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Administrative Sanctions in European law

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Answers to questionnaire: Cyprus



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Administrative sanctions in European Law

Part I – The notion of administrative sanctions

I- Q1 – Setting the respective legal frameworks

An administrative sanction, within Cyprus' legal framework and precedent law, is distinguished from a criminal one, in that, a **criminal charge** is only determinable in accordance with the provisions of the Constitution and hence a **criminal sanction**, requires a **constitutionally acceptable finding of guilt**, without which no such penalty could have been imposed (*Republic v. Demand Shipping Co. Ltd (1994) 3 C.L.R. 460*).

In order for a criminal charge to be instituted, it needs to be classified as such by Cyprus' Criminal Code, Chapter 154. It is 'processed' through the Criminal Procedure Law, Chapter 155 and safeguarded by the principles of Articles 12 and 30 of the Constitution. As precedent puts it, "no sanction can be imposed to any person for a criminal or disciplinary offence, without applying the criminal or disciplinary procedural framework, in accordance with the provisions of Article 12 of the Constitution¹."

Article 12 of the Constitution, safeguards a number of principles familiar to Article 6 and 7 of the ECHR. In brief,

- no penalty/crime without law - only the law can define a crime and prescribe a penalty (Article 12.1 of the Constitution and Article 7 of ECHR)
- ne bis in idem / double jeopardy (Article 12.2 of the Constitution, Article 19 of Chapter 154, Article 35 of Chapter 155 and Article 4 of Protocol 7 of ECHR)
- proportionality – the penalty must be proportionate to the severity of the offence (Article 12.3 of the Constitution)
- presumption of innocence (Article 12.4 of the Constitution and Article 6.2 of ECHR)
- prompt and detailed summoning of the nature of the offence and charges, sufficiency of time to prepare defense, legal aid, litigation in person or via attorney, right to call defense witnesses and cross-examine prosecution witnesses, right to an interpreter if need arises. (Article 12.5 of the Constitution and Article 6.3 of ECHR)
- the penalty of general confiscation of property is prohibited (Article 12.6 of the Constitution)

Article 30.2 of the Constitution enshrines **judicial protection**, in that in the determination of one's civil rights and obligations or against any criminal charge faced, a person has the right to a fair and public hearing within a reasonable time by an independent, impartial and competent court, established by law, identical to Article 6.1 of ECHR.

Unlike other countries, Cyprus' Criminal Code does not criminalise the intentional violation of administrative laws but such criminalisation is penetrated by the legislature in specialised legislation according with the principle of legality - *nullum crimen nulla poena sine lege*- no crime without law. Hence, in that respect, such criminal sanctions can only be imposed by criminal courts. One example would be the Protection of Environment through Criminal Law Act 22(I)/2012, which was enacted in accordance with Directive

¹ Papasavvas v. Republic (2003) 3 C.L.R. 134, Kyriakides and others v. Republic (1997) 3 C.L.R. 485 and Artemis Kleovoulou Trading and General Services Ltd and others v. Yermasoyia Municipality (2007) 4B C.L.R. 598, Lefkos Georghiades v. Republic (1969) 3 C.L.R. 396

2008/99/EU. In essence, the law criminalises actions or omissions in violation of exactly 99 environmental laws, done intentionally or with gross negligence.

Nullum crimen nulla poena is similarly applied to administrative violations that incur administrative sanctions. Thus, no administrative sanction can be imposed, by a competent public body, without statutory empowerment and subsequent breach or non-compliance by a **regulated** undertaking/institution/person. Hence, a violation is identified by a competent public body entrusted by law to regulate a group of persons for the **public interest**. In this way, the public body monitors, enforces the law and imposes administrative sanctions to those in breach. Administrative procedures are safeguarded through similar but not identical principles to those of criminal law, as explained more thoroughly below.

National notion of “administrative sanctions”

There is no positive, distinct definition of “administrative sanctions” in Cyprus’ case law, despite the fact that the Supreme Court of Cyprus has, but a number of times, held that regulatory administrative sanctions imposed by a plethora of competent administrative authorities **do not constitute penalties under criminal law but administrative sanctions** enforced and imposed under administrative procedures². An inside into the case law sketches how the notion has developed.

First, the leading case of **Republic v. Demand Shipping Co. Ltd.**³ The first instance judge held that the relevant statutory provisions breached Article 30 of the Constitution in that the pecuniary sanction of £700 was not “a regulatory administrative sanction” but one that ought to have been imposed by a competent court and not an authority. The Supreme Court of Cyprus, by an *enlarged bench* made extensive reference to the cases of *Engel and others v. the Netherlands*, *Öztürk v. Germany* and *Demicoli v. Malta* and after careful application of *Engel criteria*, overruled the first instance judgment. It held by a *majority ruling*, that the imposition of a pecuniary administrative sanction, was not a criminal charge under Article 12 of the Constitution but an administrative sanction imposed by a public body for administrative infringements of the relevant statutory provisions. In their *dissenting judgment*, Judges Constantinides and Nikitas upheld the first instance ruling and reiterated the issue as follows: “the determination of a criminal charge by a body other than a court, established by law, is unconstitutional. Thus, “a competent authority” is not a court and decisions by it that conclude a determination of a criminal charge shall be void. Hence, this is the question to be answered.” After applying a step by step approach of *Engel criteria* and *Öztürk*, concluded that “the determination of such violations constitutes a determination of criminal charges” that should have been tried by a competent court and not by a competent public body.

Secondly, the case of **Sigma Radio T.V. Ltd v. Cyprus Radio and Television Authority**⁴ followed the same dictum of *Demand Shipping*. *Engel criteria* were also applied and the court ruled that the matter in issue concerned an administrative sanction and not a penal one under *Article 12 of the Constitution*. Also, the sanction was directed solely to those that infringed the relevant administrative statute, imposed for the public interest and could be contested under *Article 146 of the Constitution*.

² Myrofora (Miranda) Papageorghiou v. Cyprus Securities and Exchange Commission Case No. 585/2007, date 9.6.2009, C.Y.T.A. v. Office of Electronic Communications and Postal Regulations, Case no, 1339/2005, date 19.3.2007, Sigma Radio TV Ltd v. Cyprus Radio and Television Authority, case no. 1096/2001, date 7.1.2003 and Sigma Radio TV Ltd v. Cyprus Radio and Television Authority, Case no. 393/2003, date 14.2.2006

³ (1994) 3.C.L.R. 460

⁴ (2003) 4A C.L.R. 1

Thirdly, the case of **C.Y.T.A v. Office of Electronic Communications and Postal Regulations**⁵, and as per Judge Kramvis: “The imposition of an administrative sanction is **independent** of a criminal procedure and the power of the Office is under no circumstances in conflict with the jurisdiction of the courts.... The statute itself does not **classify** the infringements in issue as criminal. Neither is their **nature** such. The cases of *Republic v. Demand Shipping Co. Ltd (1994) 3 C.L.R 460*, *Sigma Radio T.V. Ltd v. Cyprus Radiotelevision Authority, Case no. 1096/01 7.1.03*, *Sigma Radio T.V. Ltd v. Cyprus Radio and Television Authority, case no. 393/2003,14.2.06*, are applicable. Regarding the **severity of the penalty** criterion- I am of the opinion that the said statutory administrative sanctions (pecuniary sanction imposed in accordance with the principle of proportionality ...) are not of such severity as to fall within the scope and definition of “criminal” of Article 12 of the Constitution. Lastly, the possibility of judicial review to contest the decision of the Office is taken into account. Nor are the “charges”, “criminal charges within the meaning of Article 30.2 of the Constitution””. The first instance judgment was later upheld on appeal⁶.

Fourthly, in the case of **Pampinos Charalampous and others**⁷, the Court held that “the Commission for the Protection of Competition was not a court nor was it exercising judicial powers, in that respect, **the penalties it was empowered to impose were of an administrative and not of a criminal nature**”.

Lastly, in the case of **Jupiwind Ltd and others v. Governor of Central Bank of Cyprus**⁸, the court, after taking into account *Engel criteria* and the national leading case of *Demand Shipping*, rejected the argument of the applicant that the administrative fine imposed was of a criminal nature, and subsequently held that it did not fall under *Article 12 of the Constitution* and *Article 6(1) of ECHR*.

It appears thus; from the pithily reference to Cyprus’ precedent law that an administrative sanction is one imposed by a competent administrative authority and is distinguished from penal ones imposed by criminal courts. In making the distinction, *Engel criteria* serve as a starting point and guideline to Cyprus’ courts. While the ECtHR’s independent interpretation of the notion of ‘criminal charge’ laid down the foundations for a “progressive extension of the application of the criminal-head guarantees of Article 6”, Cyprus’ case law takes a rather dominating and constant view that the not so ‘hard core’ categories of criminal law, should be kept within the administrative law sphere, in line with *Schindler Holding*⁹, *Kaserei Champignon Hofmeister*¹⁰, *Lukasz Marcin Bonda*¹¹. In such instances, the criminal-head guarantees do not necessarily apply with their full stringency (*Jusila v. Finland*, § 43).

Despite the fact that administrative sanctions have been challenged to be contrary to the separation of powers principle, the Supreme Court of Cyprus has ruled otherwise. Nor do they breach Article 6 of ECHR since they can be subjected to judicial review that satisfies Article 6.1 of ECHR (*Schindler Holding*¹²).

Distinction between sanctions and other measures

Sanctions can take the form of fines (‘one-off’ violation or perpetual violations) or temporary or permanent revocation of license (perpetual violations). For example, under

⁵ Case no, 1339/2005, date 19.3.2007

⁶ (2009) 3 C.L.R. 465

⁷ (1991) 1 C.L.R. 677

⁸ Case nos. 791/2010, 886/2010, 887/2010, 888/2010 and 889/2010), 28/2/2012

⁹ T-138/07, 13/7/2011

¹⁰ C-210/00, 11/2/2002

¹¹ C-489/10, 5/6/2012

¹² (supra)

Waste Management Act of 2011 185 (I)/2011), a public body is authorised to fine a waste management facility if it pollutes or deteriorates environmental conditions or endangers public health (*Article 51(1)(a)*). However, the competent public body is empowered to suspend and temporarily revoke license until compliance measures have been taken or may permanently revoke license if the facility omits to comply with instructions issued by the public body or if compliance measures have been rendered impossible to take (*Article 51(2)*). Therefore, an administrative sanction can be distinguished from a measure in that an administrative measure's role is to reconstitute the well-functioning of public administration and not to repress, prevent or deter a particular statutory behaviour.

I- Q2 – Procedural requirements

“It must be remembered that the Convention is designed to “guarantee not rights that are theoretical or illusory but rights that are practical and effective.”” (*Salduz v. Turkey*¹³)

As aforementioned, administrative procedural requirements are not identical to criminal ones but resemble in practice and effectiveness. The overall legal framework is laid down in General Principles of Administrative Law Act 158(I)/1999. The statute safeguards the procedure by encapsulating the principles of fairness, competence, proper administration- bona fide and proportionality, legality, representation, natural justice- impartiality and right to be heard, equality, right to judicial review and to an appeal etc.

A concise outline of 158(I)/1999 Act's principles:

- Legality: A public authority does not act unlimitedly nor does it act as it pleases. Its powers and activities derive from statute and are hence determined explicitly and limited to the extent such a statute denotes (*Article 8*). The principle of legality is the most substantive and essential one to a democratic state which respects the rule of law and acts primarily for the public interest.
- Competence: A public authority's competence is determined by the Constitution or by Statute or Statutory Instruments/Regulations, enacted in accordance with the law (*Articles 15 and 17*).
- Proper administration:
 1. Principle of bona fide: A public authority must act in good faith. Measures/Sanctions, conflict good faith if taken in bad faith, or in a contradictory or deceiving manner (*Article 51, Tamassos Tobacco Suppliers and Co. v. Republic*¹⁴).
 2. Proportionality: The principle of proportionality requires that a public authority's measures including imposition of sanctions must be proportionate (*Article 52*). Adverse effects cannot be disproportionate to the measure taken or sanction imposed (*Andreas Azinas v. Republic (1999) 3 C.L.R 508, Theoti v. Republic (2001) 3 C.L.R 1144, C.Y.T.A. v. Office of Electronic Communications and Postal Regulations (2009) 3 C.L.R. 465*).
- Natural justice is regarded highly in administrative law. It is enshrined in *Article 30.2 of the Constitution*, which is identical to *Article 6(1) of ECHR*, reference to which was made above in relation to criminal charges (***Sigma Radio T.V. Ltd and others v. Cyprus Radio and Television Authority***¹⁵).
 1. *Impartiality- Nemo iudex in causa sua*
An administrative body must act in accordance with the principle of impartiality (*Article 42*). In the case of ***Sigma Radio T.V.***¹⁶, the *full bench* of the Supreme Court

¹³ 36391/02, 27/11/2008

¹⁴ (1992) 3 C.L.R. 60

¹⁵ (2004) 3 C.L.R. 134

¹⁶ (supra)

ruled that the Radio and Television Stations Act which empowers the public authority of Cyprus Radio and Television to impose administrative sanctions for non-compliance to statutory provisions, did not infringe the principle of natural justice. The allegation that the public body was acting as prosecutor, enquirer, witness and judge, were ill-founded¹⁷. **The ruling of the Supreme Court was upheld by the ECtHR on 21/7/2011, in the case of Sigma Radio Television Ltd v. Cyprus**¹⁸.

2. *Right to be heard- audi alteram partem*

The right to be heard is enjoyed by any person who will be affected by the administrative act or measure of a disciplinary or sanction-like character or will, in any way, be adversely affected by it (*Article 43*).

- **Representation:** The right to be heard is exercised either as a litigant in person or via an attorney, either orally or in writing (*Article 43*).
- **Equality** is enshrined in *Article 28 of the Constitution*, which provides that all are equal before the law, administration and justice. Also, *Article 38 of 158(I)/1999 Act* determines that a public body must act in accordance with the principle of equality which requires equal and uniform treatment of all civilians who are under the same or similar conditions.
- **Judicial review (judicial protection):** is a remedy made available by *Article 146 of the Constitution* where the right may be exercised on both points of fact and law with a subsequent right to an appeal to the Supreme Court, on points of law alone (*131/2015 Act*).

General Principles

- The **burden of proof** for the violation burdens the public body, since the alleged violator does not accept the alleged infringement. The burden consists of both the objective and subjective hypostasis of the violation (if it relates to a non-strict liability violation) as well as the aggravating circumstances that surround the case and ought to be taken into account during mitigation.
- **Presumption of innocence** is a fundamental principle in Cyprus' legal system for criminal and administrative law and is in direct correlation with the burden of proof. Hence, a person is presumed innocent until proven otherwise.
- **Principle against self-incrimination** is linked to the aforementioned two principles in that if a person were to self-incriminate himself it would in essence release the public body from proving the violation against him.

I- Q3– Have unwanted consequences ever accrued from the decision of the ECtHR?

Three 'legal spheres of influence' coexist - three legal pillars; Union law, national Constitution and the ECHR. Union law takes supremacy over the Constitution (*Article 1A of the Constitution*) which is sovereign nevertheless (*Article 179.1 of the Constitution*). The ECHR has acquired augmented force over national legislation after ratification (*Article 169.3 of the Constitution*).

The legal order of Cyprus has been the habitat of *ne bis in idem* for a long time (*Article 12 of the Constitution* (refers to criminal proceedings)). The *sui generis* nature of EU legal order becomes quite apparent in the context of the principle and its transfer to the transnational plane (*Article 50 of the EU Charter of Fundamental Rights* (refers to criminal proceedings 'within the Union' hence covering proceedings within more than one jurisdiction)). Also, *ne bis in idem* is a fundamental principle fortified by *Article 4 of Protocol*

¹⁷ Sigma Radio T.V. and others v. Cyprus Radio and Television Authority (2004) 3 C.L.R. 134, Sigma RADIO T.V. and others v. Cyprus Radio and Television Authority (2011) 3 C.L.R. 667

¹⁸ C-32181/2004 and C- 35122/2005

No.7 of ECHR (refers to “criminal” proceedings within a state in accordance with the autonomous interpretation of ECHR). What all three legal orders have in common is that the principle is construed as a principle of criminal law. However, do they share the same notion of criminal? The starting point is *Engel criteria* for all three but their progression might not be identical. This depends on what constitutes *idem* for each one.

In *Zolotukhin v. Russia*¹⁹, the Grand Chamber of the ECtHR specified that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second criminal “offence”, within the autonomous interpretation of ECHR, in so far as it arises from **facts which are substantially the same**. Article 4 of Protocol No. 7 guarantee becomes relevant on the **commencement of a new criminal prosecution**, where a prior acquittal or conviction has already acquired the force of **res judicata**. Hence, it contains a **safeguard against being tried or being liable to be tried again in new proceedings** rather than a prohibition on a second conviction or acquittal. The focus is, therefore, on **facts which constitute a set of concrete factual circumstances** involving the **same defendant and inextricably linked together in time and space**, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings. *Grande Stevens v. Italy*²⁰, took the matter a step further as the question for the ECtHR, was **not whether or not the elements of the offences** set out in the specific legislation in question were identical, but whether the offences with which the applicants were charged before the public authority and before the criminal courts **concerned the same conduct**. In the Court’s opinion, those proceedings clearly concerned the **same conduct** by the **same persons on the same date** and this finding was sufficient to conclude that there had been a breach of Article 4 of Protocol No. 7.

Foremost, this interpretation of Article 4 of Protocol No. 7, as formed by *Zolotukhin* and *Grande Stevens*, seems to preclude in the shaping of ne bis in idem, factors such as legitimate protected good, degree of culpability/deceit, the scope and purpose of administrative sanctions (deterrence, public interest) in relation to penal ones (punitive) and the elements of the offence. In addition, it is capable of ‘merging’ two regimes founded to be separate from each other and in essence, counter the effectiveness of administrative sanctions’ regime.

Ne bis in idem, under Union law, acquires force when a member-state acts within the Union’s legal framework - within the ‘scope of EU Law’ as broadly interpreted in *Fransson*²¹. When national law acts within the ‘scope of EU Law’ a member-state is bound to apply its fundamental rights and principles. Attempting to construct a typology of cases wherein ne bis in idem was applied dominance would shine upon competition law. Ne bis in idem first appeared in *Walt Withelm*²² and confirmed in *LVM*²³. Interestingly enough, competition law within EU law’s legal order is not considered to be of criminal nature. However, what constitutes *idem* under EU law?

Fransson, concerned a national system with two separate sets of proceedings, administrative and criminal, to punish the same wrongful conduct. The CJEU held that ne bis in idem principle laid down in Article 50 of the Charter of Fundamental Rights of the European Union **does not preclude a Member State from imposing successively, for the same acts of non-compliance** in the field of value added tax, **a tax penalty and a**

¹⁹ 14939/03, 10/2/2009

²⁰ 18640/10, 7/7/2014

²¹ C-617/10, 26/2/2013, § 21

²² (1969) ECR I, Case 14/68

²³ *Limburgse Vinyl Maatschappij (LVM) and Others v. Commission*, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P, C244/99 P, 15/10/2002

criminal penalty in so far as the first penalty is not criminal in nature, a *matter which is for the national court to determine*. In doing so the national court may decide that the combination of the two would be contrary to national standards, “as long as the remaining penalties are effective, proportionate and dissuasive”²⁴. It is clear that EU law has a narrower definition of *idem* than ECHR but possibly a wider category of “criminal law” despite ECHR’s autonomous interpretation.

In Cyprus’ legal order and as can be recalled from Part I, the concept of administrative sanctions is distinguished from criminal ones. But what constitutes *idem* under national law?

In the case of ***Myrofora (Miranda) Papageorgiou v. Cyprus Securities and Exchange Commission***²⁵ violation of the statutory provision, constituted both a criminal and an administrative offence. The competent authority imposed an administrative sanction and no criminal proceedings were instituted. The court ruled that dual regimes did not negate the autonomous and independent power of the Commission to impose an administrative sanction for non-compliance.

When acting ‘within the scope of EU law’, the notion of *idem* is identical to that of EU law. The principle of *ne bis in idem* was recently addressed by the Administrative Court in the case of ***Pfizer Hellas-Cyprus Branch and others v. Commission for the Protection of Competition***²⁶, relating to competition law. A brief outline of the case follows:

- The applicants incurred administrative fines by the Commission for the Protection of Competition for infringing Article 6(1) (d) of Protection of Competition Law and they alleged that the administrative fines fell within ECtHR’s criminal-head guarantees and subsequently breached *ne bis in idem* principle.
- The respondent made extensive reference to the case law of the Supreme Court of Cyprus, ECtHR’s and CJEU’s supporting the view that the administrative fines did not fall within the criminal-head guarantees of Article 6 of ECHR and Article 30.2 of the Constitution as they were not criminal in nature. Also, they supported that the Commission’s procedure was safeguarded by the principle of impartiality and its decisions were subject to judicial review in accordance with Article 146 of the Constitution.
- The court applied the case of ***LVM where the CJEU had discussed the issue of finality in the context of ne bis in idem in competition law*** and stated that “the principle of *ne bis in idem*, which is a fundamental principle of Community law also enshrined in Article 4(1) of Protocol No 7 to the ECHR, precludes, in competition matters, an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalised or declared not liable by a previous unappealable decision. The application of that principle therefore presupposes that a ruling has been given on the question whether an offence has in fact been committed or that the legality of the assessment thereof has been reviewed”.
- Hence, the court ruled, as in LVM, that the principle does not in itself preclude the resumption of proceedings in respect of the same anti-competitive conduct where the first decision was **annulled for procedural reasons without any ruling having been given on the substance of the facts**, since the annulment **cannot be regarded as an acquittal**. In such a case, the penalties imposed by the new decision are not added to those imposed by the annulled decision but replace them.

Additionally, if a matter falls ‘within the scope of EU Law’ and the court (first or last instance) feels that an interpretation is needed on the nature of the penalty that had been

²⁴ Fransson (supra) § 36

²⁵ Case No. 585/2007, date 9.6.2009

²⁶ Cases no. 5669/2013 and 5670/2013, date 12/09/2016

imposed during the first proceedings, it may request for a preliminary ruling on the issue from the CJEU (*Article 34(A) of Courts Act 1960 14/60*).

In Cyprus, a disciplinary, administrative procedure is independent of a criminal one²⁷ and appears to follow a rather independent approach of what constitutes *idem*.

The initiation of a criminal proceeding against a civil servant suspends or prohibits the initiation of a disciplinary one until the former has been concluded (*Article 77 of the Civil Service Act 1/1990*). If found guilty, the disciplinary procedure may proceed in relation to his conduct and the civil servant will incur disciplinary sanctions proportionate to the severity of his conduct, especially when the offence relates to dishonesty or lack of morality (*Article 84 of 1/1990 Act*). For example, a civil servant's conviction of embezzlement of public funds will most likely lead to the disciplinary termination of his employment. If acquitted, on the other hand, no disciplinary proceedings can be initiated for the same charge. He may however, face disciplinary proceedings that arise from his conduct, relevant to the criminal proceedings, but not of the same issues as the criminal proceedings (*Article 78 of 1/1990*).

In the case of ***Emmanuel v. Republic***²⁸ a civil servant was convicted of a criminal offence and subsequently incurred a disciplinary sanction. He argued that he was double sanctioned for the same conduct. The Supreme Court held that disciplinary proceedings are independent and autonomous of criminal ones as each has a different purpose to serve. This is in line with ECtHR's ruling in ***Taliadorou and Stylianou v. Cyprus***²⁹ where it was held that when disciplinary proceedings follow criminal ones *ne bis in idem* is not violated. The ECtHR ruled that the new proceedings initiated, concerned an administrative procedure not of "criminal" nature within Article 4 of Protocol No. 7 of ECHR (§ 67), hence the public authority did not breach *ne bis in idem* by terminating the civil servants' employment after the conclusion of an administrative enquiry which followed their acquittal in criminal proceedings.

Non-nationals (meaning non-EU nationals) may face double penalties, in the sense that deportation and a residence ban are possible, after or during one serves sentence. However, it may also be the case, that non-nationals are requested to be extradited to their country of origin, if Contracting Agreements are present that bind bilaterally or multilaterally the contracting parties to this effect.

Part II – System of authorities competent to impose administrative sanctions

II- Q1– Is your legal system “unified”, “dual” or “mixed”?

Cyprus' legal system can be characterised as 'dual', in that public bodies are empowered to regulate a particular area of the law, ensure and monitor compliance in accordance with the relevant legislation and regulations. In that respect, where infringements have been detected either, *ex proprio motu* or after a complaint has been made, the public body is empowered to investigate the matter and enforce administrative sanctions for non-compliance. For example, on 13/7/2016 the Central Bank of Cyprus (CBC), within the remit of exercising its supervisory role, imposed sanctions in the form of a fine on Hellenic Bank Public Company Ltd amounting to €1.145.000 for failure to comply with certain provisions of the Prevention and Suppression of Money Laundering Activities Acts of 2007 to 2016

²⁷ Republic v. Mozoras (1970) 3 C.L.R. 210, Mythillos v. Republic (1982) 3 C.L.R. 698,705, Stylianou v. Republic (2005) 4 C.L.R. 137

²⁸ (2013) 3 C.L.R. 29

²⁹ 39627/05 and 39631/05, 16/10/2008

and of the Directive issued by CBC for the Prevention of Money Laundering and Terrorist Financing, December 2013 (Fourth Edition). The decision was based on the procedures and principles of administrative law and CBC provided, inter-alia, the institution with the opportunity to be heard, before taking a final decision³⁰.

II- Q2– Levels of Jurisdiction

Any person aggrieved by a decision taken by a public authority is able to appeal it to a higher administrative authority, if the relevant statute makes such provisions. In any case, all decisions can be contested and be judicially reviewed before the Administrative Court, which is the court of competent jurisdiction under Article 146 of the Constitution. The Administrative Court has jurisdiction to review both on points of fact and points of law, and is not bound by the findings of the administrative body as to the facts of the case. It may, therefore, take an independent view on the facts. However, the Administrative Court cannot substitute its own decision for that of the public body. This can only be done where the decision relates to matters of asylum and tax discrepancies, in accordance with the provisions of the Administrative Court's Act 131/2015. In all other matters, it can only annul the decision on several grounds. According to CJEU's judgment in *Schindler Holding*³¹ a procedure where infringement is found and fines are imposed which may **subsequently be subject to review satisfies the requirements of Article 6(1) of the ECHR**, in the respect that the decision adopted can be referred to a **judicial body** that has full jurisdiction and, in particular, **the power to quash** in all respects, on **questions of fact and law**.

Furthermore, judgments of the Administrative Court can be appealed to the Supreme Court, on points of law alone.

II- Q3– Judicial Review

Judicial review in Cyprus is not restricted to grounds of legality only. It is extended upon several grounds including factual questions and circumstances. For example, the court reviews grounds such as misconception of fact and of course of law, lack of due reasoning/justification, absence of sufficient enquiry and abuse of power. The latter, denotes that first, the public body is entrusted with a scope of discretionary powers and secondly, that those powers can be judicially reviewed. The Administrative Court however, does not replace the public authority's judgement with its own nor does it engage in a primary appreciation of the facts but it reviews it in order to ascertain whether:

- there is a clear statutory empowerment of discretion and its extent.
- the public body has exercised its discretionary powers.
- there has been sufficient enquiry of all relevant facts for the discretion to have been exercised correctly, reasonably and under no misconception.

Thus, the court reviews whether the public body has abused its discretionary powers or acted excessively or in an ill manner³².

Part III- Specific questions

III- Q1– Type of liability

Both types of liability are present in Cyprus' legal system in relation to administrative sanctions. Some are of strict-liability; in that no element of mens rea, guilty-mind or fault is required (the subjective hypostasis of the violation, i.e. intention, might be irrelevant when a public body detects statutory violation). However, sanctions of strict liability are always imposed in accordance with the principle of proportionality. Others require fault,

³⁰ www.centralbank.gov.cy

³¹ (supra)

³² Cyprus Administrative Law Manual, Nicos Charalampous, 3rd edition, 2016, Page 304-305

deceitfulness, fraudulence or negligence on the part of the person concerned in accordance with the principle *nulla poena sine culpa*. For example, in the case of *Papageorghiou*³³ (dual regime) the statute created a rebuttable presumption of knowledge. In this respect, the state of mind is part of the liability. Some statutes include different kind of liability for different violations, like the *Environmental Liability Act 189 (I)/2007* where a distinct categorisation is made.

III- Q2 – Nature of administrative decision

The nature of the administrative decision contested is a core aspect. Some administrative ‘decisions’ cannot be judicially reviewed because they do not satisfy this requirement.

A non- exhaustive list of administrative ‘decisions’ / ‘actions’ that are not administrative in nature follows:

- Internal measures, i.e a public authority’s circular, instructing regulated institutions on the application of the law and cautioning as to the administrative sanctions at stake.
- Preparatory measures preceding final decision i.e. written communication /summoning of alleged violation of statutory provisions under investigation³⁴.
- An administrative authority’s opinion cannot be equated to an administrative act i.e. competent authority’s written communication, informing regulated institutions of their statutory obligations³⁵.
- Execution measures that follow a body’s decision to impose sanctions. Such cannot be construed as administrative acts.
- Affirmation or repetition of an administrative act imposing sanctions, i.e. the Court ruled that the refusal of Cyprus Radio and Television Authority to recall its decision by which an administrative fine was imposed, even if it was requested “in light of new circumstances that arose from the letter of the Commissioner for Administration and Human Rights (Ombudsman)” was affirmative as the content of the letter of the Commissioner did not constitute ‘new, significant, factual or legal circumstance’³⁶.

III- Q3 – Non-pecuniary sanctions

A non-exhaustive list of non-pecuniary sanctions follows:

- short-term imprisonment (*Kyprianou v. Cyprus*³⁷ where the short-term sentencing of a lawyer found in contempt of court was not regarded by ECtHR to fall within the criminal-head guarantees of Article 6 of ECHR)
- expulsion from professional / entrepreneurship activity (protected by Article 25 of the Constitution and subject to limitations)
- permanent or temporary revocation of license
- disciplinary termination of employment of a civil servant
- demolition

Demolition of a construction, for urban planning purposes, is only possible once the government, through the designated competent public authority, acquires requisition or eminent domain of the ownership (expropriation of private property for public use), in accordance with Article 23 of the Constitution. In the case of *Kolona v. Cyprus*³⁸, the

³³ (supra)

³⁴ *Jupiwind Ltd and others v. Governor of Central Bank of Cyprus* (supra)

³⁵ *Dias Publishing Ltd v. Cyprus Radio and Television Authority* (2002), 3 C.L.R. 461

³⁶ *Antenna Ltd v. Cyprus Radio and Television Authority*, unpublished Case no. 1190/2004, 26/1/2006, Lellos Bookbinding Ltd v. Human Resource Development Authority, Case no. 1634/2007, 24/11/2009

³⁷ 73797/01, 27/1/2004, §31

³⁸ 28025/03, 27/12/2007

ECtHR held that Article 1 of Protocol No. 1 of the ECHR had been violated in that the public authority “proceeded to demolish the applicant’s house, not only within the period the applicant still had the right to appeal against the first instance judgment on the compulsory acquisition order, but also after that order had been revoked” (§73). Demolition of a construction, without prior expropriation is only possible if the construction in issue was constructed illegally. On this occasion, the administrative authority may compulsively, but always proportionately and upon warning the aggrieved, demolish it to restore the site to its original state (*Article 14 of 158(I)/1999 Act*).

An administrative fine/sanction is a direct aftereffect of non-compliance with statutory provisions³⁹. As in the case of pecuniary administrative sanctions, non-pecuniary ones, require an objective, causal link to the statutory obligation violated as well⁴⁰. For example, the violation of one’s planning permit terms cannot justify the revocation of his driving/professional license, since the two are objectively and causally irrelevant. In addition, they would fall short of the principle of proportionality.

In civil jurisdiction, interlocutory, freezing injunctions i.e. *mareva* injunctions are governed by *Article 32 of Courts Act 14/1960* and *Article 9 of the Civil Procedure Act, Chapter 6*. The aforementioned statutory provisions do not, however, apply to administrative law. In the administrative law sphere, upon contestation, the administrative court, can suspend the execution of the decision, in accordance with *Rule 13 of Procedural Rules of Supreme Constitutional Court 1962*. Such injunctions are rarely granted and the court will only do so if the decision is manifestly illegal, either by violating substantive principles of administrative law or it has undoubtedly violated statutory procedure, or secondly, when the applicant demonstrates that he will be irreparably damaged⁴¹. However, if the administrative sanction is not contested within the relevant time period or if contested, the court has upheld it and it has acquired the force of *res judicata*, the public body can bring civil proceedings to claim the amount due.

III- Q4 – EU Law requirements / leniency programmes

The Commission for the Protection of Competition (‘Commission’) applies the EU leniency programme which in essence stipulates along the lines, ‘confess and apply for leniency’ for cartel activity. For this purpose, the Commission applies Regulations enacted in 2011 – ‘Immunity from and Reduction of Administrative Fines in cartel cases in breach of Article 3 of the Protection of Competition Act and/or Article 101 of the Treaty on the Functioning of the European Union’.

An undertaking, which has participated in a cartel, may receive total immunity from fines or receive a reduction in fine if it comes forward with information about the cartel, provided certain conditions for leniency are met. The first cartel member to report and provide evidence of a cartel will be granted total immunity, provided the Commission is not already investigating the cartel, does not otherwise have sufficient information to establish the existence of the cartel and the other conditions for leniency are met (admission of participation in cartel conduct, information, continuous and complete cooperation, termination of further participation in cartel activity, coercer test: if the undertaking has taken steps to coerce others to take part in the cartel activity it will be eligible only for a reduction in fine of up to 50%, even if it is the first to report). All other undertakings, who

³⁹ *Sharelink Financial Services Ltd v. Cyprus Securities and Exchange Commission*, Case no. 258/2001, 7/9/2001

⁴⁰ *General Administrative Law*, Dagtoglou, 2012, Page 419, para.873

⁴¹ *Cyprus Securities and Exchange Commission v. Marfin Popular Bank Public Co Ltd* 2 C.L.R. 32, Cyprus Administrative Law Manual, Nicos Charalampous, 3rd Edition, 2016, pages 43-45, Injunctions, Erotokritou and Artemis, 2016, pages 320-321

come forward with sufficient evidence of additional evidential value, may receive a reduction from fines of up to 30%.

III- Q5 – Reopening of final administrative decisions

It is not unlikely that a public authority is requested to re-examine a sanction imposed in light of CJEU case law. A legitimate sanction decision made final can be re-examined and revoked on grounds of public interest or if the conditions upon which it was based have been changed (*Article 54 of 158(I)/1999 Act*) or in accordance with the provisions of the particular relevant statute.

Court procedures however, are quite different. Once the court reserves judgment, the case cannot be reopened. Reopening is only possible under court's inherent jurisdiction for the interest of justice⁴². In ***Sigma Radio T.V. LTD and others v. Cyprus Radio and Television Authority***⁴³ the applicants/appellants requested reopening of the case after judgment was reserved in light of ECtHR's new-ruled case law. The *full bench* of the Supreme Court held that this is possible only in exceptional circumstances relating to the facts and issues of the case. In the case of ***Lampi and others v. Governor of the Central Bank of Cyprus***⁴⁴ the applicant submitted an *ex parte* application requesting the case to be reopened after judgment was reserved in light of new-found case law. The Supreme Court by an *enlarged bench* repeated the firm and consistent approach of precedent law and explained that "in the present case the matter did not concern facts but case law that the court was aware or could take into account even if reference was not made during hearing".

Judgments issued are final and will acquire the force of *res judicata*. Hence, they cannot be reopened or amended⁴⁵. They can however, be appealed, unless it is a last instance judgment.

III- Q6 – Negotiation / 'plea bargaining' of an administrative sanction

In Cyprus, an administrative sanction cannot be "plea bargained". The public authority however, must take into account mitigating and aggravating factors to determine the severity of the sanction to be inflicted. This is similar to a criminal mitigation procedure. Mitigating factors validly argued by the violator will lessen the degree of the sanction or probable amount to be imposed or may render a certain sanction 'inapplicable'. For example, a violator's cooperation, corrective measures or restitution, will weigh in his favour. Aggravating factors on the other hand, weigh the opposite direction. For example, a violator's consecutive and undeterred misconduct, will weigh against him. Nevertheless, aggravating factors are always 'calculated' in accordance with the principle of proportionality.

⁴² Republic v. Sampson (1991) 1 C.L.R. 848, page 849, Papaioannou and others v. Republic (No.1) (1991) 3 C.L.R. 659, Xenophontos v. Republic (2008) 3 C.L.R. 261

⁴³ (2004) 3 C.L.R. 134

⁴⁴ (2013) 3 C.L.R. 302

⁴⁵ Republic v. Antoniou and others (2004) 3 C.L.R. 542