



**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: Austria



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Answers to the Questionnaire

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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?*

The notion of administrative sanction (Verwaltungsübertretung) is defined by the competence of an administrative authority responsible to impose it. In most of the cases this is the district authority (Bezirksverwaltungsbehörde). In contrast, criminal sanctions are defined by the competence of a court responsible to decide upon it.

The Austrian Constitutional Court has held, that according to the Austrian Constitution in cases where the law provides for very high penalties (EUR 72.673,- or in cases of tax fraud where the law provides for a penalty in the amount of 30 or 50 times of the tax evaded) such a sanction must be treated as a criminal sanction and that a criminal court must be competent to decide upon it (Art. 91 par. 2 and 3 of the Constitutional Law, „core of the notion of criminal sanction“, e.g. VfSlg 12151/1989, 12546/1990, 12547/1990, 12920/1991).

The principle of legality (i.e. the necessity of a legislative act, “no crime without law”) certainly is applicable to administrative sanctions under constitutional law (principle of legality of all administrative acts: Art. 18 par. 1 of the Constitutional Law; Art. 7 par. 1 ECHR which is directly applicable and part of Austrian constitutional law).

Administrative sanctions are prescribed in the laws regulating the different fields of administrative law: the law of administrative sanctions concerning road traffic regulations are provided in the Road Traffic Act, sanctions concerning construction law are provided for in the buildings laws of the provinces (Länder).

Administrative sanctions are defined in the different laws with varying precision. There are some - older - laws where administrative sanctions are defined only by reference to the regulations of the respective act „a violation of this act shall be punished with a penalty of up to 100 EUR“ („Blankettstrafnorm“ „blanquet norm“). In most cases sanctions are defined more precisely.

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?

Administrative practice and jurisprudence do follow the case law of the ECtHR, in particular the Engel-approach (e.g. judgment of the Supreme Administrative Court of 24 Sept. 2014, Ra 2014/03/0001). The Jussila judgment is cited in the context of avoiding the requirement of a public hearing. The Grande-Stevens judgment has been no specific issue as far as can be seen. The Schindler Holding and Bonda judgments are cited in the context of EU-law. ECtHR jurisprudence is for example cited when determining the scope of the notion of „criminal charge“ according to Article 6 par 3 ECHR in the context of disciplinary law (16 Nov. 1995, 93/09/0054) or in the context of the prohibition of double jeopardy according to Art. 4 7th additional Protocol ECHR (24 Sept. 2014, Ro 2014/03/0063).

As already said, the ECHR is directly applicable and part of Austrian constitutional law. In the same way, the provisions of the EU Charter on Fundamental Rights are also considered to be directly applicable and part of Austrian constitutional law (judgment of the Constitutional Court of 14 March 2012, U466/11 ua, VfSlg 19.632). The provisions of the EU Charter on Fundamental Rights - which have a wider scope of application than Art. 6 ECHR - are applied in cases where the law of the European Union is applicable (Art. 51 par. 1 of the Charter).

In the Schindler case guidelines and a notice issued by the Commission regulating the imposition of sanctions and the assessment of penalties were considered as relevant and a valid legal basis for the legality of sanctions imposed by the Commission. Such an approach normally would not be followed in the Austrian legal order where such rules may not be enacted by administrative authorities responsible to impose sanctions but must be put in the law enacted by parliament itself or at least be based on such a law.

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

There is no explicit statutory provision in this respect.

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?

The Austrian Supreme Administrative Court has referred to the judgments of the CJEU Käserei Champignon and Bonda in several judgments. The validity of these judgments in respect of Art. 6 ECHR or the principle of proportionality were not put into question (e.g. 9 Sept. 2013, 2011/17/0215; 10 Oct. 2016, Ra 2014/17//0014).

The position of the CJEU in the cases Käserei Champignon, Bonda and Maizena (2 July 1987, 94/86) can maybe be regarded to fit within the framework of ECtHR decisions since the judgments in these cases did concern persons who participated in particular financial schemes, namely those who have applied for a specific economic advantage (agricultural area payment or export refunds). That argument has been mentioned explicitly in the Käserei Champignon case, par. 41.

Similarly the ECtHR has regarded disciplinary sanctions, which by their very nature only concern the members of a specific group (such as public officials or persons belonging to a specific profession) as not being a criminal charge - except in cases of deprivation of liberty (2 July 2009, Iordanov; 31 May 2011, Kurdov). Disciplinary proceedings e.g. concerning public officials have been solely regarded as proceedings for the determination of a civil right (5 February 2009, Olujic; 23 June 2016, Baka).

Withdrawal of permits, e.g. the withdrawal of a passport and of an identity card as a consequence of drug-trafficking has not been regarded as a criminal sanction by the Supreme Administrative Court (10 Oct. 2003, 2002/18/0241; 27 Feb. 2003, 2003/18/0006): according to this case law only „such a norm has a criminal character, which has a preventive and at the same time a repressive aim and a reprimanding character and embodies a value judgment with respect to the conduct sanctioned by it“.

The withdrawal of a passport does not have a punitive aim of reproach or reprimand but has the character of an administrative measure to prevent the grave disadvantages to be expected from the behaviour of the person concerned. The withdrawal of a pharmacist's licence for a period of 18 months as a sanction for having violated the code of conduct for pharmacists hasn't been qualified as a criminal sanction under Article 4 7th additional Protocol ECHR either (Constitutional Court 27 June 2000, B 683/98, VfSlg 15.867/00).

Similarly the withdrawal of a driver's licence has been considered not to be a criminal sanction by the Austrian Constitutional Court, even in a case where the period of withdrawal did not immediately follow the behaviour (14 March 2003, G 203/02 u.a). Similarly the ECtHR has qualified the withdrawal of a drivers licence for a considerably short period of time as not being a criminal charge (Escoubet 1999); in the Malige case however it had considered the deduction of points as a result of a criminal procedure leading to the loss of a driving licence as a criminal sanction.

Proceedings for the expulsion of aliens do not fall under the criminal head of Article 6, even if they are brought in the context of criminal proceedings (Maaouia v. France)

It has to be pointed out, that sanctions in the Schindler case were not directed against natural persons but against any legal subject concerned, not necessarily being a natural person.

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

The deterrent effect of a penalty is determined by the very nature of the offence and by interpretation of the law concerned.

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?)

The distinction is made by the legislator who is responsible to determine whether the measure is classified as an administrative sanction („Verwaltungsübertretung“) or another administrative measure not considered an administrative sanction. Different procedural and substantive laws are

applied depending on the question whether the measure is classified as an administrative sanction. In the case of an administrative sanction the Administrative Sanctions Act (Verwaltungsstrafgesetz) is to be applied and Chapter 3.2. of the Administrative Court Procedure Act (Verwaltungsgerichtsverfahrensgesetz) in appeal proceedings.

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)?*

See answer to I-Q1.

The principle of proportionality is being applied (case law of the Constitutional Court). The basis for the assessment of the penalty is the degree of the perpetrator's guilt.

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 solution is provided for in the Administrative Penal Act (Verwaltungsstrafgesetz). According to this law the rules of the Criminal Law Act for determining the penalty have to be applied in the administrative proceeding (Section 19 of the Verwaltungsstrafgesetz).

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.)?

Excerpts from the Administrative Penal Act (Verwaltungsstrafgesetz):

“Arrest

§ 35. Apart from special cases provided for in the law, the law enforcement officers of the police force are allowed to arrest persons caught in the act of committing an offence in order to bring them before the authority if

1. the person caught is not known to the arresting officer, does not present an identification document or is not immediately identifiable in any other way, or
2. there is reason to suspect that the person will try to escape penal prosecution, or
3. the person caught continues engaging in the offence or attempts to repeat it, in spite of being admonished not to do so.

§ 36. (1) Each person arrested shall without delay be handed over to the nearest authority having jurisdiction in the matter, or immediately be set free in case the reason for arrest has meanwhile ceased to exist. He shall be informed at the earliest convenience, if possible already at the time of arrest and in a language known to him, on the reasons for his arrest and the charges raised against him. The authority shall examine the person arrested without delay. He must in no case be detained for a period exceeding 24 hours.

(2) Arrest and detention shall be carried out with respect for human dignity and the most considerate treatment possible of the person. § 53c paras 1 and 2 shall apply accordingly to the detention;

the requirement of sufficient natural daylight may be dropped provided that sufficient artificial lighting is available.

(3) The person detained shall without undue delay be permitted to inform a close person (§ 36a General Administrative Procedure Act) or any other person of his confidence as well as his legal counsel; the person detained shall be given instructions on this right. In case of reservations against the communication through the person detained, it shall be done by the authority.

(4) The person detained may receive visits of his relatives and legal counsels, close persons (§ 36a General Administrative Procedure Act) as well as of the diplomatic and consular representatives of his home country. § 53c paras 3 through 5 shall apply accordingly as far as mail and visitors are concerned.

...

Implementation of the penal enforcement

§ 53c. (1) Detainees may wear their own clothes and engage in an adequate activity, without being obliged to do so. They may bring their own food, provided that this does neither, in accordance with the facilities available, disturb supervision and order nor cause disproportionate additional administrative work. To the extent possible, they are to be kept separate from prisoners detained on basis of other provisions of the law than of the subject federal act, in any case male detainees separate from female detainees.

(2) Detainees shall be lodged in rooms with simple and suitable furnishing with sufficient access to fresh air and daylight. The detention rooms shall be adequately ventilated and adequately heated in the cold season. During darkness they shall, except during the time of night rest, have sufficient light so that detainees may read and work without their eyesight being jeopardized. It must be possible that detainees at any time are able to immediately report any incidents that require immediate action by supervisory staff.

(3) Their correspondence must not be subject to restrictions and monitored only by random checks. Pieces of writing obviously intended to prepare or continue or conceal punishable offences shall be intercepted. Money or parcels may be received freely. Parcels shall be opened in the presence of the detainee. Objects which may jeopardize safety and order shall be handed to detainee only upon his being released from prison, unless they have to be destroyed due to their character or condition.

(4) Detainees may receive visitors within office hours, as long as possible without jeopardizing the necessary supervision and safety and order as well as the operation of the facility.

(5) Correspondence and personal communication of detainees with authorities and legal counsel of this country as well as with executive bodies set up in accordance with international treaties for the protection of human rights that apply also to Austria, must be neither subject to restrictions nor their contents monitored. The same applies to the personal communication of foreign detainees with diplomatic and consular representatives of their home country.”

There is no provision granting legal aid in the proceeding before the administrative authority. Free legal aid is only guaranteed at court proceedings regarding complaints directed against decisions of the administrative authority (sections 8a and 40 of the Administrative Court Procedure Act). However a person detained may challenge his/her arrest at the administrative court and has the right to receive legal aid in order to lodge a complaint to this effect, in this context he/she may receive legal aid - restricted to the question of the arrest and treatment in custody - during the proceeding before an administrative authority.

Section 8a par 1 Administrative Court Procedure Act:

“(1) Unless otherwise provided by federal or state-law, a party has to be granted legal aid as far as that is demanded by Art 6 para 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Federal Law Gazette No. 210/1958, or Art 47 of the Charter of Fundamental Rights of the European Union, Official Journal No. C 83 of 30 March 2010, p. 389, if he/she has not sufficient means for the costs to lead the proceeding without impairment of his/her necessary subsistence and if the

intended legal action does not appear to be apparently wilful or futile.”

Similarly section 40 par. 1 entails the right for free legal aid for the defence before the administrative court when the interests of justice require so.

There might be an argument that courts should grant legal aid under sect. 40 for purposes of the defence at the proceeding before the administrative authority, however there is no case law on this question.

Persons arrested under the Administrative Penal Act are not to be brought before a court but are to be released within 24 hours. This has been criticised under Article 5 par. 3 ECHR.

An oral hearing is not required in the proceeding before the administrative authority but only - after a complaint of the accused has been lodged - in the proceeding before the administrative court. Time limits provided for in the Administrative Penal Law:

“§ 31. (1) Prosecution of a person is not admissible if no act of prosecution has been carried out within a period of one year (§ 32 para 2). This period shall be counted from the date of termination of the offence or when the punishable behaviour ended; if the result of the offence materialized only at a later date, the period shall be counted from such date.

(2) Penal liability for an administrative offence expires under the statute of limitation. The limitation period is three years and starts at the time referred to in para 1. The limitation period shall not include:

1. the time during which the prosecution cannot be initiated or continued pursuant to a statutory provision;

2. the time during which a penal proceeding is conducted before a public prosecutor’s office, a court or another administrative authority against the offender because of the offence;

3. the time during which a proceeding is suspended until a final decision on a preliminary issue has been made;

4. the time of a proceeding before the Supreme Administrative Court, before the Constitutional Court or before the Court of Justice of the European Union.

(3) A sentence must no longer be enforced after the expiry of three years from the date when its imposition has become final. The limitation period shall not include:

1. the time of a proceeding before the Supreme Administrative Court, before the Constitutional Court or before the Court of Justice of the European Union;

2. times during which the enforcement of the sentence was not permitted, or was suspended, delayed or interrupted;

3. times during which the defendant stayed abroad.”

Unless the administrative court decides on a complaint against an administrative penal sanction within 15 months, that sanction becomes ineffective by law (sect. 43 par 1 Administrative Court Procedure Act).

A lengthy proceeding has to be taken into account as a mitigating factor whilst determining the penalty (sect. 34 par. 2 Criminal Law Act referred to in sect. 19 par. 2 Administrative Penal Act)

The burden of proof lies with the authority, in the proceeding before the administrative courts with the courts. The principle *nulla poena sine culpa* and the presumption of innocence is valid in the field of administrative sanctions. Section 5 of the Administrative Penal Act stipulates as follows:

“Guilt

§ 5. (1) Unless otherwise provided for the liability for guilt in administrative rules and regulations, even negligence shall constitute penal liability for punishment. Negligence may be assumed in case a prohibition is violated or an order not complied with if the elements of an administrative offence need not comprehend any damage or danger and the culprit does not present prima facie evidence that he is not guilty of having violated the provision of the administrative law.

(2) Lack of knowledge of administrative rules and regulations violated on the part of the culprit is an excuse only in such cases if proven to be without his fault and if he was not able to realize the illicit character of his doing without knowing the respective provision of the administrative law.”

The defendant may file a complaint against an administrative decision with the administrative court within four weeks after the decision of the authority has been served on him. The administrative court has to give a full review on all questions of facts and law and has to decide on the merits of the case. In its judgment (or decision) the administrative court has to decide on the question whether a final complaint (“Revision”) is permitted against its judgment (or decision).

The judgment of the administrative court may be challenged by “Revision” at the Supreme Administrative Court who may consider the remedy (“Revision”) admissible even if it has not been declared admissible by the administrative court but who may also declare it inadmissible if it has been admitted by the administrative court.

The principle of reasonability is applied in the sense that an accused may only be found guilty if he/she is found to be accountable in the sense that if due to a mental disturbance resulting from a pathological disruption of his/her mental activity or due to mental deficiency at the time of committing the offence he/she was not capable of realizing its illicit character or to act in accordance with such reasoning he/she shall not be subject to punishment (sect. 3 par. 1 of the Administrative Penal Act). All decisions and judgments have to be reasoned.

The principle of retroactivity in mitius is applied in the sense that the sentence depends on the law applicable at the time the offence was committed, unless the law applicable at the time of the decision would be more favourable for the culprit regarding the overall consequences (sect. 1 par 2 of the Administrative Penal Act).

The prohibition of self-incrimination is respected, Article 6 par 2 ECHR is directly applicable. In a case concerning information on the identity of a driver see the judgment of the ECtHR of 8 April 2004 in the case of *Weh v. Austria*.

The principle of the right to appeal is being applied, including Article 2 7th additional Protocol. Until now it was not seen as a problem under Article 2 7th additional Protocol that in minor cases where a fine of less than 400 Euro has been imposed, no remedy to the Supreme Administrative Court is permitted according to sect. 25a par. 4 Administrative Court Act.

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)?*

No “unwanted consequences” from the Grande-Stevens judgment are discernable. This judgment appears in a new light after the ECtHR judgment of 15 November 2016 in the case of A. and B. v. Norway (“calibrated regulatory approach”, “integrated legal response”). The consequences of this judgment are unclear and could be discussed in more detail.

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 case of Zolotukhine is taken into account and followed as far as possible (e.g. 24 Feb. 2011, 2007/09/0361) in cases where the relevant aspects of the facts do very much differ, the Zolothukine case does not seem to be taken literally (25. March 2010, 2008/09/0203), in particular by the Constitutional Court (e.g. judgment of 16 Dec. 2010, B 343/10).

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?

Such behaviour cannot be excluded but there are no concrete data available on this question. The most common situation in this context arises in cases where a person causes a road accident and inflicts bodily harm to another person under the influence of alcohol (situation of the ECtHR judgment of 23 October 1995, Gradinger v. Austria, violation of Article 4 7th Additional Protocol ECHR). There is an administrative sanction for driving a vehicle under the influence of alcohol (sect. 5 par. 1 Road Traffic Act) and a criminal sanction for causing death (sect. 81 par. 1 Criminal Code) or causing death while under influence of drink (sect. 81 par. 2), the latter with a heavier penalty, and similar criminal sanctions for causing injury. In such cases administrative authorities tend not to prosecute for violation of the road traffic act but wait until there is a decision on a charge under the Criminal Code. In cases where an administrative penalty has been imposed but later annulled, a criminal conviction has been found not to violate Article 4 7th Additional Protocol ECHR (e.g. 30 September 2004, Falkner v. Austria). No problem under Article 4 7th Additional Protocol ECHR seems to be seen in cases, where a criminal indictment has been brought without the qualification of influence of drink.

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)?

A residence ban and administrative expulsion are not seen as penalties, such measures are imposed by an administrative authority not as a penal sanction. However, they may be the consequence of a finding of guilt of having committed a crime or an administrative offence.

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?

Section 22 par 1 of the Administrative Penal Act provides:

“Multiple offences

§ 22. (1) Unless otherwise provided in administrative rules and regulations, an offence is punishable as an administrative offence only if it does not constitute an offence falling within the jurisdiction of the courts.

This provision generally rules out the imposition of criminal and administrative sanctions cumulatively for the same conduct. The strict Zolothukine approach may lead to problems however.

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?*

Normally, the district authority (Bezirksverwaltungsbehörde) is responsible to impose administrative sanctions. There are 79 such authorities. In the 15 largest cities this authority lies with the city authorities (Magistrat) which have the same function. The general competence of these authorities in matters of administrative sanctions is regulated in sect. 26 par. 1 of the Administrative Penal Act. In matters of public security this competence lies with the police authorities in larger cities (sect. 26 par. 2).

The district authorities (and city authorities) do also have a general competence in matters of general administration. In those cases, where the district authorities are also competent (e.g. to issue permits to open a shop) the same authority is competent to decide on administrative sanctions. Local authorities (who are responsible e.g. to issue building permits) never have the competence to impose administrative sanctions. In building law the district authority therefore is always responsible for imposing administrative sanctions.

The district authorities have the competence to impose sanctions under financial law (sect 8 Devisengesetz) whereas regulations are issued by the Austrian National Bank. The official who discovers an infringement normally cannot impose an administrative sanction but has to report the matter to the competent authority, which normally is the district authority (city authority).

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 decision of the administrative authority can be challenged by the accused who has been found guilty. In some cases an authority is by law given the right to file a complaint against an acquittal of the defendant. The administrative court has to give a full review on all questions of

facts and law and to decide on the merits of the case. It may only repeal the administrative authority's decision and remit the case to the authority for a closer establishment of facts in exceptional circumstances when the authority has fully disregarded its duty to establish facts. In its judgment (or decision) the administrative court has to decide on the question whether a "Revision" is permitted against its judgment (or decision) to the Supreme Administrative Court. Such a remedy is admitted only in such cases, where the case poses a question of law which has not yet been answered by the Supreme Administrative Court or where the administrative court's decision contradicts case law or where the legal question to be solved has not been answered uniformly by previous case law.

The judgment of the administrative court may be challenged at the Supreme Administrative Court who may consider the "Revision" admissible even if it has not been declared admissible by the administrative court but who may also declare it inadmissible if it has been admitted by the administrative court.

The Supreme Administrative Court has the competence to annul the case (Kassation) and is bound to the establishment of the facts by the administrative court if the facts have been established properly. In exceptional cases the Supreme Administrative Court may also decide on the merits of the case in substance (reform and adopt) if that is in the interest of convenience, expedience and cost saving.

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).*

The administrative court has to give a full review on all questions of facts and law and has to decide on the merits of the case. There is no discretion given to the administrative authority in the proceeding before the administrative court. Although it is a party of the proceeding it does not have the formal role of a prosecutor and does not have discretion e.g. to drop the indictment or to bind the court in any way. The court has to assess the guilt and the penalty on its own motion and has to perform its own discretion, however it is bound by the principle of reformatio in peius.

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)?*

According to the Administrative Penal Act, in order for an administrative penal sanction to be imposed, the requirement of guilt has to be fulfilled. Negligence is sufficient in many cases where the accused has to show that he/he has not disregarded the necessary diligence. Standards of diligence are in some contexts interpreted very strictly, where even light forms of negligence are considered as guilt.

Other administrative sanctions being no penal sanctions are not dealt with under the Administrative Penal Act but under the General Administrative Procedure Act. In these cases guilt or negligence normally is not required.

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)?*

All administrative sanctions which have an effect on the legal sphere of a person should be reviewable by the administrative courts, either being a penal order, an administrative decision or an immediate administrative act.

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).*

Sanctions such as the closure of shops, the withdrawal of a licence, the withdrawal of a residence permit or an expulsion order, the prohibition to pursue one's business or certain professional activities, disciplinary sanctions for members of certain professions or for public officials are provided for in various laws. Such sanctions normally are regarded as interferences with civil rights or obligations and not as criminal sanctions. Article 6 par. 1 ECHR under its civil limb applies in these cases. Also in these cases there is the right to complain to an administrative court who has to decide on the merits of the case.

An order to restore a building site to its original state which leads to the demolition of a construction would be possible under various building laws in Austria. Such an order would be considered as an issue under Article 6 par. 1 under its civil limb. The legislatures in different Austrian provinces however have enacted laws to legalize constructions which do not comply with zoning regulations under certain conditions.

Ancillary questions:

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

In some instances non-financial sanctions are to be in causal relation to an (administrative) offence (e.g. withdrawal of the licence to run a shop, e.g. a restaurant, sect. 87 Trade Law, some cases of a residence ban for non-nationals). In other cases a finding of guilt of having committed an administrative penal act is not required.

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)?

Such a sanction does not seem to be provided for in Austrian law.

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.)?

Some administrative sanctions may constitute an interference into the ownership rights of a

person concerned.

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. Examples are the Data Protection Authority (pursuant to Article 28 par. 1 of Directive 95/46/EC) and several regulatory authorities which are organized in conformity with EU-law. Normally the authority (court) that hears the case does also adopt the sanction.

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?*

Requests to reopen administrative decisions have been filed in several cases (e.g. Verwaltungsgerichtshof judgments 21. Dec. 2012, 2012/17/0465; 24 Sept. 2014, 2012/03/0165). In such cases the court's reasoning is based on the CEUJ-judgment of 13 January 2004 in the case of Kühne and Heitz NV, C-453/00.

There are no express provisions concerning the reopening or renewal of administrative decisions under such specific circumstances. If required by EU-law, such a reopening or renewal however will be admitted in accordance with the case law. In this context see the recent CEUJ-judgment of 17 November 2016, in the case Stadt Wiener Neustadt v. Niederösterreichische Landesregierung, C-348/15.

Sect. 363a of the Criminal Procedure Act, which provides for reopening of criminal proceedings as a consequence of a finding of violation of the ECHR by a judgement of last instance. This provision is given some kind of erga-omnes effect by the case law of the Supreme Court (e.g. 11 November 2003, 11 Os 101/03; 14 April 2009, 13 Os 16/09s).

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?*

There is no plea bargaining in Austrian administrative penal law.

More basically: There is no formal public prosecution in the proceeding before the administrative courts. The administrative court is obliged to establish exonerating circumstances as well as incriminating circumstances of its own motion. This obligation exists irrespective of whether the administrative authority which issued the penal order is present at the hearing. This has been qualified as compatible with Article 6 ECHR by the ECtHR in its decision of 4 July 2002 the case of Weh and Weh v. Austria, No 38544/97, where the administrative authority has been absent at the public hearing before the administrative tribunal.

It would be interesting to know more on the role of administrative authorities in the proceeding

before the administrative courts in other countries: Does the authority e.g. have the discretion to drop the indictment?

An Austrian case is now pending before the CJEU where these questions are an issue in the light of the ECtHR judgment of 18 May 2016 in the case of *Ozerov v. Russia*.

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.

Section 22 par. 2 of the Penal Sanctions Act reads as follows:

“§ 22 (2) If a person has committed several administrative offences through several separate offences or if an offence is subject to more than one sanction not exclusive of each other, the sentences shall be imposed cumulatively. The same is applicable to administrative offences committed simultaneously with other punishable acts to be prosecuted by an administrative authority.”

It would be interesting to know the law of other EU-countries in cases of a multiple finding of guilt:

Are penalties (fines) to be summed up or is there a different method of determining a total penalty?