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EUROPEAN COMMITTEE ON CRIME PROBLEMS (CDPC)

DRAFT QUESTIONNAIRE ON ADMINISTRATIVE SANCTIONS

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Introduction

A. Background

The boundaries between criminal law and administrative law have become increasingly porous over the last years. This overlap encapsulates different aspects, and occurred at different levels, comprising, inter alia, the scope of intervention and the division of functions between administrative and criminal measures, systems, actors, or frameworks.[1] This blurring picture is best captured in the realm of sanctions, where both the administration and criminal law authorities are vested with a sanctioning power.[2]

There is no doubt that the creation of double enforcement regimes and interdisciplinary approaches offers several advantages. The criminal law system is perceived as time-consuming and expensive.[3] Sometimes, priorities may be set to lighten the case load, thus resulting in minor offences going unpunished, in order to avoid spending disproportionate resources.[4] The use of administrative sanctions is therefore intrinsically linked to the fight against impunity.

The downside of relying on a complex and overlapping regime combining criminal law and administrative sanctions is the possible resulting asymmetries in the level of protection and the protective procedural safeguards made available to individuals. Criminal law indeed operates with a view to punishing individuals responsible for causing "serious harm" and, through the threat or actual imposition of a punishment, it expresses values for indicating the wrongfulness of certain behaviour.[5] The use of criminal law instruments is therefore limited by the procedural guarantees encapsulated under Art 6 ECHR, alongside other regulating principles, such as *ultima ratio* or *ne bis in idem*, for criminal law to be invoked fairly, and individuals protected from abusive action by the State.[6] These considerations are less relevant to administrative law, whose function is to protect public interests, by contrast with the rights of the individual.[7] In order to prevent abuses and administrative *détours*, the ECtHR ruled in its seminal *Engel* case that, for the purpose of Art 6 ECHR, State measures which are not expressly characterised as criminal can yet fall within that category, depending on the nature of the offence concerned, its aim and the degree of severity provided for.[8] Otherwise put, it made it clear that states are allowed to use administrative sanctions even where they are equivalent to criminal sanctions as an instrument, provided that they observe the fundamental standards of fair trial.[9]

The stakes described above boil down to the question of the extent to which those blurring boundaries are positive, or can become problematic. The key rationale for this study is to shed light on the answers provided by each of the national criminal justice systems analysed in this study, and clarify how the puzzle of making criminal and administrative sanctions coexist was addressed.

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[1] A. Weymebergh, F. Galli (eds), *Do labels still matter? Blurring boundaries between administrative and criminal law: The influence of the EU*, Brussels: Presses Universitaires de Bruxelles, 2014

[2] P. Caiero, The influence of the EU on the "blurring" between administrative and criminal law, *in* Weyembergh & Galli, op. cit., 2014

[3] K. Sugman Stubbs and M. Jager, The organisation of administrative and criminal law in national legal systems: exclusion, organized, or non-organized co-existence, in Weyembergh & Galli, op. cit., 2014, p. 158.

[4] Ibid. Thus, this 'blur' does not only occur at the national level, but has also been encouraged to some extent in by international organisations, such as the EU. See P. Caiero, The influence of the EU on the "blurring" between administrative and criminal law, *in* Weyembergh & Galli, op. cit., 2014

[5] E. Herlin-Karnell, Is administrative law still relevant? How the battle of sanctions has shaped EU criminal law, Draft paper to appear as a finalized version *in* M. Bergstrom, V. Mitsilegas, and T. Konstadinides (eds), *Research Handbook on EU Criminal Law*, Cheltenham: Edward Elgar, 2015, p. 2. Retrieved at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2524822

[6] E. Herlin-Karnell, The Challenges of EU Enforcement and Elements of Criminal Law Theory: On Sanctions and Value in Contemporary 'Freedom, Security and Justice' Law, *Yearbook of European Law*, 2016 p. 15

[7] G. Vermeulen, W. De Bondt and C. Ryckman (eds.) *Rethinking international cooperation in criminal matters in the EU. Moving beyond actors, bringing logic back, footed in reality*, Antwerpen: Maklu, 2012

[8] ECtHR, *Engel e.a.*, 8 June 1976, para 82

[9] Ibid, para 81.

B. Objectives and scope

More specifically, this study purports to fulfil three specific (and intertwined) objectives:

The first, and arguably the most important, objective of this research, is **to facilitate negotiations** taking place among Council of Europe members on the adoption of new conventions in the field of criminal law. Indeed, negotiations on several conventions have encountered difficulties, due to the existence of differences among CoE Member States relating to the use of administrative v. criminal sanctions. Over time, compromise solutions were found, such as the insertion of specific clause in CoE instruments allowing Member States, in accordance with their legislative practice, to impose administrative sanctions and other non-criminal sanctions with regard to particular types of offences. The flexibility retained in CoE instruments seems to be a working compromise. However, negotiations could be facilitated *"en amont"*, that is if prior research was conducted to describe and understand the different MSs specificities in this field.

Indeed, negotiations will be logically facilitated by **fostering and strengthening mutual knowledge** of different concepts and applications of administrative and criminal sanctions, which is the second objective of this research. There remains a lot of unclarity as to what Member States mean by the use of administrative and non-criminal sanctions writ large. Comparing the national models available across the Council of Europe's sphere allows us to single out a set of commonalities and divergences among national systems, that could, over time, enhance communication and mutual understanding.

Strengthening our knowledge of sanctioning systems feeds into the third objective of this research, namely to develop a common solution for negotiations that could be incorporated into the **revised CoE's Model Provisions and the Explanatory Report**. These documents provide guidelines on how to prepare and negotiate CoE conventions and could then take into consideration the different declinations of administrative sanctions available at the national level, in order to lay down sample provisions that would satisfy the requirements of a majority of national sanctioning systems.

The scope of this research, given its substantial breadth, was narrowed down to natural persons. This is because criteria for triggering liability of legal persons as well as applicable sanction regimes differ from those of natural persons. As such therefore, the questions raised in this research cannot be fully transposed to legal persons.

C. Contents of the questionnaire

Part I. The first part of the questionnaire lays down a set of general questions designed to facilitate what Member States mean by administrative sanctions, and the rationale for using them, instead of criminal sanctions. It also measures how the co-existence of administrative and criminal channels has been addressed in the implementation process of two selected CoE conventions.

Part II. The second part deals with the more delicate topic of the use of separate sanctioning channel, i.e. either administrative or criminal, and combined tracks of sanctions, i.e. administrative and criminal sanctions imposed at the same time. It aims to identify the rationale for relying on one or the other, and to measure the risk of *ne bis in idem* that may occur in case of a combined track of sanctions.

Part III. The third part addresses differences between administrative and criminal sanctions from the perspective of applicable principles. It aims to answer the general question of the extent to which principles of criminal law, be they of a general, substantive, or procedural nature, apply to administrative sanctions, including the guarantees of judicial review and the legal remedies available to individuals.

Part IV. The last part of the questionnaire focuses on mechanisms of cooperation and coordination between administrative and criminal sanctioning instruments, or the lack thereof. It adopts a two-level approach, i.e. targeting both the national and European facets of cooperation.

D. Timeframe

The questionnaire will be forwarded to the relevant experts of CoE Member States at the beginning of the month of September 2018. The responses should be received by the end of the month of November 2018. The preparation of the comparative analysis, as well as the identification of possible solutions to the problems identified over the past years in the negotiation of new CoE conventions, should be completed by the research team by 31 December 2018.

Questionnaire

I. General questions

1. Does your national law provide for administrative sanctions comparable to criminal sanctions (financial sanctions (fines), disqualifications…)?

2. What categories of administrative and criminal sanctions exist in your criminal justice system (e.g. safety measures, reparative measures, measures of order, fines, etc.)?

3. How do you define an administrative and a criminal sanction?

   3.1. How do you distinguish the two?

   3.2. Has the *Engel* jurisprudence has influenced the categorisation of sanctions in your national system?

   3.3. If so, to what extent?

4. In which cases does your national system use administrative sanctions (e.g. less serious offence, intentional offences/negligence, significance of the interest protected, speedier procedures etc.)? What is their respective added value? Please provide representative examples.

5. Have you noticed a "depenalisation process" of sanctions over the years? If so, in which fields and under which criteria?

6. In terms of criminal/administrative sanctions, how did you implement the following Council of Europe Conventions:

   6.1. Article 4 of the Convention on the protection of the environment through criminal law (ETS 172).[10]

   6.2. Article 78 (3) of the Council of Europe Convention on preventing and combating violence against women and domestic violence (ETS 210).[11]

   6.3. If you did not ratify any of these conventions, please provide another example of implementation of Coe conventions allowing the adoption of administrative sanctions against natural persons.

II. Separate or combined tracks of sanctions

7. Are there types of offences set out in your national law that provide for administrative sanctions only?

8. Does your national law allow a combination of criminal and administrative sanctions? Are there areas where the two types of sanctions co-exist?

[10] https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168007f3f4

[11] https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168008482e

8.1. Can you give examples of domains where clear divisions and no overlap exist between administrative and criminal interventions?

8.2. Can you give examples of domains where administrative and criminal interventions overlap?

9. What is the added value of a combined administrative and criminal track of sanctions?

10. What is the downside of a combined administrative and criminal track of sanctions?

11. Is the *ne bis in idem* applicable in case both tracks apply? Can you give examples of relevant national case law in this respect?

III. Identification of main differences between administrative and criminal tracks

Please identify the main consequences resulting from the application of the administrative tracks:

Substantive law

12. Is aiding and abetting sanctioned if a behaviour is only constitutive of an administrative offence?

General principles

13. Are administrative sanctions governed by general principles of administrative law or general principles of criminal law?

13.1. Do the following criminal law principles apply to the imposition of administrative sanctions?

a) Proportionality and equality

b) Impartiality

c) Nullum crimen sine lege

d) Legality

e) Lex mitior

f) Retroactivity

g) Ultima ratio

h) Ne bis in idem

i) Any other principles applicable to your country

13.2. Would your answers to question 12.1, be different in case of a combined track of administrative and criminal sanctions? If so, please explain how?

Procedural law

14. Do the following rights apply in case of administrative sanctions? Are they applied with the same intensity as in criminal law?

    a) Presumption of innocence

    b) Right to be heard

    c) Right to be informed about the charges

    d) Right of access to the case-file

    e) Right to assistance (legal and linguistic)

    f) Right to legal aid

    g) Right against self-incrimination

    h) Right to remain silent

    i) Any other procedural safeguard(s) available to the claimant applicable to your country

15. Would your answers to question 13 be different in case of a combined track of administrative and criminal sanctions? If so, please explain how?

16. What kind of authorities are involved in the decision to adopt administrative sanctions?

17. Do administrative authorities vested with a sanctioning power comply with the principles of independence and impartiality? If so, in which manner? In case a sanction is adopted by an administrative authority that does not comply with the level of independence and impartiality that normally applies to a judicial authority, is the decision on the sanction subject to a full jurisdictional review (in law and in facts)?

18. Which judicial authority is in charge of reviewing administrative sanctions? Which judicial authority is in charge of reviewing a combined track of administrative and criminal sanctions?

19. What means of appeal are available to individuals in case of administrative sanctions? What means of appeal are available to individuals in case of a combined track of administrative and criminal sanctions?

20. How thorough can the judicial review get (full jurisdiction or less)? Does it depend on the means of appeal or the nature of the sanction? Would your answer differ in case of combined tracks of administrative and criminal sanctions?

21. Is the judge competent to treat a sanction as criminal rather than administrative and apply higher standards? Would your answer differ in case of combined tracks of administrative and criminal sanctions?

IV. Cooperation and coordination

21. At the national level, do respective authorities coordinate / co-operate when imposing criminal and administrative sanctions?

21.1. If so, under which mechanism(s)?

21. 2. If not, have problems occurred? Which ones?

22. At the European level, do respective authorities coordinate / co-operate when administrative procedures/sanctions are applicable in one State and criminal law provisions in the other ?

22.1. If so, under which mechanism(s)?

22. 2. If not, have problems occurred? Which ones?