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and ACA-Europe**

Administrative Sanctions in European law

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Answers to questionnaire: The Netherlands



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Answers to the questionnaire regarding administrative sanctions in European Law – provided by the Administrative Jurisdiction Division of the Council of State of the Netherlands

Please note that, due to the limited amount of time available to answer the questions, it has not been possible to carry out extensive research on all subjects brought up in the questionnaire. Therefore, the answers should be interpreted in a general sense. Some may be incomplete.

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?*

Ancillary questions:

With respect to the above question, does your administrative practice and jurisprudence follow ECHR case law (Cases Engel, 5101/71, 5354/72, 5102/71, 5370/72, [1976] ECHR 3, 5100/71, (1976), Jussila, 73053/01, Grande Stevens, 18640/10, 18647/19, 18663/10 in 18698/10)? Do you also apply the approach of the CJEU (for instance in the case Schindler Holding, T-138/07)? Are the ECtHR and CJEU jurisprudence (including EU Charter on Fundamental Rights) applied at the same time? Is there any statutory-based solution given in this respect by the national legislator or by the administrative authorities?

Do you have examples in practice or case law where the jurisprudence of the EU law is found to be compatible with jurisprudence of the ECtHR (for instance, cases C-210/00 Käserei Champignon Hofmeister GmbH or C-489/10, Łukasz Marcin Bonda). Do the teachings of the CJEU, and in particular its definition of administrative and criminal sanctions, fit within the framework of ECtHR decisions?

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

What distinction does your national legal system make between administrative sanctions and other administrative measures to restore compliance with the law? (e.g.: the closure of an exploitation of a waste management facility that was operating without a license v. an administrative fine?)

The notion of administrative/criminal sanctions

The general definition of 'administrative sanction' is laid down in article 5:2 of the General Administrative Law Act, which states: 'administrative sanction means: an obligation imposed or an entitlement withheld by an administrative authority on account of a violation.' This article furthermore states that 'punitive sanction' means: 'an administrative sanction intended to inflict harm on the violator'. Which specific sanction can be imposed, depends on the administrative law that has been violated. Each of these laws defines the sanction or sanctions that can be imposed when that law has been violated. The general definition of 'criminal sanction' is not laid down in Dutch (criminal) law. However, title II of the first book of the Dutch criminal code does define the different types of punishments that can be imposed, such as a prison sentence, a fine, or community service.

The principle of legality

Although the principle of legality has not been codified in Dutch administrative law, it is applicable in procedures regarding administrative sanctions. With regards to the distinction between administrative (punitive) sanctions and other administrative measures/sanctions to restore compliance with the law: this distinction is laid down in article 5:2 of the General Administrative Law Act, where, in addition to the above mentioned definition of 'punitive sanction', the notion of 'reparative sanction' is defined as 'an administrative sanction intended to fully or partially undo or terminate a violation, to prevent repetition of a violation or to eliminate or limit the consequence of a violation'. In general, there are two types of reparative sanctions (defined in the General Administrative Law Act as well): the 'administrative enforcement order' and the 'order subject to a financial penalty' (for further explanation see the answer to question III-Q3).

Ancillary questions

The Dutch administrative practice and jurisprudence follow ECHR case law regarding key principles laid down in the ECHR. There have been several cases in which an administrative court was faced with the question whether or not an administrative sanction should be defined as a 'criminal charge' and where the Engel-criteria were used to answer this question¹. The same approach applies to other principles derived from the ECHR, such as the burden of proof and procedural time limits (see the answer to question I-Q2).

CJEU jurisprudence is commonly applied as well. Although there are no known cases regarding administrative sanctions where the *jurisprudence* regarding EU law has been (explicitly) found to be compatible with *jurisprudence* regarding the ECHR, there have been several cases in which the Administrative Jurisdiction Division of the Council of State concluded that a number of rights, laid down in the EU Charter on Fundamental Rights, correspond with fundamental rights laid down in the ECHR and that they share the same contents and scope². There is no national legislation regarding the combined application of the ECHR and the EU Charter or any choice between the two.

There have been numerous cases where Dutch courts have applied the CJEU jurisprudence mentioned (cases *Käserei Champignon Hofmeister GmbH and Łukasz Marcin Bonda*).³ Most of these cases revolved around the withdrawal of (agricultural) subsidies. In several of these cases, the 'College van Beroep voor het bedrijfsleven' (one of the Dutch supreme administrative courts) followed the jurisprudence of the CJEU regarding the nature of sanctions based on EU regulations regarding the Common Agricultural Policy and – on the basis of the *Käserei Champignon Hofmeister* case – concluded that the imposed sanction could not be defined as criminal in nature and therefore fell outside the scope of article 6 of the ECHR⁴. These are examples of cases where EU law meets the ECHR and where both are applied at the same time.

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)?

Ancillary questions:

With respect to the above question, does your national law offer any regulatory solutions and what is the role of direct applicability of the jurisprudence of the ECtHR and the CJEU?

*What are the administrative procedural requirements that are the closest to the ones applicable to criminal sanctions (e.g.: mandatory representation or assistance by an attorney (Cf. “Salduz-doctrine” *Salduz v. Turkey*, 36391/02), legal help, procedural time limits (including “reasonable time”), the possibility of requiring an oral hearing, burden of proof, competence of courts, legal remedies, application of the principles of reasonability, equality, presumption of innocence, prescription/prohibition of retroactivity, the principle of « retroactivity in mitius », the prohibition of self-incrimination, the principle of the right to appeal, etc.)?*

The General Administrative Law Act contains several provisions regarding the procedures of objection and appeal. These provisions apply to all administrative procedures, including those regarding administrative sanctions. With regards to the criminal procedure, requirements are laid down in the Criminal Procedure code. Although the criminal procedure and the administrative procedure, due to their different nature, each have their own characteristics and course of proceedings, they do share key procedural requirements, such as the principle of legality and the prohibition of self-incrimination. Several of these requirements have been laid down in division 5.4.1 of the General Administrative Law Act, such as the prohibition of double punishment (*ne bis in idem*) in article 5:43 and 5:44 and the principle of proportionality in article 5:46. Although not all of the procedural requirements mentioned in the question are laid

¹ For example: [ECLI:NL:CRVB:2016:2146](#) and [ECLI:NL:RVS:2013:1643](#).

² To illustrate this: in the ruling of 7 august 2013, [ECLI:NL:RVS:2013:2845](#), the Administrative Jurisdiction Division concluded that article 11 of the EU Charter corresponds with article 10 of the ECHR, that article 17 of the EU Charter corresponds with article 1 of the first AP to the ECHR and that article 49, sub 1, of the EU Charter corresponds with article 7 of the ECHR.

³ For example: [ECLI:NL:CBB:2014:400](#) and [ECLI:NL:RVS:2015:2369](#).

⁴ For example: [ECLI:NL:CBB:2011:BV1042](#).

down in administrative law, that does not mean they are not applicable. Examples of such requirements (which are applicable) are the prohibition of self-incrimination, procedural time limits and the presumption of innocence. The same applies to the burden of proof: while the General Administrative Law Act contains no provisions regarding this matter, it is commonly accepted that in cases regarding administrative sanctions, it is up to the administrative authority to prove the violation has been committed. The standard of proof is comparable to that in criminal proceedings. Some of these requirements are related directly to the ECHR and the jurisprudence of the ECtHR. An example is the jurisprudence of the ECtHR regarding procedural time limits and the burden of proof (both related to article 6 §2 of the ECHR).

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)?*

Ancillary questions:

How is the principle ne bis in idem understood in your legal system, taking into account CJEU interpretation (case C-617/10, Fransson) and ECtHR interpretation of Art. 4 of Protocol No. 7 (ECHR (GC) Zolotoukhine/Russia, No. 14939/03)?

Are national courts faced with cases where individuals, subject of administrative sanctions, would like to exclude criminal sanctions and criminal procedures (including in other EU Member states) in order to avoid dual trial?

Does your system accept double penalty for non-nationals? (e.g.: criminal punishment for a criminal offense and administrative expulsion at the end of (or during) the sentence (accompanied with a residence ban)?

Is it possible, in your legal system, that an individual be sanctioned with both - the administrative and the criminal sanction, and if so, does the criminal sanction take into account the administrative one (i.e. is the administrative sanction considered a part of the criminal sanction)? What role does the EU Charter of Fundamental Rights and the ECHR principle ne bis in idem play in this respect?

Recently, there have been several cases regarding the punishment of individuals who had been prosecuted for driving under the influence of alcohol. Under national law, it was possible to subject these individuals to criminal prosecution as well as an administrative measure which prevented them from using their vehicles when intoxicated. The Supreme Court of the Netherlands decided that if such an administrative sanction has been imposed, the individual concerned can not be subjected to criminal prosecution as well⁵. In these cases, the effectiveness of separated regimes was indeed affected by a court decision. The Supreme Court's decision, however, was not directly related to ECtHR case law such as the Grande Stevens decision. The Supreme Court also stressed that while this system of punishment could lead to tension with the principle of ne bis in idem (as laid down in article 68 of the criminal code), it was not *in violation* of this principle, as in these situations the individuals concerned were not subjected to double criminal prosecution.

Ancillary questions

In the criminal law sphere, the principle of ne bis in idem has been laid down in article 68 of the criminal code, which states that no individual can be prosecuted for an act for which he has been irrevocably prosecuted before. In administrative law, this principle has been laid down in article 5:43 of the General Administrative Law Act. This article states that an administrative authority shall not impose an administrative fine if an administrative fine has already been imposed on the violator before on account of the same violation. In addition to this, article 5:44 states that an administrative authority shall not impose an administrative fine if criminal proceedings have been brought against the violator for the same act and the hearing has started or a punishment order by the Public Prosecution Service has been issued. This article also states that if the act (punishable with an administrative sanction) also constitutes a criminal offense, it shall be submitted to the public prosecutor, unless it is provided by law or has been agreed with the Public Prosecution Service that the administrative authority may decide not to do so. This system prevents double punishment and concurrence of administrative and criminal procedures.

⁵ See [ECLI:NL:HR:2015:434](https://eur-lex.europa.eu/eli/nl/hr/2015/434).

The prohibition of double punishment is applicable to all subjects of Dutch law - nationals and non-nationals alike. The imposition of a criminal sanction due to a criminal offense on a non-national, followed by (administrative) extradition after completing of (or during) the sentence, is in some cases possible. However, this is a measure under immigration law and is therefore not regarded as a double punishment for the criminal offense.

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?

Generally speaking, the competence to adopt administrative sanctions resides with the legislative authorities, while the competence to enforce them resides with the administrative authorities. These authorities, however, can reside under the same ministry. Moreover, it is possible for administrative authorities to 'fill in' their legal enforcement competence through so called policy rules. These rules complement the rules laid down in law and describe the way an administrative authority uses its competences. Where, for example, the standard amounts of financial sanctions have not been established by law, it is common that administrative authorities create policy rules in which they list such standards.

At enforcement level: again, generally speaking, the official who discovers an infringement has no authority to impose an administrative sanction on the violator. Usually, the official passes his findings on to another division that resides under the same department. That division then decides whether or not to impose an administrative sanction and takes further action if deemed necessary.

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 Dutch legal system allows for several levels of jurisdiction in procedures regarding administrative sanctions. After a sanction has been imposed by the competent administrative authority, the person subjected to the sanction must first lodge an objection against the sanction. The decision on the objection is taken by the same authority that imposed the sanction, albeit by different officials. This decision is then open to appeal. The appeal must be filed at the district court. The district court's decision is open to a further appeal. It must be filed at one of the supreme administrative courts (depending on the nature of the case). The Netherlands has several supreme administrative courts. The Administrative Jurisdiction Division of the Council of State is one of them. When deciding on administrative sanctions, courts are generally competent to decide on issues of fact, as well as on issues of law. An exception applies to cases in which the Supreme Court of the Netherlands, which functions as one of the supreme administrative courts, is competent to decide in last instance. In these cases, regarding tax law, the Supreme Court can only decide on issues of law. Generally speaking, national courts not only fulfill a supervisory role in cases regarding administrative sanctions, but are competent to repeal or change the amount of the imposed sanction as well. This is derived from article 8:72a of the General Administrative Law Act, which states that if the district court annuls a decision to impose an administrative fine, it shall decide about the imposition of a fine and shall direct that to this extent its judgement shall take the place of the annulled decision. The courts, however, are not competent to – independently – adopt an administrative sanction: they can only do so in appeal when overturning a decision by the administration.

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).*

As indicated under question II-Q2, generally courts are competent to decide on issues of fact, as well as on issues of law. In areas where administrative authorities have created policy rules regarding the execution of their competence to impose an administrative sanction, the court will usually accept these rules as the base or starting point when reviewing a decision which is based on these rules. However, it is possible for courts to judge the merits of these rules – through review of the decision that is based on them. There have been several recent cases where administrative authorities, as a result of such a court decision, were forced to adjust their policy rules regarding administrative sanctions. The conclusion may be that where administrative authorities have a certain discretion, it is certainly limited by law and jurisprudence. There are also areas where administrative authorities have no discretion and the courts have full jurisdiction. This applies, for example, when a court is faced with the question whether or not the violation has been proven and when reviewing the proportionality of the imposed sanction. This is derived from article 6 ECHR.

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)?*

The Dutch legal system for administrative sanctions is based on fault-based liability. This is laid down in article 5:41 of the General Administrative Law Act. If the violator succeeds in establishing that he is not culpable of the violation, the administrative authority can not impose a sanction. Note that the Dutch system does allow for a legal or factual presumption of liability, as long as it is possible for the violator to refute this (Salabiaku v. France, No. 10519/83 of the ECtHR).

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)?*

In the Netherlands, all administrative sanctions must be laid down in a written decision, as defined in article 1:3 of the General Administrative Law Act, and all decisions are subject to judicial review. Therefore, it is not possible that an administrative sanction is withheld from judicial review.

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).*

Ancillary questions:

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

Can the sanctions, which are administrative sanctions in their nature, be used in the private law sphere (e.g.: a person not respecting the duty of the alimony: could he/she be sanctioned with the deprivation of his/her car)?

In your legal system, can administrative sanctions encroach upon ownership rights (Art. 1 of the first protocol ECHR – for instance, freezing of assets, substantive financial penalties, etc.)?

As indicated in the answer to question I-Q1, the General Administrative Law Act defines 'reparative sanctions' as well as 'punitive sanctions'. There are two types of reparative sanctions: the administrative enforcement order and the order subject to a financial penalty. Both orders require full or partial reparation of the violation, while in the case of the order subject to a financial penalty, the payment of a sum of money is required when the order is not carried out

or not carried out in time. In cases where a construction has been built in violation of the applicable regulations, such an order may indeed lead to the demolition of the construction. Another example of a non-financial sanction is the so called shutdown of operations. This (relatively new) sanction can be imposed on businesses that have repeatedly violated regulations, such as those regarding the employment of foreign nationals. These sanctions have to have a causal relation to the administrative offence.

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.

In the Netherlands there is one example in the area of competition law. The Netherlands Authority for Consumers & Markets (ACM)⁶ is the organization which is competent to adopt administrative sanctions based on EU law requirements.⁷

The objectives that ACM have been given by the European and Dutch legislatures determine its actions. The ACM's activities encompass general competition oversight, regulation of the energy, telecommunication, postal services, and transport markets (or parts thereof), and consumer protection. The common objectives behind these activities are promoting well-functioning markets, ensuring well-organized and transparent market processes, and fair treatment of consumers. The legislative context in which ACM operates is primarily based on European regulations. These rules are aimed at promoting further development of the European single market, and making possible an effective approach to cross-border market and consumer problems, among other objectives. The ACM's geographical scope is therefore not limited to the Netherlands alone. ACM closely cooperates with regulators outside the Netherlands and with European agencies.

The independent position of ACM is formally enshrined in its legal status of autonomous administrative authority under Dutch law. ACM fulfills its tasks independently of lawmakers and businesses, in line with the requirements set by European regulations.

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 reopenings of cases?

At this moment, there are no requests before the Administrative Jurisdiction Division of the Council of State to apply the jurisprudence of the CJEU and to reopen/change already final administrative decisions in cases about administrative sanctions.

There is a case where the district court of Rotterdam heard such a request. (ruling of 18 July 2016, [ECLI:NL:RBROT:2016:5439](#)). It regarded a case in which the company involved was fined because the employees did not have a permit to work in the Netherlands. The district court ruled that the requirements defined by the CJEU in the case of 'Kühne and Heitz' (ECLI:EU:C:2004:17) were not fulfilled. The district court pointed out that the administrative decision in question had become final as a result of a judgment of a national court ruling at final instance (requirement 2). Furthermore there was no situation as mentioned in the rulings of the

⁶ The ACM was created through the consolidation of the Netherlands Consumer Authority (CA), the Netherlands Independent Post and Telecommunication Authority (OPTA) and the Netherlands Competition Authority (NMa). Consumer protection and market oversight are now housed in a single authority. This consolidation lays the foundation for effective and efficient oversight on well-functioning markets for the purpose of optimizing consumer welfare.

⁷ More information about ACM: <https://www.acm.nl/en/>

CJEU in the cases of Byankov and Arcor I-21. The district court concluded that the case could not be reopened.

However, in cases about immigration permits the Administrative Jurisdiction Division has been addressed with requests to apply the jurisprudence of the CJEU and to reopen the case. The Administrative Jurisdiction Division applied the rulings of the CJEU in the case of Kühne and Heitz and concluded that in these cases the four requirements in the case of Kühne and Heitz were not fulfilled and therefore judged that these cases could not be reopened. Please note that these cases do not concern administrative sanctions.

Dutch administrative law in general does offer the possibility to reopen a case. According to article 4:6 of the General Administrative Law Act, a case can be reopened by the administrative body if there are new facts and circumstances.

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?

Negotiation on administrative sanctions between authorities and offenders, while not strictly prohibited, is not the practice in the Netherlands. If it happens, there is no role for the courts.