



**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: United Kingdom**



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# *Administrative sanctions in European Law*

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## *Questionnaire*

The topic that was selected for this Seminar, “*Administrative Sanctions in European Law*”, aims to address both theoretical and practical questions regarding the application of administrative sanctions at the national level, by administrative authorities and judges.

As the superposition of three different legal orders (ECHR, EU and national legal orders) may lead to potential tensions, and poses numerous questions, whenever national administrative authorities and courts deal with administrative sanctions, the Seminar will also focus on how, at the European level, the Courts have addressed the concern.

We will discuss the applicability of the European Convention of Human Rights (ECHR) and case law developed by the European Court of Human Rights (ECtHR) on Art. 6, as well as its definition of a “criminal charge”. We will also analyze the jurisprudence of the Court of Justice of the European Union (CJEU), which also addresses the question as to whether certain administrative sanctions can be considered “criminal charges”.

By definition, the ECtHR stipulates that criminal charges must satisfy certain criteria, irrespective of how they are classified at the national level: the latter is merely a starting point. Said criteria are outlined in the case *Engel and Others v. the Netherlands*, §§ 82-83:

### *1. Classification in domestic law:*

If domestic law classifies an offence as “criminal”, then this will be decisive. Otherwise, the Court will look behind the national classification and examine the substantive reality of the procedure in question;

### *2. Nature of the offence:*

In evaluating the second criteria, which is considered to be more important (*Jussila v. Finland* [GC], § 38), the following factors can be taken into consideration:

- whether the legal rule in question is directed solely at a specific group or is of a generally binding character (*Bendenoun v. France*, § 47);

- whether the proceedings are instituted by a public body with statutory powers of enforcement (*Benham v. the United Kingdom*, § 56);
- whether the legal rule has a punitive or deterrent purpose (*Öztürk v. Germany*, § 53; *Bendenoun v. France*, § 47);
- whether the imposition of any penalty is dependent upon a finding of guilt (*Benham v. the United Kingdom*, § 56);
- how comparable procedures are classified in other Council of Europe member States (*Öztürk v. Germany*, § 53).

**3. Severity of the penalty that the person concerned risks incurring:**

The third criterion is determined by reference to the maximum potential penalty for which the relevant law provides (*Campbell and Fell v. the United Kingdom*, § 72; *Demicoli v. Malta*, § 34).

The second and third criteria for the applicability of Article 6 that are laid down in the case *Engel and Others v. the Netherlands* are alternative and not necessarily cumulative. It suffices that the offence in question can by its nature be regarded as “criminal” from the point of view of the ECHR, or that its sanction belongs in general to the “criminal” sphere - by its nature and degree of severity (*Lutz v. Germany*, § 55; *Öztürk v. Germany*, § 54). The fact that an offence is not punishable by imprisonment however is not in itself decisive, since the relative lack of seriousness of the penalty at stake cannot divest an offence of its inherently criminal character (*ibid.*, § 53; *Nicoleta Gheorghe v. Romania*, § 26).

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The questionnaire we are asking you to complete, at a maximum of 12 pages, should reflect the main issues at stake at the national level, both from a practical and a judicial point of view. The questions were formulated in such a way as to allow you to address the issues and take into account the case law of the ECtHR and the CJEU. However, should there be relevant points that have not been captured by the questionnaire, please feel free to add a comment in **Part IV**.

If you have any questions regarding the questionnaire, please contact Mr. Rajko Knez at the following address: [rajko.knez@um.si](mailto:rajko.knez@um.si).

The completed questionnaire should be sent by **Monday, February 6<sup>th</sup>, 2017** to the same e-mail address.

***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?*

There is no precise concept or definition of an administrative sanction in domestic UK law. A general distinction is drawn between civil and criminal proceedings, as this may be relevant for determining the appropriate procedure. For example, hearsay evidence is admissible in civil but

not in criminal proceedings (Civil Evidence Act 1995). The standard of proof also differs. Administrative sanctions would usually be referred to as 'civil penalties'.

However, there is no uniform statutory definition of either 'civil' or 'criminal' acts for these purposes. The Courts have simply defined criminality by reference to the penal consequences of an act – see *Proprietary Articles Trade Association v Attorney General for Canada* [1931] AC 310, 324 per Lord Atkin:

"Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the state. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences?"

There is a general presumption against retrospective operation under the common law. Unless the contrary intention appears, an enactment is presumed not to be intended to have retrospective operation (*Bennion on Statutory Interpretation*, 6<sup>th</sup> Edition, S97). This will apply to civil as well as criminal penalties. Article 7 of the European Convention on Human Rights only apply where the penalty is "criminal" as defined by the European Court – see *Welch v UK* (1995) 20 EHRR 247.

In *Huitson v. United Kingdom* (Application no. 50131/12) the European Court found that retrospective legislation intended close a tax loophole did not disproportionately breach Article 1 Protocol 1. **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?*

Under Section 2 of the Human Rights Act 1998 a domestic court must "must take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights" when interpreting the European Convention. Similarly, under Section 3 of the European Communities Act 1972 "judicial notice" must be taken of any decision of, or expression of opinion by, the European Court of Justice.

The Strasbourg case law on administrative penalties has been applied in a number of domestic cases, including:

A search reveals no references to Case 138/07 *Schindler Holding v Commission* in the domestic UK courts.

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

No.

*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?*

No.

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

It is not.

*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?)*

There is no formal distinction between administrative sanctions and other administrative measures. Both may engage Article 6(1) depending on whether they affect civil rights and obligations and both may engage the common law duty of fairness.

**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)?*

With regard to civil (i.e. non-criminal) sanctions:

- a) Article 6(1) may apply, requiring a fair hearing within a reasonable time. There is also a common law right to be heard.
- b) In some cases a civil penalty may only be imposed by a court – for example Anti-Social Behaviour Orders under the Crime and Disorder Act 1998 or a confiscation order under section 12 of the Powers of Criminal Courts (Sentencing) Act 2000. Other penalties may be applied by an administrative body or Government department, but carry a right of appeal – for example tax penalties or parking fines. In such cases, the statute usually carries a right of appeal. Where there is no right of appeal, the only remedy is judicial review in the High Court.
- c) There is no presumption of innocence, although the burden of proof is usually on the administrator seeking to impose the penalty;
- d) The standard of proof is the balance of probabilities, as opposed to the criminal standard of beyond reasonable doubt - *Re B (Children)* [2008] UKHL 35;
- e) Hearsay evidence is admissible (Civil Evidence Act 1995);
- f) Legal aid is not generally available, but may be available in certain cases, for example to challenge an anti-social behavior order, or proceeds of crime order or in a judicial review challenge to a sanction (Schedule 1 of the Legal Aid Sentencing and Punishment of Offenders Act 2012).

***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?*

See above.

*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.)?*

See above.

**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)?*

Not that we are aware of.

***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)?*

The common law principle of double jeopardy applies to bar a prosecution for the same offence twice. This is otherwise known as the plea of ‘autrefois acquit’ and ‘autrefois convict.’ See *R. v. Miles* (1890) 24 Q.B.D. 423 at 431 (Q.B.) per Hawkins J:

“Where a criminal charge has been adjudicated upon by a Court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offence.”

However, the principle only applies where the former criminal trial was before a court of competent jurisdiction. Only prior criminal proceedings will suffice – civil proceedings are not covered – *R v K. B. and A.* [2007] 2 Cr. App. R. 15. Therefore, the application of an administrative sanction will not form the basis of a plea in bar to a subsequent criminal trial based on the same facts. For example, where the applicant had previously been disciplined for breach of internal prison rules and subsequently charged with a criminal offence based on the same facts, the defendant was not able to raise the double jeopardy bar – *R. v. Hogan and Tompkins* [1960] 2 Q.B. 513 (C.C.A.).

The United Kingdom has not signed Article 4 of the Seventh Protocol of the European Convention on Human Rights. Protocol 30 on the application of the Charter of Fundamental Rights to the European Union to Poland and the United Kingdom also applies.

A search reveals no references to Case C-617/10, *Fransson* in domestic UK case law.

*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))?*

This problem does not arise, as there is no common law rule against double jeopardy which would exclude criminal sanctions following civil punishment. Therefore, the UK system accepts double penalty for non-nationals as it does for nationals. Foreign criminals, for example, are subject to deportation following the completion of their sentence under s3 of the Immigration Act 1971 and s32 of the UK Borders Act 2007. However, the rule may apply to bar extradition where there is a significant overlap between the extradition offence and an offence for which the defendant has already been indicted - *Fofana and Belise v Deputy Prosecutor Thubin, Tribunal de Grande Incidents de Meoux, France* [2006] EWHC 744 the Administrative Court

*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, it is possible, for the reasons given above. The standard of proof in criminal proceedings is higher – beyond reasonable doubt – and therefore the fact that an offence has been proved to the civil standard is not taken into account in the criminal proceedings. However, the prior imposition of a civil sanction may be relevant when considering sentencing and mitigation. As explained above, the EU Charter and the ECHR principles of *ne bis in idem* have not been applied in the UK to date.

## ***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?*

The answer to this question varies depending on the type of sanction. Some sanctions can only be imposed by a Court (e.g. the Magistrate’s Court), others can be imposed by an administrative body (such as the HM Revenue and Customs or the Competition and Markets Authority), but subject to a right of appeal to a court or independent tribunal. The UK system is therefore a mixed system.

***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?*

*Again, this depends on the type of sanction. For example, decisions of the Competition and Markets Authority are appealable to the Competition Appeal Tribunal which has full fact finding powers. Some decisions, however, can only be challenged by judicial review on an error of law.*

***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).*

*Where there is no right of appeal, judicial review can only lie against the lawfulness of the decision rather than the merits, unless the decision irrational.*

### **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*)?

Some sanctions are fault based others are strict liability.

**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)?

Judicial review only lies against decisions of public authorities. Therefore, where a sanction is imposed by a purely private body – for example a private parking fine – the only remedy will lie in contract – see e.g. *Cavendish Square Holding v Talal El Makdessi* [2015] UKSC 67.

**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).

**Antisocial behavior orders** (ASBO's) – Under the Crime and Disorder Act 1998, the magistrate's court may prohibit an individual from certain forms of behavior as part of an antisocial behavior order. ASBO proceedings are classified as civil proceedings (*R(McCann v Manchester Crown Court* [2003] 1 AC 787), although breach of an ASBO is a criminal offence which can result in up to five years' imprisonment.

**Confiscation orders** – The Courts have various powers to make confiscation orders following conviction for certain offences (e.g. Drug Trafficking Act 1994, the Criminal Justice Act 1988 and the Powers of Criminal Courts Act 1995). A confiscation order is an order made against a convicted defendant ordering him to pay the amount of his benefit from crime. Failure to pay the confiscation order can in some cases result in a default term of imprisonment longer than that served for the offence for which the defendant was convicted. Confiscation proceedings are classed as civil proceedings under domestic law and under the Convention (*Phillips v UK* (2001) 11 BHRC 280).

**Planning enforcement** - Section 173(5) of the Town and Country Planning Act 1990 states that a planning enforcement notice "may, for example, require ... (a) the alteration or removal of any buildings or works." See *Kestrel Hydro v Secretary of State for Communities and Local Government* [2016] EWCA Civ 784

#### **Ancillary questions:**

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

Such sanctions are provided for by statute and vary in their severity. Following *Kestrel Hydro*, they would need to be proportionate in order to comply with Article 8 and Article 1 Protocol 1.

*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)?*

There are various civil procedures open for the enforcement of private law court judgments. Examples include charging orders, orders for sale, attachment of earnings and bankruptcy and insolvency proceedings.

*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.)?*

Yes, provided such sanctions are a proportionate means of achieving a legitimate aim.

**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.*

The Competition and Markets Authority has a leniency policy for the grant of immunity in competition cases:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284417/OFT1495.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf)

This says that, when considering an oral application, the Authority will, among other things, have regard to the European Competition Network Model Leniency Programme.

**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?*

No. The principle of legality means that absent any appeal final court decisions cannot be revoked.

*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?*

No.

***Part IV – Additional information (if needed)***

In this section, you can add any information on the topic of administrative sanctions in your national legal system that you deem appropriate and that hasn't already been covered in this questionnaire.

Thank you for your cooperation!