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

Administrative Sanctions in European law

Ljubljana, 23–24 March 2017

Answers to questionnaire: Malta

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Questionnaire

Part I – The notion of administrative sanctions

I-Q1 – *Are the definitions of administrative sanctions (sanctions for minor offenses) and criminal sanctions precisely regulated at the national level? How is the notion of "administrative sanctions" defined in your administrative practice and case law? How does it differ from the notion of "criminal sanctions"? Is the principle of legality (i.e. the necessity of a legislative act, "no crime without law", etc.) of the incrimination applicable to administrative sanctions?*

Over the recent years – particularly since 2012 – these notions are being fine-tuned by means of case-law, whereby administrative sanctions are now, on the basis of case law by the European Court of Human Rights, be considered as akin to "criminal sanctions" and therefore as akin to "criminal charge" for the purposes of Article 6 of the Convention. The elementary difference between criminal sanctions and administrative sanctions is the ultimate effect of the sanction whereby a criminal sanction could be a term of imprisonment, effective/suspended, whereas the administrative sanction, though punitive in nature, is monetary – however, non-payment of the administrative sanction within the fiscal sphere could lead to separate criminal proceedings being taken against the individual. Administrative sanctions can only be imposed if there is a legislative act which provides for the imposition of such a sanction and which authorizes the relative administrative authority to impose such administrative sanctions.

Ancillary questions:

With respect to the above question, does your administrative practice and jurisprudence follow ECHR case law (Cases Engel, 5101/71, 5354/72, 5102/71, 5370/72, [1976] ECHR 3, 5100/71, (1976), Jussila, 73053/01, Grande Stevens, 18640/10, 18647/19, 18663/10 in 18698/10)? Do you also apply the approach of the CJEU (for instance in the case Schindler Holding, T-138/07)? Are the ECtHR and CJEU jurisprudence (including EU Charter on Fundamental Rights) applied at the same time?

In general, the Maltese legal system tends to follow ECHR case law as such case law is the first point of reference however, case law by the CJEU is referred to as well and followed both when the same are in conformity or complement ECHR case law or if for some reason ECHR case law is silent on the matter at issue. However, in so far as concerns administrative sanctions the trend is to follow and apply principles emanating from ECHR case law.

One has to keep in mind the Fundamental Rights and Freedoms are enshrined within the Constitution of Malta and Malta is a signatory to the Convention, which has been incorporated within our legal system by means of a specific Act of Parliament.

Is there any statutory-based solution given in this respect by the national legislator or by the administrative authorities?

There is no statutory-based solution neither by national legislator nor by administrative authorities, it is more the way in which the Courts interpret the case and applicable principles on a case to case basis.

Do you have examples in practice or case law where the jurisprudence of the EU law is found to be compatible with jurisprudence of the ECtHR (for instance, cases C-210/00 Käserei Champignon Hofmeister GmbH or C-489/10, Łukasz Marcin Bonda). Do the teachings of the CJEU, and in particular its definition of administrative and criminal sanctions, fit within the framework of ECtHR decisions?

Instances dealt with so far by the Administrative Review Tribunal under the fiscal sphere all emanate from administrative sanctions imposed in terms of law and which are imposed following default by the taxpayer (the taxpayer can then contest whether he was in default or otherwise and therefore whether or not he should have been subjected to such an administrative sanction) and therefore the case law by the ECHR is more in line with principles dealt with in such instances. However, EU law principles do come in play when the issue of proportionality is raised.

How is the EU law requirement -according to which sanctions need to have a deterrent effect- applicable?

Since the principles followed are those set out by the ECHR, the deterrent effect of an administrative sanction is only one of the three elements (Engel criteria) which is examined.

What distinction does your national legal system make between administrative sanctions and other administrative measures to restore compliance with the law? (e.g.: the closure of an exploitation of a waste management facility that was operating without a license v. an administrative fine?)

Legislation per se makes no distinction and I am not aware of any case law dealing with the any issues pertaining to violation of Fundamental Rights enshrined in the Convention or in the EU Charter raised within the context of administrative measures to restore compliance with the law. However, since the revocation of a license would impact a group of people (i.e. license holders) and not the generality of people (for example tax payers) it could be that under an ECHR perspective not all the Engel criteria would be satisfied, namely the

classification of the default as "criminal".

I-Q2 - *Are procedural requirements regarding administrative sanctions equally or similarly regulated in the case of criminal sanctions (how far-reaching is the principle of legality, what is the role of the principle of proportionality)?*

As explained above the imposition of an administrative sanction is permissible only if the sanction itself is provided for under the law and the notion of proportionality (within the fiscal sphere the balance between endangered tax and fine imposed) is one of the elements which is taken into account when determining if the administrative sanction so imposed is "criminal" in nature in so far as concerns the safeguards resulting from the Convention.

Ancillary questions:

With respect to the above question, does your national law offer any regulatory solutions and what is the role of direct applicability of the jurisprudence of the ECtHR and the CJEU?

The regulatory solutions essentially consist in the right to contest the imposition of the administrative fine before a Tribunal, namely the Administrative Review Tribunal. Case law of the ECHR and the ECJ are not as such directly applicable (save any preliminary references to the ECJ should these arise) but the principles set out in the same are closely followed and applied.

What are the administrative procedural requirements that are the closest to the ones applicable to criminal sanctions (e.g.: mandatory representation or assistance by an attorney (Cf. "Salduz-doctrine" Salduz v. Turkey, 36391/02), legal help, procedural time limits (including "reasonable time"), the possibility of requiring an oral hearing, burden of proof, competence of courts, legal remedies, application of the principles of reasonability, equality, presumption of innocence, prescription/prohibition of retroactivity, the principle of « retroactivity in mitius », the prohibition of self-incrimination, the principle of the right to appeal, etc.)?

This is an area which over the past few years is in constant development within the Maltese legal system and this due to the fact that administrative fines are now being recognized as being akin to a "criminal charge" within the context of Article 6 of the Convention and in fact recently I have been asked to determine whether or not a tax payer should specifically be given the right to remain silent during an investigation by the Income Tax Department (an issue which I am still deliberating on) however, case law has tackled issues pertaining to procedural time limits, more specifically the issue of reasonable time, where a tax assessment was revoked by the Constitutional Court as a remedy for the fact that the investigations were not concluded within a reasonable time with the consequence that by the time the matter was brought before the Courts most of the persons directly involved in the matter and who could therefore provide evidence for the tax payer, had passed away. "John Geranzi Limited v. Commissioner for Revenue et" Application No. 22/09 delivered on the 30th November 2012. Over the past couple of years the principle of presumption of innocence has been introduced within the context of proceedings by means of which a tax assessment (which includes and administrative fine element) is contested. Fiscal legislation generally provides that it is the tax payer who must prove that the contested assessment is excessive, however by means of various judgments/decrees the Constitutional Court and the Administrative Review Tribunal on the basis of judgments by the ECHR, the principle is emerging that administrative fines are akin to a criminal charge and therefore when an assessment includes such administrative fines, the taxpayer is granted the presumption of

innocence with the Tax Authorities having first to prove their case against the taxpayer.

I-Q3 – *Have unwanted consequences ever accrued from the decision of the ECtHR (e.g.: Grande Stevens, No. 18640/10, 18647/19, 18663/10 in 18698/10) (such as decreasing the effectiveness of separated regimes – administrative and criminal- because the administrative sanction, which has the characteristic of criminal sanction, prevents criminal procedure; in line with the principle ne bis in idem)?*

So far no, in spite of various judgments by the Constitutional Court declaring that criminal proceedings for a tax infringement instituted following the imposition of an administrative fine for that same tax infringement, amount to a violation of Article 4 of the Convention (ne bis inidem principle). Legislation so far hasn't changed and tax authorities still proceed in pretty much the same manner and it is then the individual taxpayer who has to seek due remedy before the competent courts.

Ancillary questions:

How is the principle ne bis in idem understood in your legal system, taking into account CJEU interpretation (case C-617/10, Fransson) and ECtHR interpretation of Art. 4 of Protocol No. 7 (ECHR (GC) Zolotoukhine/Russia, No. 14939/03)?

Maltese Legislation does provide for administrative sanctions and criminal sanctions for the same infringement and in fact it is very common that both proceedings are instituted. It is then up to the person against whom the sanctions are imposed or sought to be imposed to contest the same on the grounds of infringement of the ne bis in idem principle. Within the fiscal sphere it is now being acknowledged that criminal sanctions sought to be obtained after the imposition of an administrative fine for the same infringement could be in violation of the ne bis in idem principle. However, each case is to be considered on its own merits. There is however a provision under the Malta Communications Authority Act which specifically provides that if for a particular omission, which omission also constitutes a criminal offence under the Act, an administrative fine is imposed, then criminal proceedings cannot and must not be instituted against the party concerned.

Are national courts faced with cases where individuals, subject of administrative sanctions, would like to exclude criminal sanctions and criminal procedures (including in other EU Member states) in order to avoid dual trial? Does your system accept double penalty for non-nationals? (e.g.: criminal punishment for a criminal offense and administrative expulsion at the end of (or during) the sentence (accompanied with a residence ban)?

Yes, Maltese national courts do face such cases and in fact one recent judgment where the matter was dealt with is Robert Ciantar v. Prime Minister, Application No. 14/ delivered on the 30th September 2016.

Yes, the Maltese legal system does accept double penalty for non-nationals. There were instances when foreigners, especially if in the country illegally, were found guilty for a criminal offence and were punished for it and following such punishment were expelled from the country, normally sent back to their country of origin. This however happened within a purely criminal law ambit.

Is it possible, in your legal system, that an individual be sanctioned with both - the administrative and the criminal sanction, and if so, does the criminal sanction take into account

the administrative one (i.e. is the administrative sanction considered a part of the criminal sanction)? What role does the EU Charter of Fundamental Rights and the ECHR principle ne bis in idem *play in this respect?*

Yes, the system does provide for both and yes both are imposed and no, one does not take the other into account and as stated above it is then up to the individual concerned to contest the imposition of such dual sanctions before the competent Court.

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

II-Q1 *– Is your legal system "unified" or "dual" when it comes to authorities competent to impose administrative sanctions? More specifically: Are the administrative authorities that are competent to adopt administrative sanctions only responsible for their enforcement? Or is it a system where administrative bodies are competent for both the enforcement and the regulation of certain areas of law? (e.g.: in areas like competition or financial transactions, are the authorities that are competent for the regulation of these areas also competent to adopt administrative sanctions in case the rules are not respected?) Or is it a third, mixed, system in which both solutions coexist? And finally, at enforcement level, can the official who discovers an infringement impose an administrative sanction?*

By and large the Authorities are competent to regulate (ex-ante and ex-post) and at the same time to impose administrative sanctions where applicable.

II-Q2 *– Does your legal system allow for only one, or several levels of jurisdiction in procedures regarding administrative sanctions? What role is given to the national courts (and to the highest administrative court if it is competent to decide issues of fact and not only issues of law, like a court of cassation) when deciding on administrative sanctions? Do courts only have a supervisory role (i.e. a judicial review, a competence to annul) or are they also competent to reform or adopt (alone) the administrative sanctions?*

At the moment in Malta there is a parallel system, i.e. judicial review before the Civil Court, First Hall where the Court can only review the decision taken and if it finds an infringement of the grounds on which a review can be demanded, then it can order the cancellation of the decision without however being able to replace its discretion with that of the administrative authority involved; and proceedings before the Administrative Review Tribunal where a decision can be contested in fact and at law and the Tribunal can in certain instances (mainly the fiscal sphere) replace its discretion with that of the Commissioner for Revenue. Cases which fall within the specific jurisdiction of the Administrative Review Tribunal are generally specifically provided for under the relevant Acts of Parliament, for example the right to contest a tax assessment arises from the Income Tax Management Act or the from the Value Added Tax Act.

II-Q3 *– Is the court's judicial review of administrative sanctions based solely on the legality of the decision, or also on factual questions/circumstances? If there is certain discretion given to the administrative authorities? Can the courts review the discretion exercised by the administrative authorities too? (See CJEU C-510/11 P, Kone and others v. Commission, as well as Menarini, No. 43509/08 of the ECtHR).*

Answer given above, applies here too.

Part III – Specific questions

III-Q1 *- What kind of liability is provided by your national legal system for administrative sanctions: fault-based liability or strict liability? Does your legal system require a fault of the individual as a condition for the administrative sanction (See: CJEU C-210/00 Käserei Champignon Hofmeister GmbH)?*

Normally administrative sanctions are imposed for infringements of specific provisions of the law for example, failing to provide the Malta Communications Authority with the required information on a particular matter or failing to submit a true and fair declaration of income received during the basis year.

III-Q2 *– Is it the nature of the administrative act relevant for its judicial review? Is it possible that a judicial review is impeded by the nature of the decision leading to the administrative sanction (when, for example, the act is not considered an administrative act)?*

Both administrative review and judicial review of an act by an administrative authority depend on that act being a decision (or at least having the characteristics of a decision) by the administrative authority. In so far as judicial review is concerned, if a request remains unanswered by an administrative authority for a period of two months from when it receives such request, then that will be tantamount to a refusal. The same does not apply to administrative review. In the case of administrative review there has to be a decision or at least an act which had the characteristics of a decision.

III-Q3 *- What kind of non-financial (non-pecuniary) sanctions are known in your legal system (for instance, the prohibition to pursue one's business or certain professional activities, the deprivation of the ownership, the duty perform certain works, etc.)? More specifically, in matters of urban planning, can an order to restore the site to its original state lead to the demolition of a construction? (case of ECtHR Hamer/Belgium, No. 21861/03).*

There are a number of non-financial sanctions as for example the withdrawal or suspension of the license of a VRT Station operator, or the withdrawal or suspension of a private guard/private guard agency.

In so far as concerns urban planning an enforcement notice can lead to the demolition of a building considered to have been built without a permit, not as per permit or in violation of planning laws. However, appeals from such notices are not filed before the Courts of Law or the Administrative Review Tribunal but before a quasi-judicial body named the Environment and Planning Review Tribunal which is not presided by a judge but by a lawyer and two architects.

Ancillary questions:

When provided, do non-financial sanctions have to be in causal relation to the (administrative) offence?

Can the sanctions, which are administrative sanctions in their nature, be used in the private law sphere (e.g.: a person not respecting the duty of the alimony: could he/she be sanctioned with the deprivation of his/her car)?

In your legal system, can administrative sanctions encroach upon ownership rights (Art. 1 of the first protocol ECHR – for instance, freezing of assets, substantive financial penalties, etc.)?

Non-financial sanctions are linked to the administrative offence in fact the withdrawal or suspension of a license, be it for example of a VRT Station Operator or of a private guard/private guard agency, occur when the person involved is in violation of certain provisions of the relative law. In the case of VRT Station Operators the withdrawal or suspension of the license could also be as a consequence of accumulated violations in the sense that violations carry with them a reduction in penalty points which when accumulated up to a certain amount will automatically lead to the withdrawal/suspension of the license.

Administrative sanctions cannot be used within the private legal sphere.

It is the enforcement of such administrative monetary sanctions which could lead to the encroachment of the right to property since if these remain unpaid, they can be collected as normal civil debts (apart from criminal proceedings being instituted).

III-Q4 *– Are there cases in your national system where the organization of the authorities competent to adopt administrative sanctions is based on EU law requirements? This question could, for instance, refer to the leniency program that exists in EU competition law, which allows for the severity of the administrative sanction to depend on the party's ability and willingness to produce evidence, and requires a system where the same authority that hears the case also adopts the sanctions.*

Under the Maltese legal system, it is generally the same authority which hears the case and imposes the sanctions and there are some instances when the sanctions are – provided the pertinent circumstances subsist – mitigated in favour of the individual. For example if a service provider is warned by the Malta Communications Authority that an administrative fine is going to be imposed against him and such provider desists from the behavior being sanctioned and duly observes the provisions of the Law and reaches a written agreement with the Authority that he will observe any conditions imposed upon him by the said Authority, then the Authority may at its own discretion opt not to proceed any further against the said service provider. Similar mitigation of administrative fines/penalties is provided for under the Value Added Tax if prior to being served with a provisional assessment the taxpayer corrects any under-declaration of Output Vat or any over-declaration of Input Vat. The administrative fine would normally be 20% of the excess but if a correction is submitted as explained, then the administrative fine will be 10% of the excess.

III-Q5 *– Have your national administrative authorities, or even courts, been faced with the request to apply the jurisprudence of the CJEU and to reopen/change already final administrative decisions on administrative sanctions? Do national rules of administrative procedure (or even rules on court reviews) allow such re-openings of cases?*

Administrative decisions understood as decisions by the Civil Court, First Hall (Judicial Review) or by the Administrative Review Tribunal (Administrative Review) concerning administrative sanctions are subject to appeal but once such decisions become *res judicata*, either because no appeal is lodged or the same are ultimately decided on appeal, then it is very difficult for the same to be re-opened. At most Constitutional proceedings could be instituted on the basis of an infringement of one or more of the Fundamental Human Rights and Freedoms enshrined in the Maltese Constitution or the Convention.

III-Q6 *– Is it possible for the administrative authorities and offenders to negotiate on an administrative sanction (in order to reach a deal), similar to "plea bargaining" in certain*

criminal procedures? If so, is this a general rule or is it only possible in specific cases? In case a deal is reached, what is its status when a court reviews the case? What is the position and role of the court in such cases?

Normally deals are struck in out of Court settlements which means that the case can never actually be brought before the Courts or if the settlement is reached during the course of the proceedings, then the said proceedings are generally withdrawn by the applicant. In so far as concerns fiscal matters, the Government from time to time issued Schemes whereby administrative taxes (tax surcharges) and interests are substantially mitigated if an agreement is reached as to the amount and modality of payment of the tax due. If proceedings regarding the tax assessment are pending when the taxpayer requests to benefit from such a scheme, the withdrawal of the proceedings is one of the requisites needed for said taxpayer to actually benefit from the scheme. So far nobody has challenged such an imposition, even though lately complaints are beginning to emerge.

Part IV – Additional information (if needed)

Nothing to add.