 December 2012, Societe groupe canal Plus, No. 353856.
[17] Cons. const. No. 2011-200, QPC, 2 December 2011.
[18] CE, 9 October 1996, No. 170363.
[19] CE, 2 July 2007, No. 285485.
[20] CE, 3 December 1999, No. 162925.
[21] CE, 23 July 1976, No. 99520.

matters is applicable to administrative and disciplinary sanctions."[22] Only the convicted person should suffer the consequences of the sanction. In other words, personal responsibility implies the individual nature of penalties, which is a general principle of law. These two principles are interrelated and embody the presumption of innocence enshrined in Article 9 of the Declaration of the Rights of Man and of the Citizen of 1789.

2.2.4. Proportionality of penalties. Based on Article 8 of the aforementioned Declaration, which states that "the law should only establish penalties that are strictly and obviously necessary," this principle implies that the sanction provided for by law must be proportionate to the seriousness of the alleged offense. In the context of an appeal for abuse of power, the administrative judge simply verifies any manifest error of judgment by the administration.[23] The principle therefore applies both to the author of the text and to the one who implements it. Both national[24] and European[25] judges are particularly vigilant regarding automatic sanctions that leave very little room for administrative discretion in their implementation.

2.2.5. *Non-bis in idem*. A general principle of law, the non-accumulation of administrative sanctions is broadly applied. It means that "the same offense can only give rise to one administrative sanction, unless the law provides otherwise.[26]" While two administrative sanctions cannot be imposed simultaneously, the judge may take into account the fact that a sanction has already been imposed when assessing the severity of a subsequent sanction resulting from further conduct.[27] Furthermore, the imposition of an administrative sanction is not incompatible with that of a criminal sanction "provided that the institution of each of these types of sanctions is based on a different objective and aims to safeguard values or interests that are not identical."[28] To respect the principle of proportionality, the Constitutional Council requires, however, that "the total amount of any sanctions imposed must not exceed the highest amount of any one of the applicable sanctions".[29]

2.3. Implementation

Various avenues of appeal exist for controlling the use of administrative fines. Once exercised, they are now subject to in-depth review.

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[22] CE, 29 October 2007, No. 307736.
[23] CE, 30 May 2012, No. 351551.
[24] CE, 30 November 2007, No. 292705.
[25] ECtHR judgment, 7 June 2012, Segame SA c/ France, No. 4837/06.
[26] CE, 30 December 2016, No. 395681.
[27] CE, 14 June 1991, No. 107365.
[28] CE, 29 April 2004, No. 370136.
[29] Cons. const. 18 March 2015, No. 2014-453/454, QPC.

Expanded judicial review

2.3.1. Traditional appeals. Appeals to the administrative judge can be made through the traditional methods of an appeal for abuse of power or a full appeal. The former is mandatory when challenging an administrative sanction imposed by the administration on one of its employees. The judge will then conduct a factual review of the facts to ensure their veracity and seriousness, verifying compliance with the principle of proportionality. The latter is reserved for reviewing sanctions imposed by administrative authorities. The judge can then adjust the amount of the penalty without being solely required to annul the sanction or dismiss the appeal. While lower court judges have broad discretionary power, they remain subject to review by the Council of State.[30]

2.3.2. Emergency appeal. Despite its enforceable nature, the request for a suspension of an administrative sanction is subject to the constitutionally protected rights of the individual. The Council affirms: "The right of a litigant filing an appeal against a decision of this body (the Competition Authority) to request and obtain, where applicable, a stay of execution of the contested decision constitutes an essential guarantee of the rights of the defence.[31]" This interim injunction[32] allows, in cases of urgency and doubt regarding the legality of the measure, the suspension of the administrative decision until a judgment is rendered. The individual may also opt for an interim injunction, which allows for the preservation of fundamental rights in cases of manifestly unlawful infringement of the individual's basic rights.[33] The judge rules within 48 hours of being seized of the matter.

2.4. In-depth judicial review

2.4.1. Judicial review of abuse of power. To limit the scope of jurisdictional immunity, public authorities have increased the number of acts that can be subject to judicial review. This is particularly true of measures taken with regard to military personnel.[34] Under pressure from the European Court of Justice and the Constitutional Court, the Council of State has also strengthened its oversight of the principle of proportionality between the offense and the penalty, no longer limiting itself to verifying the factual accuracy of the facts but now also assessing the legality of the measure. This review is comprehensive for all sanctioned public officials.[35]

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30 CE, ass. 30 December 2014, No. 381245.

31 Cons. const. 23 January 1987, No. 86-224 DC.

32 C. adm. Art. L. 521-1.

33 C. adm. Art. 521-2.

34 CE, 17 February 1995, No. 107766 et No. 97754.

35 CE, ass. 1 June 2015, No. 380449.

2.4.2. Full jurisdiction review. The administrative judge has progressively broadened the scope of full jurisdiction to include cases previously excluded. This is the case for the unemployed[36] or motorists penalized with points deductions. Beyond the personal sphere, while the review focuses on the sanction itself, it has also extended to its publication and any prior administrative inquiry.[37] Furthermore, in the context of full judicial review, and unlike an appeal for abuse of power, the administrative judge conducts a case-by-case analysis of the sanction imposed, particularly its financial repercussions. This point is especially important in labour law.[38]

2.4.3. Post-litigation review. The jurisprudential development highlighted is all the more remarkable given that the identified violation of a fundamental right of the individual constitutes a new element that can allow for the early termination of the administrative sanction.[39] This termination is not always definitively established.

3. Imposing administrative fines in French labour law

3.1. Legislative context

To expedite the enforcement process while limiting legal proceedings,[40] public authorities have granted the labour inspectorate the power to impose sanctions, independently and easily, for violations of certain behaviours observed during inspections. The possibility of imposing administrative fines stems from the slowness and cumbersome nature of the criminal justice system, or even its neglect, as labour law is rarely a priority in the courts' criminal policy. Thus, a specific Chapter V on "administrative fines" was created in the Labour Code, itself inserted into Title I concerning the jurisdiction and means of intervention of the labour inspectorate. The provisions in question are derived from Article 5 of Ordinance No. 2016-413 of 7 April 2016, concerning the enforcement of labour law,[41] as amended by Law No. 2018-727 of 10 August 2018, for a State serving a society of trust.[42]

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[36] CE, 23 February 2011, No. 332837.

[37] CE, 12 June 2013, No. 349185.

[38] CE, 27 June 2007, No. 276076.

[39] CE, ass. 30 July 2014, No. 358564. – CE, 9 March 2016, No. 392782.

[40] Coeuret A., Duquesne F., Jonin D. Punir sans juger en droit du travail [Punishing without trial in labour law]. RJS, 2016, p. 555.

[41] Ord. No. 2016-413 du 7 April 2016, relative au controle de l'application du droit du travail [relating to the monitoring of the application of labour law], JO 8 April 2016. – decret No. 2016-510 du 25 April 2016 (JO 27 April 2016) – (Circ. 18 July 2016 : BO Justice No. 2016-07, 29 July 2016).

[42] L. No. 2018-727 du 10 aout 2018, pour un Etat au service d'une societe de confiance [for a state at the service of a society of trust], JO 11 aout 2018.

3.2. Tools

The labour administration has other tools at its disposal to penalize violations of social standards. In matters of occupational health and safety, it can order the suspension of an activity to protect workers' health. Regarding the dismissal of protected employees, it can prohibit the termination of the employment contract if the conditions of its implementation are discriminatory, unjustified, or disregard procedural rules. Financial penalties are simply an additional tool enabling state agents to enforce labour law within companies. The objective is to ensure greater effectiveness of labour law by allowing the administration to directly penalize a number of violations of the Labour Code and collective bargaining agreements.

3.3. Statistics

The number of fines issued is increasing year after year.[43] While only 453 fines were issued in 2016, totalling €2.4 million, this number rose to over 1200 fines representing nearly €7 million by 2020, and is projected to exceed 2000 fines by 2024. The construction and public works sector, as well as the road transport sector, alone account for nearly 75% of prosecutions. Regulations concerning working time and health and safety are the areas most affected. Therefore, it is necessary to examine the framework for intervention before considering its modalities.

4. Context of the intervention

This framework requires examining the scope of administrative fines and the procedures for prosecution.

4.1. Scope

4.1.1. Framework. Article L. 8115-1 of the French Labour Code specifies the persons authorized to impose an administrative fine and the types of conduct that may be subject to it.

4.2. Personal scope

4.2.1. Competent authority. Paragraph 1 of the aforementioned Article L. 8115-1 specifies that "the competent administrative authority may, upon a report from the labour inspector mentioned in Article L. 8112-1…" take the measures analysed below. The relevant administrative authority is the Regional or Departmental Directorate for Employment, Labour, and Solidarity (DREETS). This department can only intervene, however, on the basis of a report from a labour

[43] Statistiques consultables sur le site de la DGT [statistics can be viewed on the digital website].

inspector, whose status is defined by Article L. 8112-1, guaranteeing them, in particular, independence in their actions.

4.3. Scope of application

4.3.1. General and limited framework. Article L. 8115-1 of the French Labour Code authorizes the labour administration to impose administrative fines in strictly defined areas: violations of maximum working hours, failure to respect rest periods, failure to keep records of working hours, violations of provisions relating to the statutory or collectively agreed minimum wage, and violations of certain applicable health and safety standards at work.[44] From this short list, three areas stand out: working hours, the minimum wage, and worker safety. While these three themes are essential, they are far from covering all the mandatory rules of labour law. Thus, the rules relating to employee recruitment, the misuse of temporary contracts, violations of the rules governing the transfer of employment contracts in the event of restructuring, discrimination, or harassment are not targeted. No aspect of collective relations is addressed either, even though the administration is likely to intervene in each of these areas, whether it concerns the right to employee representation, collective bargaining agreements, or collective disputes. Therefore, the entire scope of fundamental freedoms is not targeted. Two reasons explain this choice. First, violations of these provisions are already subject to specific criminal or civil penalties. Not granting the labour administration independent sanctioning powers does not mean the absence of impunity, as the legislature has provided for numerous minor offenses and misdemeanours in this area. Second, Article L. 8115-1 is particularly flexible regarding the conditions for potential administrative sanctions. Indeed, there is no need to establish intentional misconduct on the part of the employer, as is the case in criminal law. The finding of a simple "breach", which the supervisory authority assesses at its sole discretion, is sufficient. Therefore, further broadening the scope of the law risked subjecting companies to excessive arbitrariness that might not have passed the Constitutional Council's scrutiny. Nevertheless, the legislature retains the power, if it so chooses, to expand the scope of the current legislation.

4.3.2. Specific breaches. The legislation also provides for the possibility of imposing administrative fines in various areas: breaches of posting rules, such as those relating to the declaration[45] or posting of applicable regulations; failure by the employer to comply with a formal notice to cease a situation of serious breach of regulations concerning working hours, rest periods, wages, or working

[44] On peut citer les prescriptions relatives aux installations sanitaires, a la restauration et a l'hebergement, ainsi qu'aux techniques de protection durant l'execution des travaux de batiment et genie civil (C. trav., art. L. 8115, al. 6) [Examples include regulations relating to sanitary facilities, catering and accommodation, as well as protection techniques during the execution of building and civil engineering works].

[45] C. trav. Art. L. 1264-1 à L. 1264-3.

or accommodation conditions contrary to human dignity;[46] and violations of the provisions relating to the construction industry identification card.[47]

4.3.3. Strict interpretation of the scope. Given that the aforementioned Article L. 8115-1 and the other provisions cited establish a limited list of possible offenses, the administrative judge decided, based on the principle of strict interpretation of criminal law, not to broaden the material scope of the provision. The administration therefore does not have the right to impose an administrative fine to penalize an employer who has failed to declare some of their employees,[48] as undeclared work is not a specific offense. This analysis seems appropriate. According to established administrative case law, offenses subject to administrative sanctions are to be interpreted strictly, particularly in tax matters.[49] There is no reason why this should be any different in labour law. Like the criminal court, the administration must simply apply the law strictly and cannot grant itself the prerogative of giving it a meaning or scope that the public authorities have not foreseen or even intended. The principle of the separation of powers and the preservation of individual liberties dictate such a solution.

4.3.4. Strict interpretation of the offense. Not only can the administration not impose a fine for conduct not covered by the public authorities, but for conduct that is covered, it must be careful to interpret it strictly. Thus, in a company where some employees work according to regularly posted collective schedules,[50] the authorities cannot infer that the other group works individual schedules, obligating the employer to establish individual records of working hours,[51] when these employees also work collectively but according to schedules distinct from the other group. While the authorities did respect the scope of Article L. 8115-1, they could not impose a fine based on employer conduct that is not prohibited by any law. An employer can have employees work in two groups, each with distinct schedules, without the existence of a group implying that those not belonging to it should be subject to individual schedules with the constraints that accompany this system. To assert the contrary would amount to calling into question the employer's management and leadership authority,[52] as well as the theory that the employer is the sole judge protecting the constitutionally protected freedom to conduct business. From this observation, case law deduces that the principle of legality of offenses and penalties prevents the administration from imposing a sanction if, at the time of the disputed events, it did not appear reasonably foreseeable to the individual concerned that the conduct in question was liable to be sanctioned.[53]

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46 C. trav. Art. L. 1263-6.

47 C. trav. Art. L. 8291-2.

48 TA Marseille, 19 November 2019, No. 1704847, SAS Manexe : JCP S 2020, 1022, concl. X. Haili.

49 CE, 16 April 2010, No. 313456, M. Kaspereit : JurisData No. 2010-004214 ; RJF 2010, No. 680, concl. L. Olleon.

50 C. trav. Art. L. 3171-1 et D. 3171-1.

51 C. trav. Art. D. 3171-7.

52 Cass. ass. plen. 8 December 2000, No. 97-44.219, SAT, JCP E 2001, p. 426, note F. Duquesne.

53 CE, 1er February 2023, No. 457116 : JCP S 2023, 1068, note F. Duquesne.

The administration cannot replace the applicable working hours system with one it deems more appropriate given the working conditions. With regard to punitive mechanisms, it is the right to a fair trial, as enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, that is guaranteed by the judge.

5. Prosecutions

5.1. Framework. Prosecutions initiated by the labour administration are governed by several standard rules concerning the appropriateness of prosecution, the framework of a report drafted by the labour inspector, and the risk of combining administrative and criminal proceedings.

5.2. Principle: Discretionary power

5.2.1. Advantage of prosecution. Conventions No. 81 and 129 of the International Labour Organization, in Articles 17 and 81 respectively, guarantee significant discretionary power to labour inspectors in exercising their enforcement authority. Thus, those concerned can choose a middle ground between no sanctions and the purely punitive approach of imposing fines. Indeed, since the aforementioned 2018 law, the administration can opt for a middle ground by issuing a warning, which offers two advantages. Firstly, the measure in question expands the range of actions the administration can take. It strengthens its discretionary power, allowing it to closely align with the social reality and the alleged behaviour. In this respect, the administration is encouraged to consider the good faith of the accused party by asking very practical questions: Is the breach isolated or repeated? How many employees does it affect? Had the employer taken measures to prevent it or prevent it from worsening? What was the extent of the harm, if any? The administration must take into account any efforts made. Secondly, while a warning allows one to avoid a financial penalty, this is no longer the case in the event of a repeat offense. Indeed, if the employer repeats the prohibition within one year of receiving the warning, they are liable to a fine increased by 50%, amounting to 6000 euro. The initial tolerance granted can prove particularly punitive if the accused party does not take advantage of it, especially since the legal conditions for repeat offenses do not need to be met. Paradoxically, the administrative sanction proves more severe than the criminal penalty, even though the warning was intended to limit the use of coercion.

5.3. Procedural limitations: the agent's report

5.3.1. Cumulation of proceedings, coordination of sanctions. The administration's decision to impose an administrative fine does not have

the force of *res judicata*. Because it does not extinguish the right to prosecute,[54] this decision does not prevent the Public Prosecutor's Office from initiating criminal proceedings for the same facts, especially since the provisions giving rise to the fines in question have not been decriminalized,[55] except in matters of posting of workers. The accumulation of criminal and administrative penalties is therefore theoretically possible,[56] provided that the former follows the execution of the administrative sanction. While some texts provide for this accumulation, the 2016 ordinance does not. In the absence of specific provisions, administrative and judicial authorities must apply the principles established by the Constitutional Council, including the principle of proportionality.[57] To support the administration, regulations[58] suggest that the Public Prosecutor's Office respond to the Directorate General for Labour to inform them of its intentions, adding that a lack of response within one month signifies the Public Prosecutor's Office's lack of objection to the potential imposition of an administrative sanction. This complementary, dual approach, which is optional,[59] fulfils the requirement set by public authorities for "common objectives that are both deterrent and punitive.[60]" It does not preclude other administrative sanctions such as exclusion from public procurement contracts, the reimbursement of public subsidies, or the inability to receive new ones.[61]

5.3.2. Implementation of the intervention

The labour administration, when deciding to sanction the accused, must issue a decision and meticulously identify the debtor.

5.3.2.1. Decision

Fine. The administration's decision entails the imposition of a fine, the amount of which was initially increased by law and then by the judge. Companies must

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[54] C. trav. Art. L. 8291-2.

[55] CE, 24 July 2019, No. 431243 : « L'article L. 8113-7 du code du travail ne fait pas obstacle a la faculte pour le ministere public, qui doit etre informe des procedures administratives engagees en application de l'article L. 8115-2 du meme code, de diligenter des poursuites penales s'il l'estime necessaire » [Article L. 8113-7 of the French Labour Code does not preclude the public prosecutor, who must be informed of administrative procedures initiated pursuant to Article L. 8115-2 of the same code, from initiating criminal proceedings if deemed necessary].

[56] C. com., art. L. 465-2 VI : « Lorsqu'une amende administrative est susceptible de se cumuler avec une amende penale infligee a raison des memes faits a l'auteur du manquement, le montant global des amendes prononcees ne depasse pas le maximum legal le plus eleve » [When an administrative fine is likely to be combined with a criminal fine imposed for the same offense on the perpetrator, the total amount of the fines imposed does not exceed the highest legal maximum].

[57] Cons. const., 22 July 2016, No. 2016-556 QPC. – Cons. const., 24 June 2016, No. 2016-545 QPC et No. 2016-546 QPC. – Cons. const., 13 March 2014, No. 2014-690 DC, consid. 96.

[58] Circ. Min. Justice, 18 July 2016, No. II-C-2, 1. – Instr. DGT No. 2016/03, 12 July 2016, III, 3.3.1 in fine.

[59] C. trav. Art. L. 8115-1 : L'autorite administrative « peut » prononcer un avertissement ou une amende… [The administrative authority "may" issue a warning or a fine…]

[60] Cons. Const., 24 June 2016, No. 2016-546 QPC, consid. 20.

[61] C. trav. Art. L. 8272-1.

be aware of this administrative risk, of which they are not always conscious, and whose fines are often higher than those imposed by a criminal court.

5.3.2.2. Amount of the fine increased by law

Increased penalty. Administrative sanctions, like criminal sanctions, have a deterrent and punitive function, especially since the aforementioned law of 10 August 2018, which doubled the maximum penalty. The ordinance of April 7, 2016, had stipulated a maximum amount of €2000, which, two years later, increased to €4000[62] per employee affected by the prohibition. Indicative of greater severity, these amounts are significant, especially when compared to those incurred for committing a minor offense[63] or a more serious crime.[64] This point is all the more important given that the fine, like the financial penalty in criminal matters,[65] can be applied as many times as there are workers affected by the breach.[66] For the public authorities, protecting the social safety net required such severity.

Temporal aggravation. The tightening of the applicable regime is all the more evident given that the aforementioned law of 10 August 2018, imposed immediate effect on the imposition of the fine, since any objection to enforcement no longer suspends the debt recovery action.[67]

Tempered aggravation. The new penalties adopted correspond to the maximum applicable sentences. If it is not possible to impose a sentence heavier than the aforementioned maximums, the competent administrative authority has the right to individualize[68] the sanction imposed. Article L. 8115-4 of the French Labour Code states: To determine the amount of the fine, the aforementioned authority must take into account the circumstances and seriousness of the breach, the conduct of the offender, as well as their income and expenses. This requirement implies an obligation to provide reasons for the decision, allowing the debtor, as in

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[62] C. trav. Art. L. 8115-3, al. 1er : "Le montant maximal de l'amende est de 4000 euros et peut etre applique autant de fois qu'il y a de salaries concernes par le manquement" [The maximum fine is 4000 euro and can be applied as many times as there are employees affected by the breach].

[63] A titre d'illustrations : amende de 750 euros d'amende en cas de violation de la duree maximale quotidienne (C. trav. Art. R. 3124-3) ou hebdomadaire (C. trav. Art. R. 3124-11) de travail ; amende de 1500 euros en cas de violation des règles relatives au salaire minimum (C. trav. Art. R. 3233-1-1°). [For example: a fine of 750 euro for violating the maximum daily (Labour Code Art. R. 3124-3) or weekly (Labour Code Art. R. 3124-11) working hours; a fine of 1500 euros for violating the rules relating to the minimum wage (Labour Code Art. R. 3233-1-1°)].

[64] A titre d'illustrations : amende de 10 000 euros en cas de violation des regles relatives aux installations sanitaires, a la restauration et a l'hebergement (C. trav. Art. R. 4534-1 et s.). [For example: a fine of 10 000 euro in the event of a violation of the rules relating to sanitary facilities, catering and accommodation (C. trav. Art. R. 4534-1 et seq.)].

[65] C. trav. Art. L. 4741-1 : « L'amende est appliquee autant de fois qu'il y a de travailleurs de l'entreprise concernes… » [The fine is applied as many times as there are employees of the company concerned…].

[66] C. trav. Art. L. 8115-3, al. 2.

[67] C. trav. Art. L. 8115-7.

[68] Cons. Const. 2 March 2018, No. 2017-694 DC : Dr. Pen. 2018, Etude 9, No. 4, obs. Guerin D. – Cons. Const., 21 February 2008, No. 2008-562 DC : JCP G 2008, II, 10077, note J. P. Feldman.

criminal matters,[69] to understand its rationale. In this respect, the administration must, "in particular", consider the good faith of the individual, as well as their income and expenses; this list of criteria is not exhaustive. In addition to these objective criteria, the administration may also consider the individual's personal circumstances, such as their health or family situation. In this regard, any observations made by the employer may shed light on the employer's difficulties.

5.3.2.3. Amount of the fine increased by the judge

Stricter case law. The question arose as to whether the number of fines imposed should be determined by the number of categories affected by the violation of the rule (in this case, exceeding the daily and weekly working hours and failure to respect minimum rest periods) or whether it should depend on the number of breaches observed of the provisions relating to these categories. Case law has ruled in Favor of the second solution, which is unfavourable to the defendant.[70] By granting lower court judges the power "to sanction [...] each observed breach," the judge empowers them to individualize the sanction. If the labour administration decides against issuing a warning, it can opt for a particularly punitive approach. Legal doctrine states: "The legislator's repressive intent, which permeates the entire system of administrative sanctions in labour law, leads to the appropriateness of such a method, which prevents completely intolerable behaviours from going unanswered."

5.3.3. Debtor

Targeting. Identifying the debtor clarifies the scope of their rights.

5.3.3.1. Identifying the debtor

Identification. According to Article L. 8115-7 of the French Labour Code, "fines are collected according to the procedures established for state receivables unrelated to taxes and public property." In other words, the fine falls under the employer's liabilities, a term that can be ambiguous, although the existence of a subordinate relationship must always be noted.[71] The debtor may be a legal entity or a natural person. This concerns the possibility of delegated powers or a lack of legal entity. Case law has clarified that, due to the responsibilities incumbent upon corporate employers, breaches committed by the directors of these companies or their agents under the provisions of Article L. 8115-1 cited above can be directly attributed to them in their capacity as legal entities, provided they acted within the scope of their duties, without violating the constitutional principle of personal liability.[72] This assertion is important: it allows the administration to impose the sanction on either party, provided both have the status of employer. However, the administration must ensure that the attribution respects the principle of personal liability, which prevents another person from being prosecuted and

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[69] C. pen. Art. 132-20 et 132-24. – Cass. crim., 30 May 2018, No. 16-85.777 : JCP G 2018, 703, obs. Collet P. – Dreyer E. La motivation des peines : quoi et comment ? [The motivation behind sentences: what and how?]. JCP G 2018, 330.

[70] CE, 11 February 2022, No. 448372 : JCP S 2022, 1166, note Duquesne F.

[71] Cass. soc., 13 November 1996, No. 94-13.187 : RJS 1996, No. 1320.

[72] TA Marseille, 19 November 2019, No. 1704847, SAS Manexe: JCP S 2020, 1022, concl. X. Haili.

sanctioned in place of the perpetrator. In this regard, case law has already established that the principle of personal liability applies to all administrative sanctions.[73] This point is all the more important given that a company is not merely an abstraction. It is first and foremost an economic entity with assets that administrative fines are specifically designed to target. Indeed, it is often in the company's interest, rather than that of its legal representative or delegate, that regulations concerning working hours, remuneration, or health and safety are violated.

Issues. Identifying the debtor is crucial. It determines who is responsible for paying the fine, given that legal entities are generally more solvent than natural persons. However, this distinction is irrelevant to the severity of the penalty. The debtor, regardless of whether they are a legal entity or a natural person, is subject to the same sanction. The rule that the maximum fine applicable to legal entities is five times that stipulated for natural persons by the regulations governing the offense applies specifically to criminal fines.[74] Not only have the public authorities not foreseen such an extension, but the principle of strict interpretation of criminal law would prohibit both the administration and the judge from imposing this rule on fines issued by the labour administration. Legal scholars affirm that "the identity of the accused does not affect the amount of the penalty incurred."[75]

5.3.3.2. Rights of the debtor

Rights of the defence. According to case law, a fine can only be imposed following an adversarial procedure that allows the court to make a decision taking into account the observations of the employer concerned. Respect for this procedure, which constitutes a safeguard for the employer, requires that the employer be clearly informed, within a reasonable timeframe before the fine is imposed, of the charges against them and have access to the documents on the basis of which the alleged violations were established.[76] The employer must be informed of the potential measure; they must be able to access their file,[77] including the labour inspector's report, and they must be able to submit their observations. These are the principles of the right to a fair trial.

Appeals. Once the report has been received, the accused party may submit any observations they deem relevant to the administration within fifteen days or one month, which may be extended. The principle of adversarial proceedings must be respected. The regional employment office that demands payment of a fine must inform the individual concerned by any means that provides proof of

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[73] CE, 29 October 2007, No. 307736, Societe sportive professionnelle LOSC Lille Metropole : JurisData No. 2007-072593.

[74] C. pen. Art. 131-41.

[75] Coeuret A. et Duquesne F. La pratique de l'amende administrative en droit du travail [The practice of administrative fines in labour law]. JCP S, 2016, 1327.

[76] CAA Marseille, 2 October 2020, No. 19MA03613.

[77] TA Dijon, 28 May 2019, No. 1802213.

the date of notification,[78] as well as the works council.[79] The appeal procedures must also be clearly defined.[80] The individual who is aggrieved by the decision may contest the decision through an informal appeal followed by a formal appeal to the administrative court within the standard two-month period, excluding any hierarchical appeal.[81] According to the Constitutional Council, the judge must "ensure compliance with the procedure" and verify that the fines imposed are not manifestly disproportionate.[82] The judge ensures compliance with the external legality of the decision, to which the employer must pay close attention. This includes the signature, date, and justification, as well as the procedure followed. As this dispute falls under the full jurisdiction of the court,[83] the judge may overturn the legality of the fines imposed and replace them with fines of a different amount.[84] The judge may also reduce the fine to a more "fair proportion".[85] Recourse to the administrative court is not incompatible with bringing a case before the civil court to obtain damages as compensation for harm suffered.

Repeat offense. The conviction of the accused potentially triggers the mechanism of repeat offenses addressed in the aforementioned ordinances of 7 April 2016, and 10 August 2018. However, the latter only considers repeat offenses in cases of repeated violations of one of the core protected values, whereas the earlier 2016 text defined repeat offenses more broadly, encompassing the failure to comply with any rule.[86] While the 2018 ordinance reduces the material scope of repeat offenses, it expands their temporal scope. Indeed, the penalty can now be increased when a new violation is observed within two years – rather than one – of a first conviction, that is, from the date the fine is notified.[87] A simple repetition of the material element is sufficient. The accused then faces a fine doubled to € 4000 per employee concerned.

Conclusions

The development of administrative fines in French labour law is not surprising. It is expanding in this branch of law, just as it has expanded in administrative

[78] C. trav. Art. L. 8511-5, al. 2 et R. 8115-2.

[79] C. trav. 8115-5, al. 3 et L. 4751-2.

[80] C. trav. Art. R. 8115-3.

[81] C. trav. Art. L. 1264-3 et L. 8115-6.

[82] Cons. Const., 13 March 2014, No. 2014-690 DC, consid. 69, 72 et 73.

[83] Le juge administratif se doit « d'examiner tant les moyens tires des vices propres de la decision de sanction que ceux mettant en cause le bien-fonde de cette decision » [The administrative judge must "examine both the arguments based on the inherent flaws in the sanction decision and those challenging the merits of that decision"]. (CE, 11 February 2022, No. 448372).

[84] CE, 26 July 1985, No. 64718 : Lebon 1985, Tables, p. 698.

[85] CAA Lyon, 2 April 2020, No. 18LY03401. – CAA Nantes, 23 October 2020, No. 18NT04123.

[86] C. trav. Art. L.

[87] C. trav. Art. L. 8115-3, al. 2.

law. While the legislature sees undeniable advantages, the judge remains bound by the fundamental principles of fair trial law, particularly those established by European law. Its effectiveness, however, should guarantee it a bright future.

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