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Administrative Sanctions in European law

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Answers to questionnaire: Sweden

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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 general definition of administrative sanctions in Swedish law and while there is such a legal definition of criminal sanctions in the Criminal Code, Chapter 1 § 3, this is a purely terminological definition.

Administrative sanctions are not generally defined (see above), but the major difference between them and criminal sanction (apart from administrative sanction not being mentioned in the Criminal Code) is the lack of subjective guilt on the behalf of the offender and the standardized level of sanction (not so much concern about the individual). The principle of legality is a general principle of Swedish law and applicable on all use of public power, administrative sanctions included.

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?

Yes. The Supreme Administrative Court (SAC) has applied the Engel criteria when considering whether what according to national legislation is an administrative sanction effectively is to be regarded as a criminal sanction. The Court has, in cases concerning implemented EU law, applied case-law of both the ECtHR and the CJEU unitil now, however not the EU Charter.

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?

We have no such examples yet.

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

No general answer possible, as it depends upon the legislation and situation at hand. The SAC has however in a few judgments emphasized the "punitive and deterrent" aspect of the Engel criteria (cf inter alia Zolothukin) when adjudicating whether administrative sanctions should be regarded as criminal sanctions.

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?)

Swedish law makes distinctions in various legal instruments that the public authorities may use in order to fulfil their tasks. Procedural safe-guards may for example exist to a greater degree in situations where the authority takes actual measure against an individual or a company as compared to administrative fines.

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)?*

Yes, they are similar..

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?

Criminal sanctions are regulated in the Criminal Code and – to a certain extent – in specific criminal law on particular crimes, while administrative sanctions are regulated in the substantive administrative law applicable.

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.)?

Administrative law is too varied to give a general answer to this question. In some fields many of the above-mentioned rules or principles would apply. Mandatory representation is only stipulated in areas of law that involves the deprivation of personal freedom of individuals (child care, psychiatric care, etc.) The burden of proof will fall on the person seeking a positive decision from an authority, while it will fall on the authority in cases it seeks to interfere with the life of a citizen. The level of proof demanded for a sanction may also vary and are often below those of a criminal procedure ("beyond reasonable doubt"). Administrative sanctions can, according to the constitution, not be applied retrospectively and are always possible to appeal. The prohibition of

self-incrimination is sometimes a problematic issue, i.e. in areas of public law in which the public authorities are supervising private actors and often are dependent upon their reports in order to evaluate the lawfulness of the same actors. No general solution exists.

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)?*

Yes. This has been a major issue in Swedish law during 2013 – 2015, during which the supreme courts had to adopt their case-law in order to adjust to the case-law of the ECtHR. Administrative sanctions – and sometimes criminal sanctions –precludes the start of other such procedure and consequently that also parallel procedures are prohibited by the principle of ne bis in idem.

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 supreme courts has taken a rather extensive view on this issue (compared to A and B V. Norway from 2016) and found that in cases in which the administrative sanction is a "criminal sanction" in the meaning of the convention, the first procedure that is directed towards the individual precludes and other such procedure and that parallel procedures also such be included in this interpretation of the ne bis in idem.

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)?

In Sweden, individuals would most likely rather want to avoid administrative sanctions, as they can be rather costly and also cause practical problems for them. Only in situations concerning more serious crimes would it be the other way around. Criminal penalties and expulsion is accepted in the Swedish system, but the expulsion is in these cases decided on by the criminal court and thus part of the same decision as the criminal sanction.

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?*

Before the development of national case-law mentioned above, this was possible and account was then taken of the sanction in the "other" procedure.

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?*

Dual system. In regard of the follow-up question, Sweden is a bit of a mixed system. In many cases the authority deciding on administrative sanctions would also be the one responsible for such additional rule-making that the legislation makes room for. But in some areas a more strict separation between rule-making and general decision-making power on one hand and supervisory tasks and powers of administrative sanctions on the other is upheld. Varies a lot, but more substantial sanctions are often decided or confirmed by a superior or panel of some kind.

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?*

There are possibilities for several levels of jurisdiction. The administrative courts, the Administrative Court of Appeals and the Supreme Administrative Court, can in most cases decide issues of fact as well as questions of law and can either vacate the decision or replace it with its own decision.

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).*

See II-Q2. No special discretion as such. Yes, what we call full review.

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)?*

Fault based, with certain exceptions. No, also faults due to organizational issues can be liable.

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)?

Yes. Yes.

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).*

Many types of such sanctions are known. Yes, such orders can be done, i.e. if the construction was made illegally.

Ancillary questions:

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

Yes.

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)?

No.

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.

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.

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?*

Yes. In cases where Swedish courts has applied EU-law incorrectly, they can be re-opened if the mistake was flagrant and of importance for the decision. In some cases a new decision from CJEU has provoked individuals to ask for re-opening of old cases as they have felt that it wouold

have been decided differently if the new case from CJEU had existed. In these cases, no re-opening is allowed.

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, the principle of legality as interpreted in Sweden does not permit such a system.

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.