SUPREME COURT
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ACA EUROPE

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: Latvia

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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*.

The completed questionnaire should be sent by **Monday, February 6th, 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?*

First, it should be explained that in Latvia administrative courts do not review criminal and administrative violation (minor offenses) cases. Both of these types of cases are reviewed by general criminal courts.

Secondly, the definitions of administrative sanctions and criminal sanctions are precisely regulated at national level. In substance, both definitions are equal.

Article 22 of the Latvian Administrative Violations Code provides „Administrative sanction is the means of liability and shall be applied in order to educate a person, who has committed an administrative violation, in the spirit of law abiding and respecting provisions of social life, as well as in order to prevent the violator of the rights, as well as other persons, from committing new violations."

Article 35 (1) of the Criminal Code provides „Punishment (sanction) as provided for in the Criminal Law is a compulsory measure which a court, within the limits of this Law, adjudges on behalf of the State against persons guilty of the commission of a criminal offence or in the cases provided for by law, determined by a public prosecutor by drawing up a penal order."

Both in administrative violation cases and criminal cases the principle of legality (i.e. the necessity of a legislative act, "no crime without law", etc.) of the incrimination is applicable.

However, there are certain number of sanctions which are not covered by Latvian Administrative Violations Code but they are regulated by separate laws, for example Law On Taxes and Fees provides tax penalties and late payment charges which are charged as a result of a tax review (audit), Competition law provides financial penalties which are applied if a market participant does not comply with the legal obligation. These types of sanctions in Latvia are dispersed in many laws. These types of sanctions are usually reviewed by administrative courts when reviewing the whole administrative case.

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?

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

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?

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

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?)

As for the notion of „civil rights and obligations" or of „any criminal charge", it must be mentioned that Latvian administrative courts review administrative cases (taxes, competition maters, urban planning etc.). When performing judicial review and applying ECHR or CJEU case law with respect to the above question, the courts pay attention to the character of the case, that

is, whether it qualifies as criminal or civil case within the notion of European Convention on Human Rights. With respect to the above question, Latvian administrative practice and jurisprudence follows the ECHR case law. There is no statutory-based solution given in this respect by the national legislator or by the administrative authorities.

At the moment there is no direct case law of the Supreme Court on definition or distinction in relation to administrative and criminal sanctions. There are not any direct references to the case law mentioned above as well.

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)?*

Both administrative violation sanctions and criminal sanctions are equally regulated.

Article 8 of the Latvian Administrative Violations Code provides „A person who has committed an administrative violation shall be liable in accordance with the law, which was in force at the time and place of the committing of the violation".

Article 1 (1)(2) of the Criminal Code provides „(1) Only a person who is guilty of committing a criminal offence, that is, one who deliberately (intentionally) or through negligence has committed an offence which is set out in this Law and which has all the constituent elements of a criminal offence, may be held criminally liable and punished.
(2) To be found guilty of committing a criminal offence and to impose a criminal punishment may be done by a judgment of a court and in accordance with law."

When state institutions and courts apply administrative sanctions (as opposed to administrative violation sanctions) such as tax penalties or financial sanctions in competition matters it is acceptable to apply the general principles of criminal law and Criminal Code. When administrative courts review general administrative cases, principle of proportionality is applied as a general principle of administrative law. However, there may be exceptions, for example, if the sanction itself excludes discretion of the state institution.

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?

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.)?

Article 15(4) of the Administrative Procedure Law directly states that when applying the legal norms of the European Union, institutions and courts must take into account European Court of Justice case law. Although, there is no direct reference to the application of the ECtHR case law, courts take it into account when they apply the European Convention of Human Rights. However, the jurisprudence (case law) of the mentioned courts is not applicable directly as it is in common

law legal system.

All the administrative procedural requirements mentioned above are familiar to Latvian legal system as well (especially, in administrative offences procedure).

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)?*

Generally, so far we have not ever had any unwanted consequences accrued from the decision of the ECtHR (neither similar to the case of Grande Stevens). However, the principle *ne bis in idem* is applied in Latvian courts frequently, judgments of Latvian courts are extensively motivated with references to the case law of ECtHR or/and CJEU.

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)?

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)?

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?*

In Latvia, both Latvian Administrative Violations Code and Criminal Procedure Code stipulates the principle *ne bis in idem.* This principle is widely applied in tax and customs law as well. In courts this principle is always applied making extensive references to the case law of ECtHR or/and CJEU. It is not possible in our legal system that an individual would be sanctioned with both – an administrative and a criminal sanction for the same substantive matter. There are many such cases. Either administrative or criminal sanction is excluded if the one of them has been already effective. In Latvia, application of the principle *ne bis in idem* is not related to the nationality of the person. Our system does not accepts double penalty both towards nationals and non-nationals.

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?

Latvian legal system is a rather "mixed" one. There are certain number of administrative authorities which are competent for both the enforcement and the regulation of certain areas of law (e.g.: in areas like competition and tax). However, simultaneously, there are certain administrative authorities which may only file a complaint to the police or other authorities which further have the right to adopt administrative violation sanctions. The right to impose sanction and the procedure of punishment always depends on the statutory law of that institution. These statutory laws usually are adopted by the national legislator.

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?*

The legal system of Latvia generally demands, that prior the dispute in court, the decision of an administrative authority must be disputed in a higher administrative authority, if there is such an authority. However in some fields of law the administrative authority imposing the administrative sanction has no higher administrative authority, for example, in competition cases. Therefore in those cases the only reviewing procedure is the one provided in administrative courts.
If the decision on administrative sanction is disputed in administrative courts, the judicial review is usually provided in three levels – the court of first instance, the court of appellate instance and the Supreme Court – the cassation instance. However in some cases (for example, competition cases) there are only two levels of judicial control – the regional court (that usually operates as the court of appellate instance) fulfills the role of first instance, and its judgement can be disputed in the Supreme Court.
The court of first instance and the court of appellate instance decide not only on the legality issues, but also on matters of facts. The Supreme Court as the cassation instance reviews only matters of law, but that also includes evaluation, whether the lower instance court has observed procedural rules to review the issues of facts properly.
Administrative court can quash the decision of an administrative authority, if it finds the decision factually wrong or in contradiction with the law (including legal principles, such as proportionality and legitimate expectations protection). After the court's judgement the case usually does not return to the administrative authority. Only in exceptional cases, if the court decides, that it is necessary for the crucial interests of society that the person does not go unpunished, the court returns the case to the administrative authority and in the motives of the judgement gives guidelines that must be observed by the administrative authority, when repeating the administrative proceedings.
Administrative court can reduce the sanction itself only if such competence is provided in statutory law. Generally courts cannot adopt the administrative sanctions thus substituting national authority.

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).

Generally, the court's judicial review is based on the legality of the decision and also on factual questions/circumstances.

Different laws provide different levels of discretion to administrative authorities.
As for courts, according to article 103 (1) of the Administrative Procedure Law administrative courts control the legality and validity of administrative acts issued by institutions or actual (physical) actions of institutions within the scope of freedom of action (discretion given to the administrative authorities). That is, the courts are allowed to intervene in the discretion given to the administrative authorities only in exceptional cases (Judgment of the Supreme Court of January 11 2013, case No. SKA-53/2013). However, the courts are allowed to control whether the exercise of the discretion was legal and proper. Therefore the court controls whether the administrative authority has taken into account all the necessary aspects (including proportionality) and all the important facts and circumstances and whether the authority has evaluated them properly. If the way authority has used its discretional power is in contradiction with, for example, principle of proportionality, principle of protection of legitimate expectations or principle of equal treatment or in contradiction with the legitimate aim of the law regulating the certain situation, the court can quash the decision of the authority.

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)?*

As for criminal and administrative violation cases our national legal system provides fault-based liability. That is, the fault and blameable aspect (committed with intent or through negligence) has to be assessed. Although, it seems that the mentioned judgment (*CJEU C-210/00 Käserei Champignon Hofmeister GmbH*) names this type of liability as strict liability.

Article 1 (1)(2) of the Criminal Code provides „(1) Only a person who is guilty of committing a criminal offence, that is, one who deliberately (intentionally) or through negligence has committed an offence which is set out in this Law and which has all the constituent elements of a criminal offence, may be held criminally liable and punished.
(2) To be found guilty of committing a criminal offence and to impose a criminal punishment may be done by a judgment of a court and in accordance with law."

Article 8 of the Latvian Administrative Violations Code provides „An administrative violation shall be acknowledged as an unlawful, blameable (committed with intent or through negligence) action or inaction, which endangers State or public order, property, rights and freedoms of citizens or management procedures specified and regarding which administrative liability is specified in the Law."

The same applies to tax infringements (Art. 1 para 21 of the Law On Taxes and Fees).

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)?*

Generally, according to article 103 (1) of the Administrative Procedure Law the administrative courts perform control of the legality and validity of administrative acts issued by institutions or actual (physical) actions of institutions. Thus, to perform the judicial review, the act have to comply with the definition of the administrative act or actual actions.

There is an example in the Law On Taxes and Fees where indirectly it could be possible to argue that the act is not considered an administrative act. That is, according to article 26 (7) of the Law On Taxes and Fees a decision to recover late tax payments is an execution document and it shall be executed by:

1) an officer of the tax administration pursuant to its job duties;

2) a sworn bailiff in accordance the Civil Procedure Law and on the basis of a decision to recover outstanding tax payments if the tax administration has in accordance with the procedures laid down in the Civil Procedure Law submitted to the sworn bailiff the execution document.

Thus this type decision is not open to judicial review as it is considered by the law as an execution document.

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).*

Different laws provide different kind of non-financial sanctions. For example, article 23 (1) of the Latvian Administrative Violations Code provides such non-financial sanctions as:
a warning;
a confiscation of the administrative violation object or the instrument of commitment;
a forfeiture of special rights assigned to a person;
a prohibition to obtain the right to drive a means of transport for a certain period of time;
a prohibition for a specified period to obtain a license to drive a recreational craft;
a forfeiture of rights to hold particular offices, or the forfeiture of rights to specified or all forms of commercial activities;
an administrative arrest.

These sanctions are applied in administrative violation cases.

In Latvia, in matters of urban planning, an order to restore the site to its original state can lead to the demolition of a construction (see judgment of May 26 2015 of the Supreme Court, case No. SKA-64/2015).

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.)?

Generally, non-financial sanctions must be in causal relation to the (administrative) offence. To our knowledge, it is not typical that administrative sanctions would be used in the private law sphere. For example, at the moment, as mentioned in the example with alimony, person may not be sanctioned with such a non-financial sanction as the deprivation of their car. However, there is an intention in the parliament to introduce the deprivation of someone's car license if the person does not respect duty of the alimony. As for encroachment upon ownership rights, there exist such measures as freezing of assets, however, it is rather considered as an interim measure not a sanction. In addition, confiscation of some objects or instruments, forfeiture of rights to hold particular offices which were mentioned in article 23 (1) of the Latvian Administrative Violations Code may encroach upon ownership rights.

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.*

Yes, leniency program provided by the article 12.1 of the Competition Law stipulates option to award exemption or option to decrease the amount of financial penalty if the party cooperates with competition authority in order to investigate the infringement of competition law. The same authority that hears the case also adopts the sanctions.

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?*

At the moment, there is no case law where the Supreme Court has assessed the request to reopen/change already final administrative decisions on administrative sanctions as a result of the jurisprudence of the CJEU.

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?*

According to article 433 (1) of the Criminal Procedure Law it is possible to conclude an agreement in Pre-trial Proceedings. That is, a public prosecutor may enter into an agreement, on the basis of his or her own initiative or the initiative of an accused or his or her defence counsel, regarding an admission of guilt and a punishment, if circumstances have been ascertained that apply to an object of evidence, and the accused agrees to the amount and qualification of his or her incriminating offence, an assessment of the harm caused by such offence, and the application of agreement proceedings. In certain cases it is possible to conclude agreement in trial procedure as well.

Further, according to the article 438 (1) of Criminal Procedure Law after entering into an agreement, a public prosecutor sends the materials of a criminal case together with the minutes of the agreement to a court, proposing for such court to approve the entered into agreement. After reviewing the case, the court makes a judgment by which it approves the agreement which was concluded between the prosecutor and the accused.

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!