SUPREME COURT
REPUBLIC OF SLOVENIA

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: Croatia

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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?*

There are no definitions of administrative sanctions at the national level, while criminal sanctions are defined by the Criminal law. Administrative sanctions are imposed by the administrative bodies on the basis of administrative law, while criminal sanctions are pronounced by the criminal courts.

The principle of legality is applicable to administrative sanctions, but there is also general rule in the General administrative procedure act which provides enforcement of non-monetary administrative obligations by a fine.
It provides: (1) If the obligor does not fulfil the obligations from the decision himself, if the enforcement by third persons is not possible or is not suitable for the purpose of the enforcement, the administrative body performing the enforcement shall force the obligor to fulfil the obligations from the decision by imposing a fine.
(2) A fine by which a natural person is forced to fulfil obligations is adjudicated in a decision in the amount of up to two average annual gross salaries in the Republic of Croatia in the previous year. The fine by which a legal entity is forced to fulfil obligations is adjudicated in a decision to the responsible person of the legal entity in the amount of up to ten average annual gross salaries in the Republic of Croatia in the previous year. An objection against the decision on the fine does not postpone the enforcement of the decision.
(3) In case of further non-fulfilment of the obligation, another fine, a higher one, shall be adjudicated within the determined scale. If necessary, the fine may be adjudicated several times.
(4) Fines are enforced pursuant to the provisions of this Act on enforcement of monetary obligations.

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?

ECtHR and CJEU jurisprudence is followed as a principle. It could be possible that ECtHR and CJEU jurisprudence (including EU Charter on Fundamental Rights) are applied at the same time

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

There is no any statutory-based solution given 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?

There are no examples in national practice or case law where the jurisprudence of the EU law is found to be compatible with jurisprudence of the ECtHR.

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?)

Administrative sanctions and other administrative measures are prescribed by a specific law. So, the measure is choice of the legislator. Regarding the procedure, there is no distinction in procedural requirements needed for imposing administrative sanctions and other administrative measures.

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)?*

The administrative body is authorized to impose only the sanction which is proscribed by law, but in some specific laws there is a general rule according to which the specific body is entitled to choose any sanction which is appropriate to restore compliance with a law.

The principle of proportionality is always applicable. It is a general principle of administrative procedure (Principle of Proportion in Protection of Rights of Parties and Public Interest).

It is proscribed: (1) The right of a party may be limited by the action of an administrative body only where so anticipated by law and if such action is necessary for achieving the purpose determined by law and proportionate with the aim that is to be achieved.

(2) If a party has certain obligations under law, measures provided by regulations, which are more advantageous for such party, shall be applied to the party, if by such measures the purpose of law may be achieved.

(3) In conducting procedures, administrative bodies are obligated to ensure that parties realize the protection and acquisition of their rights in the easiest possible way, taking care that the realization of their rights is not at the expense of other persons' interests or contrary to public interest.

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?
As a general principle there is obligation 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.)?
Administrative procedural requirements are equal for every administrative 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)?*
There is no prevention of criminal procedure because of the administrative santction.

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)?

Ne bis in idem principle is considered only in specific procedure (administrative or criminal).

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)?

There is no information about the cases where individuals, subject of administrative sanctions, would like to exclude criminal sanctions and criminal procedures. There is possibility for a double penalty for non-nationals (e.g.: criminal punishment for a criminal offense and administrative expulsion).

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?*

It is possible that an individual is sanctioned with both - the administrative and the criminal sanction, and if so, the criminal sanction does not take into account the administrative one. The administrative sanction is not considered a part of the criminal sanction.

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 administrative bodies are competent for both the enforcement and the regulation of certain areas of law, but they are not the only one competent for enforcement. Enforcement of non-monetary obligations is performed by the administrative body that adjudicated the matter in the first instance, while enforcement of monetary obligations is performed according to regulations applicable to court enforcement. The enforcement of monetary obligations is performed in court (not administrative, but municipal court) further to the motion of an administrative body which rendered the decision or the party who has interest in the enforcement.

At enforcement level, the official who discovers an infringement can impose proscribed administrative sanction in separate administrative procedure.

Regarding enforcement it is proscribed as follows - Enforcement of Non-Monetary Obligations by a Fine:

(1) If the obligor does not fulfil the obligations from the decision himself, if the enforcement by third persons is not possible or is not suitable for the purpose of the enforcement, the administrative body performing the enforcement shall force the obligor to fulfil the obligations from the decision by imposing a fine.

(2) A fine by which a natural person is forced to fulfil obligations is adjudicated in a decision in the amount of up to two average annual gross salaries in the Republic of Croatia in the previous year. The fine by which a legal entity is forced to fulfil obligations is adjudicated in a decision to the responsible person of the legal entity in the amount of up to ten average annual gross salaries in the Republic of Croatia in the previous year. An objection against the decision on the fine does not postpone the enforcement of the decision.
(3) In case of further non-fulfilment of the obligation, another fine, a higher one, shall be adjudicated within the determined scale. If necessary, the fine may be adjudicated several times.
(4) Fines are enforced pursuant to the provisions of this Act on enforcement of monetary obligations.

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?*

General rules for levels of jurisdiction are the same in all administrative procedures and administrative disputes. They can vary only on the basis of special material law which can reduce levels proscribed by general procedural acts.
The first instance administrative courts as well as the High Administrative Court of the Republic of Croatia, are competent to decide issues of fact and also issues of law when deciding on administrative sanctions.
Full jurisdiction administrative dispute is a rule, so the administrative court, as well as the High Administrative Court of the Republic of Croatia, is competent to reform or adopt (alone) the administrative sanctions except it may not do that in view of the nature of things or where the administrative body acted according to its discretion.

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's judicial review of administrative sanctions is based not only on the legality of the decision, but also on factual questions/circumstances.

Administrative dispute may not be conducted concerning the correctness of an individual decision issued through the application of discretionary judgment of the body of public law. Administrative disputes may be conducted concerning the lawfulness of such a decision, the boundaries of authority and the purposes because of which the authority was granted.

Full jurisdiction administrative dispute is excluded in administrative matters where the administrative body acted according to its discretion, which means that the administrative court is not competent to reform or adopt (alone) the administrative sanctions where it is a matter of discretion of the administrative body.

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)?*

Croatian legal system for administrative sanctions is based on strict liability. A fault of the individual as a condition for the administrative sanction 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)?*

The scope of administrative dispute is defined wider than the assessment of the lawfulness of the administrative act.

The scope of administrative dispute is the following:

1. assessment of the lawfulness of a decision by which the body of public law adjudicated on a right and obligation in an administrative matter (administrative act) against which it is not permissible to file a regular legal remedy and the adjudication on the rights, obligations and legal interests of the party;

2. assessment of the lawfulness of an act of the body of public law by which a right, obligation and legal interest of the party was breached against which it is not possible to file a regular legal remedy;

3. assessment of the lawfulness of a failure of the body of public law to adjudicate on a request or a regular legal remedy of the party or to act in accordance with subordinate legislation within the time limit fixed by law as well as the adjudication on the rights, obligations and legal interests of the party;

4. assessment of the lawfulness of the conclusion, termination and enforcement of administrative contracts.

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).*

Non-financial (non-pecuniary) sanctions are proscribed by a specific material law. All mentioned sanctions can be imposed: the prohibition to pursue one's business or certain professional activities, the deprivation of the ownership, the duty perform certain works, order to restore the site to its original state lead to the demolition of a construction.

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)?

Only if it is proscribed by a specific law applicable in the concrete administrative matter.

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, but respective of conditions laid in Art. 1 of the first protocol ECHR.

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.*
It can be proscribed that the severity of the administrative sanction depends on the party's ability and willingness to produce evidence. This rule can also be used without a special provision in any administrative matter, depending on the special circumstances and the nature of the case.
As a rule 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?*
Requests to apply the jurisprudence of the CJEU are usual but there was not request to reopen/change already final administrative decisions on administrative sanctions because of the jurisprudence of the CJEU.
National rules of administrative procedure not even rules on court reviews do not allow such re-openings of cases.
Act on administrative diputes only provides that dispute finalised by a judgment shall be renewed upon the proposal of one of the parties if in a final judgment of the European Court of Human Rights it was decided on a violation of fundamental human right or freedom in a way different from the judgment of the court.
Regarding reopening of administrative procedure before administrative bodies, the Constitutional court case-law exists that allows reopening of the administrative procedure after a final judgment of the European Court of Human Rights.

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?*

As a general rule Act on administrative dispute provides Court settlement.
It provides:
(1) During the dispute the parties may reach a settlement before the court about the merits of the dispute.
(2) Settlement may not be reached on claims that the parties may not dispose of.
(3) In the course of the dispute, the court shall advise the parties about the possibility of reaching a settlement and assist them in reaching it. Court settlement shall be recorded in the minutes that shall also be signed by parties.
(4) If the settlement relates to the statement of claim in full, the court shall discontinue the dispute in a decision, and if it relates to the statement of claim in part the court shall include the content of the settlement in the dispositive part of the judgment.

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!