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EUROPEAN COMMITTEE ON CRIME PROBLEMS (CDPC)

REPLIES TO 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 As an alternative to criminal sanctions some States thus provide for the possibility to impose administrative sanctions in the course of specific proceedings conducted with a view to sanctioning infringements of administrative offences specified in their national legislation.

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 frequently are less relevant to proceedings in respect of offences set out in 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, however, has 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.

¹ A. Weyembergh, 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.

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, focusses on natural persons. This is because criteria for triggering liability of legal persons as well as applicable sanction regimes differ from those in respect of natural persons. 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 offences’ and ‘administrative sanctions’, and the rationale for using them, instead of criminal offences and 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. Contrary to parts I. to III., the questions in part IV. also address cross-border cooperation in proceedings against legal persons.

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ANDORRA

I.- Questions générales

1.- Il existe dans le droit interne des infractions administratives qui permettent au Ministre de l'Intérieur ou des Finances, aux autorités de supervision financière ou la caisse de sécurité sociale, entre autres, d'imposer des mesures punitives, telles que :

- Amendes
- Mesures administratives d'expulsion du territoire national pour une durée déterminé
- Suspension ou perte définitive d'autorisation d'activités commerciales dans certains domaines, tels que la vente de tabac ou l'activité financière o dans le secteur des assurances.
- Suspension ou perte définitive du permis de conduire, d'armes ou de chasse.

Outre ces sanctions de caractère général, l'Administration peut aussi imposer des sanctions en matière disciplinaire aux fonctionnaires et autres assimilés.

2.-

2.1.- La différence entre « sanction administrative » et « sanction pénale » dépend du caractère de la loi qui la prévoit et de l'autorité qu' à la compétence pour sanctionner. Dans ce sens, les seules sanctions pénales sont celles prévues dans le Code pénal, et imposées par un juge. Les mesures privatives de liberté sont réservées à la juridiction pénale.

Toute autre mesure punitive est considérée administrative et doit être imposée dans le cadre de la procédure prévue dans le Code de l'administration.

2.2.- La jurisprudence Engel est modifiée en quoi que ce soit la catégorisation des sanctions dans notre droit interne.

3.- Les sanctions administratives sont réservées aux actions plus graves, que ce soit des délits ou des contraventions. Dans certains cas, il y a des infractions aux normes administratives, que pour sa gravité ont un type aggravé qui retombe dans le pénal. Dans ce cas, le Code pénal fixe des seuils, comme dans le cas de l'infraction et le délit fiscal ou pour les infractions de contrebande.

Donc, l'article 248 du Code pénal caractérise les actions ou omissions, de fraude à l'Administration afin d'évader des impôts si le montant de la fraude est supérieur a 75.000 €. Si la fraude est d'un montant inférieur, la même conduite serait passible de sanction administrative. Dans l'infraction pénale le fraudeur encoure une peine de prison de 3 mois à 3 ans et une amende. En dessous de ce seuil, l'infraction administrative prévoit une sanction uniquement pécuniaire.

4.-

4.1.- Andorre n'a pas ratifié la Convention sur la protection de l'environnement par le droit pénal.

4.2.- En ce qui concerne la Convention sur la prévention et la lutte contre la violence à l'égard des femmes et la violence domestique, les sanctions prévues sont de nature pénale, puisque les infractions comportent la commission d'un délit.

II. Voies de sanctions distinctes ou combinées

5.- Il existe des types d'infractions établies dans notre législation nationale qui prévoient des sanctions administratives uniquement, mais il s'agit des infractions à la réglementation administrative moins graves, comme les manquements aux obligations de registre, la

présentation tardive de documentation, ou les manquements à la normative commerciale ou autres.

6.- Dans la plupart des domaines il y a une coexistence entre sanctions administratives et pénales. La différence repose sur la gravité des conduites et, dans certains cas, la compétence est délimitée par des seuils, comme cela a été expliqué dans l'épigraphe 3.

7.- La régulation de la procédure administrative prévoit qu'en cas d'identité de sujet, faits et fondement de la sanction, il faut suspendre puis classer sans suite la sanction administrative. Dans le cas où une sanction administrative a été imposée mais il n'y a pas la concurrence des trois conditions d'identité de sujet, faits et fondement, il est possible d'imposer une double sanction, mais les faits déclarés prouvés au cours de la procédure pénale ne peuvent pas être contestés lors de la procédure administrative. (Art. 4 Règlement du 22 juillet 2015).

III. - Identification des grandes différences entre la voie administrative et la voie pénale

8.- Droit matériel

La législation administrative, à différence de la pénale, ne sanctionne pas la complicité. A niveau administratif les poursuites sont limités à la personne responsable de l'infraction, selon le Code de l'Administration (modifié le 20 février 2015). Par conséquent, dans les infractions moins graves, la complicité n'est pas susceptible de sanction.

9.- Principes généraux

L'article 123 ter du code de l'administration établit le principe *nullum crimen sine lege* et le principe de légalité. Le principe de non-rétroactivité et autres sont des principes généraux du droit interne qui doivent être respectés dans tout acte et, donc, s'appliquent tant aux sanctions administratives que pénales.

10.-Droit procédural

L'article 123 ter du Code de l'Administration établit les principes généraux du droit administratif en matière procédurale et inclut le droit à la présomption d'innocence, le droit d'être entendu, le droit d'accès au dossier et le droit de garder silence. Donc, si on ajoute a cela les droits reconnus au niveau constitutionnel, les principes généraux seraient les mêmes pour les deux types de procédure.

11.- Les sanctions administratives peuvent être imposée par les Secrétaires d'Etat, les Ministres, et les Directeurs des institutions indépendantes, tels que les organismes de supervision ou du la sécurité sociale, ou par leur conseil d'administration, entre autres. La loi qui prévoit l'infraction et la sanction établit aussi l'autorité compétente pour instruire la procédure et pour décider de l'imposition de la sanction, prévue dans chaque texte.

12.- L'article 124 et suivants du Code de l'Administration établit les principes d'indépendance et impartialité pour toute autorité avec des pouvoirs de sanction. En tout cas, les personnes sanctionnées peuvent toujours faire appel devant les organes de l'administration supérieur à celui qui a imposé la sanction d'abord, mais aussi devant la juridiction administrative, en double instance.

IV.- Coopération et coordination

21.- L'autorité administrative informe le procureur de l'ouverture d'une procédure d'infraction administrative, si elle considère que les faits pourraient aussi être constitutifs d'infraction pénale. Si le procureur débute une procédure pénale sur les mêmes faits, la procédure administrative reste suspendue dans l'attente de la résolution pénale.

22.- L'éventualité exposée ne s'est jamais présentée en Andorre, raison pour laquelle il n'est pas possible de répondre à cette question.

ARMENIA

I. General questions

1. Does your national law provide for administrative offences, allowing to impose administrative sanctions against natural persons, which are comparable to criminal sanctions? If so, what categories/types of administrative sanctions comparable to criminal sanctions exist in your legal system (e.g. punitive and/or preventive measures, such as fines, disqualifications, etc.)?

Yes. In spite of their specifics, the following sanctions are comparable in this context:

Administrative sanctions

Fine

Confiscation of the instrument or the direct object of an administrative offence

Deprivation of a special right (driving license, hunting license) granted to a natural person

Criminal sanctions

Fine

Confiscation of property

Deprivation of the right to hold specified offices or to engage in specified activities

2. How do you define an administrative and a criminal offence/sanction?

According to Article 9 (paragraph 1) of the Code of Administrative Offences of the Republic of Armenia (hereinafter referred to as “the Administrative Code”), administrative offence is an illegal, guilty (intentional or negligent) action or inaction which encroaches against state or public order, property, citizens’ rights and freedoms, established order of governance and for which an administrative liability is envisaged by legislation.

The Article 22 of the Administrative Code provides for that administrative sanction is a measure of liability and is applied to educate an administrative delinquent in the spirit of respect to the rule of law, the social norms, as well as to prevent the committal of new offences, either by the offender or other persons.

In accordance with Article 18 (paragraph 1) of the Criminal Code of the Republic of Armenia (hereinafter referred to as “the Criminal Code”), the willful committal of a socially dangerous act envisaged in this Code is considered a crime. The act or inaction which may formally contain the features of an act envisaged in this Code, but which, however, does not present public danger because of its little significance, i.e. it did not cause or could not have caused significant damage to an individual or a legal entity, to the society or the state, is not considered a crime (Article 9, paragraph 2).

In Article 48 (paragraph 1) of the Criminal Code the punishment is defined as a means of state enforcement assigned by court sentence on behalf of the state to the person who has been found guilty of the crime, and is expressed in deprivation or restriction of one’s rights and freedoms, as envisaged by law.

- 2.1. How do you distinguish the two?

The main distinguishing criteria between administrative and criminal offences are the nature and the degree of social danger of behavior. So, the administrative offence should be a *socially harmful* behavior while the crime is a *socially dangerous* action

or inaction. Moreover, administrative sanction entails the application of more severe administrative sanction when during the period of one year an administrative offence is repeated, while criminal sanction entails a criminal record. Besides that, in some cases in the Administrative Code there are absolutely certain sanctions indicating the type and the exact degree of sanction. As Article 71 (paragraph 2) of the Constitution of the Republic of Armenia (hereinafter referred to as “the Constitution”) provides for the principle of proportionality of punishment, therefore, such type of sanctions has been excluded from the Criminal Code.

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

Armenian national legislation in general complies with the Engel jurisprudence.

2.3. If so, to what extent?

As it was mentioned above, the nature and the degree of social danger of behavior should serve as main criteria to distinguish (classify) offences. As a reflection of the third criterion of Engel jurisprudence, the sanctions related to imprisonment has been currently excluded from the Administrative Code.

3. 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 the respective added value of administrative and criminal sanctions? Please provide representative examples.

The administrative sanctions in the Republic of Armenia are applied for less serious, intentional or negligent offences to protect state or public order, property, citizens' rights and freedoms, established order of governance. The act against mentioned protected interests can be qualified as a crime if the offence is more serious. Speedier procedures have no crucial importance for application of administrative sanctions.

The added value of administrative sanctions is to educate an administrative delinquent in the spirit of respect to the rule of law, the social norms, as well as to prevent the committal of new offences. The added value of criminal sanctions is to restore social justice, to correct the punished person, and to prevent crimes. For example, deprivation of a driving license granted to a natural person may result, *inter alia*, a prevention of new administrative offences in the realm of traffic. Or, application of imprisonment for a certain term (life sentence) aims to restore social justice, to correct the punished person, and to prevent new crimes.

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

4.1. Art. 4 of the Convention on the protection of the environment through criminal law (ETS 172).¹⁰

The Republic of Armenia has not ratified the Council of Europe Convention on the Protection of the Environment through Criminal Law of November 4, 1998.

4.2. Art. 78 (3) of the Council of Europe Convention on preventing and combating violence against women and domestic violence (ETS 210).¹¹

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>

The Republic of Armenia has not ratified the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence of May 11, 2011.

4.3. 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.

The Republic of Armenia has ratified the Civil Law Convention on Corruption (signed on 17 February 2004, ratified on 7 January 2005, entered into force on 1 May 2005) and the Criminal Law Convention on Corruption (signed on 15 May 2003, ratified on 9 January 2006, entered into force on 1 May 2006). As an implementation of obligations, administrative sanctions were adopted. In particular, amendments to the Administrative Code providing for administrative sanctions in respect of violations related to the regulations on asset declarations were adopted on 9 June 2017 and entered into force on 1 July 2017 (Law HO-106-N of 9 June 2017 on amendments to the Code of Administrative Offences, Article 169.28 of the Administrative Code).

II. Separate or combined tracks of sanctions

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

Yes. For all offences, included in the Administrative Code, are provided for administrative sanctions only. For example, Article 92 of the Administrative Code provides for a responsibility for cruelty to animals. It is *only an administrative responsibility*.

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

Under the Armenian national legislation, the combination of criminal and administrative sanctions is prohibited. Article 9 (paragraph 2) of the Administrative Code sets out that the misdemeanors prescribed by the Administrative Code entail administrative responsibility if criminal liability has not been envisaged for them in accordance with the current legislation.

There are several areas where criminal and administrative sanctions co-exist but they cannot be applied simultaneously. In this respect, the two types of sanctions co-exist in the spheres of public order, property, human rights and freedoms, order of governance, environment, public health and etc.

7. In your view: is the *ne bis in idem* applicable in case both tracks apply? Can you give examples of relevant national case law in this respect?

Armenian Criminal Code recognizes the principle *ne bis in idem*. In accordance with Article 10 (paragraph 2) of the Criminal Code, the repeated conviction of the person for the committal of the same crime is prohibited. Article 21 (paragraph 1) of the Criminal Procedure Code of the Republic of Armenia declares that no one can be convicted twice for the same offence. Moreover, double jeopardy is forbidden by Article 68 (paragraph 1) of the Constitution: "No one may be tried twice for the same act".

In our view, *ne bis in idem* prohibits not only double jeopardy but also administrative and criminal responsibility for administrative offence or disciplinary and criminal

responsibility for disciplinary offence at the same time if administrative or disciplinary liability (in accordance with the second and third criteria of Engel jurisprudence) complies with the notion “*criminal charge*”.

The following example of national case law refers to the application of disciplinary and criminal sanctions at the same time when disciplinary responsibility complies with the notion “*criminal charge*” and reflected in the Decision No. KD1/0043/01/11 of July 8, 2012 of the Court of Cassation of the Republic of Armenia (hereinafter referred to as “the Court”). According to the materials of the case, disciplinary sanctions in a form of disciplinary arrest have been applied to conscripted serviceman Davit Babayan for abandoning the military unit without leave. After that for the same actions he was found guilty by a court in a committal of crime prescribed by Article 361 (paragraph 1) of the Criminal Code and was sentenced to a punishment in a form of service in disciplinary battalion for the term of one year. The Court found that the criminal prosecution against Davit Babayan, in accordance with Article 361 (paragraph 1) of the Criminal Code, concerned to the same actions for which he had already been subjected to disciplinary liability. The Court found also that the applied disciplinary sanctions by their nature and degree are complying with the notion “*criminal charge*”. The Court concluded that an infringement of the principle *ne bis in idem* took place in this case. Therefore, the criminal prosecution against Davit Babayan should be terminated.

III. Identification of main differences between administrative and criminal tracks

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

Substantive law

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

No. The legislation of the Republic of Armenia does not provide for a responsibility for aiding and abetting to administrative offences.

General principles

9. Are administrative sanctions governed by general principles of administrative law or general principles of criminal law (such as proportionality, nullum crimen sine lege, legality, lex mitior, non-retroactivity etc)?

The general principles of administrative law (general principles of criminal law) are reflected in different articles of the Administrative Code. In particular, the principle of proportionality is prescribed by Article 32 (paragraph 2), the principle nullum crimen sine lege is provided for by Article 8 (paragraph 1) and Article 32 (paragraph 1), the principle of legality is envisaged by Article 8 (paragraph 3), Article 32 (paragraph 1), Articles 246-250, the principle lex mitior is reflected in Article 8 (paragraph 2), and the principle of non-retroactivity is prescribed by Article 8 (paragraph 2). In addition, the Administrative Procedure Code of the Republic of Armenia (hereinafter referred to as “the Administrative Procedure Code”) ensures the realization of the principle of legality by Article 6 and Article 8 (paragraphs 1 and 2).

Procedural law

10. Do typical criminal procedural rights apply in case of administrative offences/sanctions (such as presumption of innocence, right to be heard, right of access to the case-file, right to remain silent)?

The typical criminal procedural rights are in general reflected in the following articles of the Administrative Procedure Code: presumption of innocence - Article 216 (paragraph 1), right to be heard - Article 6, Article 18 (paragraph 1), right of access to the case-file - Article 18 (paragraph 1), right to remain silent - Article 33 (paragraphs 2, 3, 5).

11. What kind of authorities are involved in the decision to impose administrative sanctions?

The courts consider and adjudicate administrative cases. In addition, the Police, the Central Electoral Commission, the inspection bodies authorized to perform a control and other authorities listed in Article 214 of the Administrative Code are involved in the decision to impose administrative sanctions. The delimitation of competence of above mentioned bodies is prescribed by Article 215 of the Administrative Code.

12. Do administrative authorities vested with a sanctioning power comply with the principles of independence and impartiality? Is the decision on the sanction subject to a full judicial review (in law and in facts)? Which judicial authorities/courts are in charge of reviewing administrative sanctions?

The principle of legality, as a guarantee for administrative authorities' activity, is prescribed by Article 6 (paragraph 1) of the Constitution: "State and local self-government bodies and officials shall have the power to perform only such acts for which they are empowered by the Constitution or laws". The right to proper administration is provided for by Article 50 (paragraph 1) of the Constitution: "Everyone shall have the right to the impartial and fair examination by administrative authorities, within a reasonable period, of cases concerning him". Such guarantees are prescribed by Articles 246-250 of the Administrative Code and by other laws.

The decision on the administrative sanction is subject to a full judicial review. According to Article 3 (paragraph 1) of the Administrative Procedure Code, every natural person or legal entity shall, in accordance with the procedure prescribed by this Code, have the right to apply to administrative court, if considers that has been illegally brought to administrative liability by administrative act of state body or local self-government body or its official.

According to Article 1 of the Administrative Procedure Code, the courts being in a charge of reviewing administrative sanctions, are the Administrative Court, the Administrative Court of Appeal, and the Civil and Administrative Chamber of the Court of Cassation of the Republic of Armenia.

IV. Cooperation and coordination

13. At the national level, do respective authorities coordinate / cooperate when imposing criminal and administrative sanctions?

Yes. For example, the investigative bodies and appropriate authorities cooperate when combating illegal turnover of narcotic drugs and psychotropic materials. According to Article 44.2 of the Administrative Code, the illegal use of narcotic drugs or psychotropic materials entails an administrative responsibility. Articles 266-270, 272 -274 of the Criminal Code envisage a criminal responsibility for other forms of illegal turnover of narcotic drugs and psychotropic materials. So, when a criminal act

of illegal turnover is detected, the investigative bodies, in a case of availability, shall forward the materials of criminal case, related to illegal use of narcotic drugs or psychotropic materials, to Police to apply administrative sanctions. At the same time, the Police shall forward the materials of the case to investigative bodies if, *prima facie*, a crime in above mentioned sphere has been committed.

14. At the European level, do respective authorities coordinate / cooperate when administrative procedures / sanctions are applicable in one State and criminal law provisions in the other? Please refer here also to situations where only administrative sanctions may be imposed against a legal person in one State whereas the law of the other State provides for criminal liability of legal persons.

14.1. If so, under which mechanism(s) / legal instruments?

-

14.2. Have problems occurred? Which ones?

-

AUSTRIA

I. General questions

1. Does your national law provide for administrative offences, allowing to impose administrative sanctions against natural persons, which are comparable to criminal sanctions? If so, what categories/types of administrative sanctions comparable to criminal sanctions exist in your legal system (e.g. punitive and/or preventive measures, such as fines, disqualifications, etc.)?

Yes.

Sanctions/penalties: Fines, substitute confinement and even prison sentences.

Measures: Forfeiture § 17. (1) Administrative Penal Act (VStG): Unless otherwise provided in administrative rules and regulations, only such objects may be declared forfeited being the property of the culprit or an accomplice or which have been left with them by the person authorized to dispose of them, although the latter should have realized that leaving them the object would serve to commit an administrative offence entailing forfeiture.

(2) Objects subject to forfeiture according to para 1, for which however a person not participating in the offence as culprit or accomplice submits proof of a lien or right of retention, may only be declared forfeited if the respective person by negligence has contributed to the use of such object in connection with the offence, or who, upon acquiring the rights to it, knew or should have known about the offence establishing grounds for its forfeiture.

(3) If no particular person can be persecuted or punished, a decision for forfeiture may be taken independently if all other prerequisites are given. Notice of such rulings may be served also by public announcement.

2. How do you define an administrative and a criminal offence/sanction?

The definition is linked to the competence of either administrative or judicial authorities. The (subordinated) administrative bodies are responsible for the prosecution and punishment of administrative offences (by imposing administrative sanctions), the independent (criminal) courts are responsible for the prosecution and punishment of judicial offences (by imposing criminal sanctions).

2.1. How do you distinguish the two?

The law determines the competent authority. The judicial criminal law is regulated mainly in the Austrian Penal Code. In case of criminal provisions in other laws, the law expressly states whether the enforcement is carried out either by the administrative authorities or the courts. In financial criminal law, the courts are responsible for financial offences whose value exceeds EUR 100.000,--, below this threshold the administrative authorities are competent.

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

2.3. If so, to what extent?

The categorisation of the sanctions (in the meaning of difference between judicial criminal law and administrative law) has not been influenced by the Engel jurisprudence. However, the system of legal protection had to be adapted to the existing system of administrative criminal law, because of the ECtHR jurisdiction. Thus, in 1988, judicial-type independent administrative authorities (UVS) were established to fulfil the requirements of Article 6 ECHR, which in particular had to decide on remedies in administrative penal matters. In 2014, these independent administrative authorities (UVS) were replaced by the newly established administrative courts, also with regard to the requirements of the ECtHR and Article 47 GRC.

3. 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 the respective added value of administrative and criminal sanctions? Please provide representative examples.

Administrative criminal law generally applies to minor offences, negligence offences, traffic offences, offences against the general public and others.

The judicial criminal law deals mainly with intentional offences. Serious offences have to be regulated in the judicial criminal law (Art 91 of the Austrian Constitutional Law).

Examples:

- Murder, robbery, aggravated theft: judicial criminal law
- Traffic offences: eg. driving under the influence of alcohol, driving too fast = administrative offence
- Criminal financial law: value exceeds EUR 100.000,-- means judicial criminal offence, below administrative offence

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

4.1. Art. 4 of the Convention on the protection of the environment through criminal law (ETS 172).¹⁰

The acts described in **Art. 4 lit b, c and e** of the mentioned convention are implemented as **judicial offences** (see for example § 181a, § 181b, 177b of the Criminal Code).

Some of the provisions of Article 4 lit g of the mentioned Convention apply to **judicial offences** (§ 8 Artenhandelsgesetz/wildlife trade law), the **majority are implemented as administrative offences** (§ 9 Artenhandelsgesetz/Wildlife trade law, §§ 38 f Tierschutzgesetz/animal welfare law and others).

Also the acts described in **Art 4 lit a, d, e and f** of the mentioned convention are implemented as **administrative offences** in different codes/laws (eg §§ 366 ff Gewerbeordnung/trade regulations law, 18 Sicherheitskontrollgesetz 1991/safety control act 1991 and others).

4.2. Art. 78 (3) of the Council of Europe Convention on preventing and combating violence against women and domestic violence (ETS 210).¹¹

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>

Austria has not made a declaration in accordance with Art. 78 (3) of the mentioned convention. Physical force, stalking eg are regulated in the criminal code.

4.3. 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

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

Yes. Offences are either administrative sanctions or criminal sanctions.

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

A combination of criminal and administrative sanctions imposed by the same authority (judicial or administrative authority) is not possible, as different authorities decide, each within their own procedural and sanction systems. A combination of sanctions is possible in such cases as mentioned under point 7

In the field of financial criminal law, however, either administrative or judicial criminal law applies to the same offences, depending on the gravity of the offence (see also answer 2.1).

7. In your view: is the ne bis in idem applicable in case both tracks apply? Can you give examples of relevant national case law in this respect?

Yes. Ne bis in idem prohibits double punishment with a criminal sanction and an administrative sanction, if essential elements of the offences are the same.

§ 22 VStG regulates multiple offences

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

'Unless otherwise provided in administrative rules and regulations' means that it could also be the other way round, as it is the case with respect to sect. 52 of the Act on Gambling, according to which in a case of overlapping between this administrative offence and the related criminal offence of sect. 168 of the Criminal Code, the administrative offence prevails (i.e. it excludes the prosecution for the criminal offence).

Being prosecuted (or punished) for the same conduct by the administrative as well as by the criminal authorities, however, is not permitted, as it would constitute a violation of ne bis in idem.

Some relevant decisions of the Constitutional Court:

VfSlg 14696/1996: Driving under the influence of alcohol is an essential element in case of a conviction for the criminal offence Negligent Killing with the special aggravating element "allowing himself ... to become intoxicated" (§ 81 (2) Criminal Code). An additional administrative sanction for driving under the influence of alcohol (§ 99 (1) Road Traffic

punishment in this case was declared unconstitutional.

This decision has been a direct consequence of the ECtHR's verdict of 23 October 1995 in the case of *Gradinger vs. Austria*, No. 33/1994/480/562, in which the ECtHR declared an Austrian declaration/reservation with respect to the (non)applicability of 'ne bis in idem' (Article 4 of Protocol No. 7 to the ECHR), which would have exempted the Austrian administrative offences from the scope of this provision, as 'invalid'.

VfSlg 18833/2009: The applicant was convicted for Suppression of Evidence (§§ 94, 295 Criminal Code), but the Prosecution Authority desisted from prosecuting Negligent Assault with the special aggravating element "allowing himself ... to become intoxicated" (§ 88 (1), (3) and § 81 (2) Criminal Code) as it was expected that it would have no significant impact on the sentence. Therefore, the Court did not examine the intoxication at all. The administrative sanction for driving under the influence of alcohol (§ 99 (1) Road Traffic Regulation) did not violate the principle of ne bis in idem, as the administrative offence was different in its essential elements from the remaining criminal offences.

VfGH E 507/2017: The applicant moved a large amount of soil, cleared a small wood and thus destroyed several protected plants on his property, without the necessary authorizations under the Nature Protection Act of Tyrol. Following his acquittal from the criminal charge of causing "Other hazards to animal or plant populations" (§ 182 (2) Criminal Code), an administrative sanction was imposed on the defendant for several violations of the Nature Protection Act of Tyrol concerning the same conduct. The Constitutional Court found no violation of the principle of ne bis in idem because the offences were not identical in their essential elements. The criminal offence penalizes substantial hazards to an eco-system as a whole or the animal/plant population. This is different from the objective of the administrative offences, which penalize the moving of a large amount of soil and the clearing of a small wood without authorization in general, not only when protected animal or plant populations are affected.

III. Identification of main differences between administrative and criminal tracks

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

Substantive law

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

Yes. § 7 VStG regulates, that who deliberately causes another person to commit an administrative offence or who deliberately facilitates an administrative offence committed by another person is subject to the punishment determined for such offence even in case the actual culprit is not liable to punishment.

General principles

9. Are administrative sanctions governed by general principles of administrative law or general principles of criminal law (such as proportionality, nullum crimen sine lege, legality, lex mitior, non-retroactivity etc)?

The general principles of criminal law (proportionality, nullum crimen sine lege etc) apply also to the administrative law.

Procedural law

10. Do typical criminal procedural rights apply in case of administrative offences/sanctions (such as presumption of innocence, right to be heard, right of access to the case-file, right to remain silent)?

Yes.

The presumption of innocence applies also in case of administrative offences/sanctions because of the constitutional status of Article 6 ECHR.

The right to be heard is regulated in § 40 VStG: If the authority does not already dispense with prosecution on basis of the data in the report received or of the results of the investigation carried out, it shall give the suspect an opportunity to present his case.

For this purpose the authority may summon the suspect to appear for examination or, at his/her option, to either appear for examination at a given time or submit his/her case in writing by that time. On this occasion the suspect shall be instructed on his/her right to bring in a legal counsel of his/her choice for the examination. If the suspect is not resident in the municipality of the authority's office, the authority may organize the suspect's examination in the municipality of his/her actual residence.

The right of access to the case-file is written down in § 24 VStG.

§ 33 (2) VStG regulates, that the defendant must not be forced to answer questions he is asked (right to remain silent).

11. What kind of authorities are involved in the decision to impose administrative sanctions?

Subordinated administrative authorities investigate and decide on the cases (inquisition maxim). Unlike in criminal law, the principle of separation of investigating and deciding authority does not apply.

12. Do administrative authorities vested with a sanctioning power comply with the principles of independence and impartiality? Is the decision on the sanction subject to a full judicial review (in law and in facts)? Which judicial authorities/courts are in charge of reviewing administrative sanctions?

No. The authorities are usually subordinated and bound by instructions. Although they are obliged to objectivity and they have to take into account the arguments serving to exonerate the suspect in the same way as the arguments incriminating the inquisition maxim applies: The authority unites the indictment and the decision-making function, so that there is no impartiality comparable to a court.

The decisions to impose a sanction are subject to full judicial review by the administrative jurisdiction. First, the Federal Finance Court, the Federal Administrative Court or one of the nine regional administrative courts are responsible for the appeals/complaints. As a rule, these courts have to hold a public, oral hearing. These courts have full cognitive power and decide in administrative penal matters always in the matter itself. These decisions are subject to a legal control by the Supreme Administrative Court or the Constitutional Court. The Administrative Courts were established in 2014 to fulfil the requirements of Article 6 ECHR and Article 47 GRC.

IV. Cooperation and coordination

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

punishable as an administrative offence only if it does not constitute an offence falling within the jurisdiction of the judicial court. If a suspect is charged with an administrative offence to be prosecuted by more than one authority or with an administrative offence and a further penal act to be prosecuted by an administrative authority or a court, such offences shall be prosecuted independently from each other, generally also in such cases when the offences are the result of only one single action. If, however, an action is to be prosecuted by the authorities only because it does not constitute an offence within the jurisdiction of other administrative authorities or of the courts, and it is doubtful whether this is the case, the authority shall suspend the penal procedure until this issue will finally be decided by the administrative authority having jurisdiction or by the court.

22. At the European level, do respective authorities coordinate / cooperate when administrative procedures / sanctions are applicable in one State and criminal law provisions in the other? Please refer here also to situations where only administrative sanctions may be imposed against a legal person in one State whereas the law of the other State provides for criminal liability of legal persons.

22.1. If so, under which mechanism(s) / legal instruments? Yes.

- a) Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties;
- b) Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters. Regarding the latter, administrative authorities are responsible, if the act constitutes an administrative offence.

22. 2. Have problems occurred? Which ones?

- a) Yes. Some member states enforce only judicial penalties (see the pending trial before the European Court of Justice C-671/18, „Centraal Justitieel Incassobureau“) Enforcement is hampered by poor quality of the certificates or the translation; problems with unclear responsibilities
- b) The provisions concerning the EIO only entered into force on 1 July 2018.

BELGIUM

I. Questions générales

Votre droit interne prévoit-il des infractions administratives, permettant d'imposer des sanctions administratives à des personnes physiques, qui sont comparables à des sanctions pénales?

Le droit belge prévoit deux grands systèmes de sanctions administratives à caractère pénal, à savoir celles avec dépenalisation et celles sans dépenalisation.

1. Traitement administratif avec dépenalisation

Il y a tout d'abord le traitement administratif avec dépenalisation. Dans cette option, il n'est plus question de « véritables » infractions et l'action normative à l'égard des comportements visés se situe en dehors de la sphère du droit pénal. La contravention à ces normes non pénales peut ensuite faire l'objet de sanctions administratives à caractère pénal. Dans ce système, il existe deux variantes : des normes de ce type existent tant au niveau local qu'au niveau fédéral.

a) *Première variante : les normes locales*

Dans la première variante, la compétence est conférée aux autorités locales. Dans cette variante, il convient de mentionner l'article 2, § 1^{er}, de la loi du 24 juin 2013 relative aux sanctions administratives communales (ci-après dénommée « loi SAC »)¹². La loi définit en outre les sanctions administratives qui peuvent être imposées ainsi que les modalités et la procédure. Elle détermine également les limites de cette compétence (étendue) de la commune.

b) *Deuxième variante : les normes fédérales*

Dans la deuxième variante, la compétence est conférée à l'autorité fédérale. L'autorité fédérale normalise alors le comportement en question en dehors du droit pénal.

Ainsi, l'article 444 du Code des impôts sur les revenus 1992 (CIR) prévoit, dans une réglementation fédérale, qu'une sanction administrative d'accroissement d'impôt peut être imposée.

2. Traitement administratif sans dépenalisation

Il y a ensuite le traitement administratif sans dépenalisation. Les infractions visées sont maintenues dans le droit pénal et elles sont sanctionnées administrativement par d'autres voies. Ce système comporte trois variantes.

a) *Première variante : les normes locales*

Dans la première variante, la compétence est conférée à l'autorité locale. Rien n'empêche en effet l'autorité de sanctionner administrativement, au moyen d'une autre qualification, des comportements sanctionnés par une norme supérieure.

Dans cette variante, il convient de mentionner à nouveau la loi SAC, laquelle prévoit, outre le système de traitement purement administratif, également un système d'infractions mixtes (une sanction pénale et une sanction administrative).

b) *Deuxième variante : les normes fédérales*

¹² MB du 1^{er} juillet 2013, en vigueur le 1^{er} janvier 2014.

La deuxième variante se caractérise par une réglementation qui reste fédéralement pénale et une exécution que l'on peut qualifier (en partie) d'administrative. Cette variante comporte deux sous-catégories qui donnent la priorité soit au parquet, soit à l'administration.

i) Priorité au parquet

Dans ce système, une liste d'infractions soumises à une procédure particulière est établie. Les compétences du parquet restent inchangées. Seule une phase y est ajoutée. Lorsque l'une des infractions visées est constatée, le procès-verbal est transmis au parquet et une copie de celui-ci est transmise à l'administration (éventuellement locale). Le parquet dispose ensuite d'un délai dans lequel il a la possibilité d'engager des poursuites pénales. S'il classe l'affaire sans suite ou laisse expirer le délai sans prendre de décision, la compétence de l'administration est alors réactivée. Celle-ci peut imposer une sanction administrative indépendante, susceptible de recours devant un juge indépendant et impartial.

Ainsi, le Code pénal social belge¹³ prévoit, aux articles 74 à 91/3, une procédure donnant la priorité au parquet, en particulier, par exemple, l'article 72 du Code pénal social.

ii) Priorité à l'administration

Les comportements qui constituent un crime ou un délit doivent toujours être signalés au parquet, conformément à l'article 29 du Code d'instruction criminelle. L'alinéa 2 de cet article prévoit toutefois une exception pour un certain nombre de fonctionnaires en matière fiscale confrontés à des infractions bien déterminées.

Des exceptions à cette règle sont dès lors possibles. Différentes modalités sont possibles. Il est ainsi possible de laisser au fonctionnaire qui fait le constat le choix d'informer le parquet ou de sanctionner administrativement. D'autre part, il est possible d'utiliser un système mixte dans lequel l'administration est tenue d'informer le parquet de son intention d'imposer une sanction administrative et le parquet dispose d'un certain délai pour marquer son accord ou se saisir de l'affaire.

Ainsi, le droit pénal environnemental prévoit des procédures pénales donnant la priorité à la mise en œuvre administrative, dérogeant en fait à l'article 29 du Code d'instruction criminelle. L'article 16 de la loi du 9 juillet 1984 concernant le transit de déchets peut être cité à cet égard.

c) Troisième variante : le traitement extrajudiciaire par le parquet

La troisième variante donne au ministère public la possibilité de permettre, à côté des formes existantes de règlement extrajudiciaire, l'imposition d'une sanction administrative contraignante pour certaines infractions. Si le contrevenant ne forme pas de recours contre cette décision du ministère public, cette sanction administrative devient exécutoire. Dans cette optique, les comportements en question sont toujours pénalisés, mais font l'objet d'un règlement accéléré et simplifié. Le contrevenant peut former un recours contre cette décision devant le tribunal de police, de sorte que la possibilité existe de soumettre la décision à l'examen d'une instance judiciaire indépendante et impartiale.

¹³ Pour un examen approfondi de cette matière, voir : A. JACKERS, « Les sanctions en droit pénal social », *Droit pénal de l'entreprise* 2015, 271-278 ; F. KEFER, *Précis de droit pénal social*, 2^{ème} édition, Limal, Anthémis, 2014, 381 p..

À titre d'exemple, il peut être renvoyé à l'article 65 de la loi relative à la police de la circulation routière, lequel prévoit un ordre de paiement et une amende administrative. Dans ce système, la sanction administrative est imposée par le parquet, ce qui, comme l'indiquent les travaux parlementaires préparatoires, « offre encore plus de garanties en termes de procédure et de respect des droits de la défense. »¹⁴.

15. Si tel est le cas, quelles catégories/types de sanctions administratives comparables aux sanctions pénales existent dans votre système légal (par exemple mesures punitives et/ou préventives, telles que des amendes, déchéances etc.) ?

Les sanctions administratives peuvent être subdivisées en quatre variantes en fonction du domaine dans lequel elles sont appliquées : les sanctions administratives de nature purement disciplinaire, les sanctions administratives qui peuvent être imposées aux non-fonctionnaires qui collaborent avec un service public, les sanctions administratives pouvant être imposées aux utilisateurs de services publics, les sanctions administratives pouvant être imposées pour non-respect de dispositions légales et réglementaires¹⁵.

Puisque les trois premières catégories sont imposées à un groupe déterminé ayant un statut déterminé, il ne s'agit, en principe, pas d'une sanction administrative à caractère pénal, conformément à la jurisprudence de la Cour de cassation, dans ses arrêts des 25 mai 1999 et 6 mai 2002 (cf. *infra* 2.1).

Dans la catégorie des sanctions administratives à caractère pénal pouvant être imposées pour non-respect d'une disposition légale ou réglementaire, on peut mentionner de manière non exhaustive : l'article 444 du Code des impôts sur les revenus 1992 (*accroissement d'impôt*), l'article 74/4*bis* de la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (*amende administrative*), la loi du 24 juin 2013 relative aux sanctions administratives communales (*amende administrative, suspension ou retrait d'une autorisation et fermeture d'un établissement*).

16. Comment définissez-vous une sanction administrative et une sanction/infraction pénale ?

En droit belge, la sanction administrative peut être définie comme une mesure prise par l'autorité administrative pour sanctionner le non-respect d'une disposition de droit public et qui est toujours considérée comme un attribut normal de la fonction exécutive¹⁶.

En droit belge, la sanction peut être définie, dans le sens interne, comme une peine définie par la loi et imposée par le pouvoir judiciaire à titre de sanction pour une infraction. En droit belge, aucune définition de la peine autre que cette tautologie ne peut être donnée, à savoir qu'il s'agit de la sanction que le législateur a voulu revêtir du caractère de peine. On peut déjà noter que l'article 14 de la Constitution a une portée plus large que cette définition du droit pénal au sens strict.

16.1. Comment faites-vous la distinction entre les deux ?

¹⁴ *Doc. parl.*, Chambre, 2001-2002, 1915/001, 19.

¹⁵ A. MAST, J. DUJARDIN, M. VAN DAMME et J. VANDE LANOTTE, *Overzicht van het Belgisch administratief recht*, 21^e édition, Malines, Kluwer, 2017, n^{os} 12-15, 11-14.

¹⁶ A. MAST, J. DUJARDIN, M. VAN DAMME et J. VANDE LANOTTE, *Overzicht van het Belgisch administratief recht*, 21^e édition, Malines, Kluwer, 2017, n^o 10, 9; M. BOES, *Administratieve sancties en art. 6 EVRM in België. Preadvies voor de Vergelijkende Studie van het Recht van België en Nederland*, Zwolle, Tjeenk Willink, 1989, 1-9; A. ALEN, "Administratieve geldboeten: hun internationaal- en internrechtelijke kwalificatie", dans *Liber amicorum Prof. Dr. G. Baeteman*, Deurne, Kluwer rechtswetenschappen, 1997, pp. 396-421.

Dans ses arrêts du 25 mai 1999 et du 6 mai 2002, la Cour de cassation a estimé qu'une sanction administrative doit être considérée comme une peine (ou une sanction administrative à caractère pénal) si : 1. elle concerne [...] non uniquement un groupe déterminé doté d'un statut particulier ; 2. elle prescrit un comportement déterminé et prévoit une sanction en vue de son respect ; 3. elle ne concerne pas seulement une réparation pécuniaire d'un préjudice mais tend essentiellement à sanctionner afin d'éviter la réitération d'agissements similaires ; 4. elle se fonde sur une norme à caractère général dont le but est à la fois préventif et répressif, 5. elle est très sévère eu égard à son montant¹⁷.

16.2. La jurisprudence *Engel* a-t-elle influencé la catégorisation des sanctions dans votre système national ?

Oui.

16.3. Si oui, dans quelle mesure ?

La jurisprudence de la CEDH¹⁸ (notamment dans l'affaire Engel), dans laquelle une piste de réflexion comportant trois critères a été développée¹⁹, a certainement eu une influence sur la subdivision des sanctions en catégories dans le droit belge interne.

La Cour de cassation²⁰, le Conseil d'État²¹ et les juges du fond²² ont accepté que des sanctions administratives puissent être une poursuite pénale au sens de l'article 6 de la CEDH et de l'article 14.7 du PIDCP.

17. Dans quels cas votre système national recourrait-il à des sanctions administratives (infraction moins grave, infractions intentionnelles/négligence, importance de l'intérêt protégé, procédures plus rapide, etc.) ? Quelle est la valeur ajoutée respective des sanctions administratives et pénales? Merci de fournir des exemples représentatifs.

Les sanctions administratives peuvent être subdivisées en quatre variantes en fonction du domaine dans lequel elles sont appliquées (*cf. supra*). Elles sont répétées ici afin de préciser dans quels domaines les sanctions administratives sont appliquées : les sanctions administratives de nature purement disciplinaire, les sanctions administratives qui peuvent être imposées aux non-fonctionnaires qui collaborent avec un service public, les sanctions administratives pouvant être imposées aux utilisateurs de services publics, les sanctions administratives pouvant être imposées pour non-respect de dispositions légales et réglementaires²³.

Les sanctions administratives sont utilisées en matière de droit pénal spécial et pour lutter contre des formes de nuisances.

¹⁷ Cass., 25 mai 1999, *Arr.Cass.* 1999, n° 307; Cass., 6 mai 2002, *Arr.Cass.*, 2002, n° 276, concl. Th. WERQUIN (avocat général).

¹⁸ CEDH, 8 juin 1976, *Engel* e.a. c. Pays-Bas, nos 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, <http://hudoc.echr.coe.int/eng?i=001-62036>; CEDH, 21 février 1984, *Öztürk* c. Allemagne, n° 8544/79, <http://hudoc.echr.coe.int/eng?i=001-62111>; CEDH, 25 août 1987, *Lutz* c. Allemagne, n° 9912/82, <http://hudoc.echr.coe.int/eng?i=001-62089>; CEDH, 27 août 1991, *Demicoli* c. Malte, n° 13057/87, <http://hudoc.echr.coe.int/eng?i=001-62240>; CEDH, 24 février 1994, *Bendenoun* c. Frankrijk, n° 12547/86, <http://hudoc.echr.coe.int/eng?i=001-62420>; CEDH, 10 février 2009, *Zolotukhin* c. Russie, n° 14939/03, <http://hudoc.echr.coe.int/eng?i=001-91225>.

¹⁹ J. PUT, *Administratieve sancties in het sociaizekerheidsrecht*, Bruges, Die Keure, 1998, 139 et suivantes.

²⁰ Cass., 5 février 1999, *Arr.Cass.* 1999, 155, concl. Ph. GOEMINNE (avocat général); *RW* 1998-99, 1352 et 1999-2000, 640; *JLMB* 1999, 537, note A. DEMOULIN; *JT* 1999, 767; voir également I. VAN DE WOESTIJNE, "Het strafrechtelijk karakter van de fiscale administratieve geldboeten", *R.Cass.* 2000, 213-218.

²¹ Conseil d'État, 17 décembre 2014, n° 229.581, *De Winne*, nos 14-15.

²² Corr. Hasselt, 30 juin 2000, *RW* 2001-02, 955; Corr. Tongres, 19 janvier 2001, *Limb.Rechtsl.* 2001, 163, note J. KERKHOFS; Corr. Liège, 8 décembre 2008, *JLMB* 2009, 1581; Corr. Nivelles, 27 janvier 2010, *JT* 2010, 425, note.

²³ A. MAST, J. DUJARDIN, M. VAN DAMME et J. VANDE LANOTTE, *Overzicht van het Belgisch administratief recht*, 21^e édition, Malines, Kluwer, 2017, nos 12-15, 11-14.

Les raisons invoquées à cet égard par le législateur²⁴ et la doctrine sont les suivantes : une meilleure garantie de l'application de la loi, qui, en raison du nombre excessif de dispositions pénales à caractère extrêmement technique ou de peines inadéquates, aboutit rarement, voire jamais, à des poursuites pénales et souvent à l'impunité ; une procédure pénale trop lourde pour des infractions légères ; un manque de connaissances de la part des autorités pénales dans des domaines stratégiques spécialisés ; la décharge des parquets et des juridictions pénales d'une grande part des poursuites pénales ; un système de sanction plus rapide et plus efficace ; un moyen de sanctionner directement des personnes morales.

La décharge des juridictions pénales en imposant, pour des infractions légères, des amendes administratives au lieu de peines, permet aux autorités pénales d'accorder davantage d'attention à la poursuite et à la sanction de la criminalité grave²⁵. Pour l'individu également, les amendes administratives entachent moins la réputation : elles ne sont pas prononcées par le juge pénal et ne sont pas consignées dans le casier judiciaire²⁶.

Les sanctions administratives sont également utilisées pour lutter contre les nuisances, en particulier dans le cadre notamment de la loi SAC.

18. En matière de sanctions pénales/administratives, comment avez-vous appliqué les dispositions ci-dessous du Conseil de l'Europe :

18.1. Art. 4 de la Convention sur la protection de l'environnement par le droit pénal (STE 172)²⁷,

Cette convention a été signée le 7 mai 1999 par la Belgique, mais n'a pas encore été ratifiée et n'est pas encore entrée en vigueur. La question est dès lors sans objet.

18.2. Art. 78 (3) de la Convention sur la prévention et la lutte contre la violence à l'égard des femmes et la violence domestique (STE 210).²⁸

Le Traité a été signé le 11/09/2012, a été ratifié le 14/03/2016²⁹ et est entré en vigueur en Belgique le 01/07/2016.

L'article 78(3) de la convention dispose ce qui suit : « 3. *Tout État ou l'Union européenne peut, au moment de la signature ou au moment du dépôt de son instrument de ratification, d'acceptation, d'approbation ou d'adhésion, dans une déclaration adressée au Secrétaire Général du Conseil de l'Europe, préciser qu'il se réserve le droit de prévoir des sanctions non pénales, au lieu de sanctions pénales, pour les comportements mentionnés aux articles 33 et 34.* »

La Belgique n'a formulé aucune réserve quant au fait de prévoir des sanctions non pénales au lieu de sanctions pénales. Il est par conséquent opté pour une réponse pénale.

²⁴ Plusieurs de ces raisons figurent dans l'exposé des motifs du projet de loi de la loi antérieure du 30 juin 1971 : *Doc. parl.*, Chambre, 1970-71, n° 939/1, 1-2; A. DE NAUW, "L'évolution législative vers un système punitif administratif", *Rev.dr.pén.crim.* 1989, 363-368 ; A. DE NAUW, *Les métamorphoses administratives du droit pénal de l'entreprise*, Gand, Mys & Breesch, 1994, 7-43.

²⁵ A. DE NAUW, "L'évolution législative vers un système punitif administratif", *Rev.dr.pén.crim.* 1989, 367.

²⁶ A. MAST, J. DUJARDIN, M. VAN DAMME en J. VANDE LANOTTE, *Overzicht van het Belgisch administratief recht*, 21^e édition, Malines, Kluwer, 2017, n° 10, 9.

²⁷ <https://rm.coe.int/168007f3f7>

²⁸ <https://rm.coe.int/1680084840>

²⁹ Loi du 1^{er} mars 2016 portant assentiment à la Convention du Conseil de l'Europe sur la prévention et la lutte contre la violence à l'égard des femmes et la violence domestique, faite à Istanbul le 11 mai 2011, MB du 9 juin 2016, 34897 et suivantes.

18.3. Si vous n'avez ratifié aucune de ces conventions, merci de donner un autre exemple de mise en œuvre de Conventions du CdE permettant l'adoption de sanctions administratives à l'encontre de personnes physiques.

Voir 4.2

II. Voies de sanctions distinctes ou combinées

19. Existe-t-il des types d'infractions établies dans votre législation nationale qui prévoient des sanctions administratives uniquement ?

Comme expliqué dans l'aperçu, au point I, il existe un système de traitement administratif avec dépenalisation, dans lequel certaines infractions administratives ne font l'objet que d'une sanction administrative.

20. Votre droit interne permet-il une combinaison de sanctions pénales et administratives ? Existe-t-il des domaines où ces deux types de sanction coexistent ?

Comme expliqué dans l'aperçu, au point I, il existe dans le système de traitement administratif sans dépenalisation une catégorie d'infractions mixtes. Ces infractions peuvent faire l'objet d'une sanction administrative ou d'une peine.

Aucune (autre) situation ne permet de cumuler les deux (cf. la question ci-après concernant le principe *ne bis in idem*).

21. Selon vous: le principe *ne bis in idem* est-il applicable lorsque les deux moyens de sanctions s'appliquent ? Pouvez-vous donner des exemples de jurisprudence pertinente à cet égard dans votre droit interne ?

Le droit à ne pas être condamné deux fois pour une même infraction figure à l'article 4 du Protocole n° 7 à la CEDH, à l'article 50 de la Charte des droits fondamentaux de l'Union européenne et à l'article 14.7 du PIDCP. Une deuxième poursuite ou sanction par des sanctions qui, selon l'interprétation autonome de la Convention européenne des droits de l'homme, doivent être considérées comme « pénales », pour un même comportement, quelle que soit sa définition ou qualification juridique, viole le principe *ne bis in idem*.

Le principe *ne bis in idem* ne s'oppose pas au cumul d'une condamnation pénale et de mesures administratives qui ne doivent pas être qualifiées de pénales.

Depuis les arrêts Zolotoukhine et Ruotsalainen de la Cour européenne des droits de l'homme et l'entrée en vigueur en Belgique, le 1^{er} juillet 2012, du Protocole n° 7 à la Convention de sauvegarde des droits de l'homme, un cumul de sanctions pénales et de sanctions administratives à caractère pénal n'est plus autorisé. Conformément à ces arrêts, le principe « *non bis in idem* » s'applique bel et bien aux faits qui font l'objet de sanctions tant pénales qu'administratives pour autant qu'il s'agisse de la même personne et des mêmes faits, quelle que soit la qualification juridique définitive.^{30,31}

³⁰ CEDH, 10 février 2009, Zolotoukhin c. Russie, n° 14939/03, <http://hudoc.echr.coe.int/eng?i=001-91225>, § 81 : « En outre, l'approche qui privilégie la qualification juridique des deux infractions est trop restrictive des droits de la personne, car si la Cour s'en tient au constat que l'intéressé a été poursuivi pour des infractions ayant une qualification juridique différente, elle risque d'affaiblir la garantie consacrée par l'article 4 du Protocole no 7 et non de la rendre concrète et effective comme le requiert la Convention » ; CEDH, 16 juin 2009, Ruotsalainen c. Finlande, n° 13079/0, <http://hudoc.echr.coe.int/eng?i=001-92961>. Voir également : A. DE NAUW, « Cumulatie van straffen en administratieve sancties met een strafrechtelijke karakter na de arresten Zolotoukhin en Ruotsalainen », dans F. DERUYCK (éd.), *Strafrecht...meer dan ooit*, Bruges, Die Keure, 2011, n°s 7, 13 et n°s 8, 15; voir également : P. OLIVER et T. BOMBOIS, « *Ne bis in idem* en droit européen : un principe à plusieurs variantes », *JDE* 2012, 266. Voir également Cour constitutionnelle, 19 décembre 2013, n° 181/2013.

Ainsi, dans un arrêt du 27 mars 2013, la Cour de cassation a dit pour droit que le principe général du droit « *non bis in idem* » inscrit à l'article 14.7 du PIDCP s'oppose à ce qu'une personne fasse l'objet de poursuites pénales après avoir payé une amende administrative à caractère répressif, lorsque le texte prévoyant l'amende administrative et celui relatif à l'infraction pénale répriment, en des termes équivalents, le même comportement et que les éléments essentiels des deux infractions sont identiques^{32, 33}.

III. Identification des grandes différences entre la voie administrative et la voie pénale

Veillez identifier les principales conséquences découlant de l'application de la voie administrative :

En droit belge, les effets juridiques suivants sont liés à la constatation du fait qu'une mesure est une sanction administrative³⁴ :

1. La sanction administrative *n'est pas* consignée dans le casier judiciaire.
2. Un cumul de sanctions administratives et de sanctions pénales est possible sauf lorsque la loi ou le décret interdit le cumul³⁵ ou lorsqu'une personne a payé une amende administrative à caractère pénal qui lui a été imposée et que cette personne fait ensuite l'objet de poursuites pénales devant une juridiction pénale *pour la même infraction avec des éléments essentiels identiques*³⁶. Cette réglementation ne s'applique plus sans réserve depuis l'arrêt de la CEDH, selon lequel le principe *non bis in idem* n'est pas enfreint lorsque les procédures administrative et pénale sont complémentaires et n'ont pas la même finalité³⁷.
3. Les règles de la procédure pénale et les principes du droit pénal belge, telles notamment la tentative de corréité, la récidive et la preuve, ne s'appliquent *pas* à l'imposition d'une sanction administrative³⁸.
4. Lorsqu'une *sanction administrative revêt un caractère pénal* au sens de l'article 6 de la CEDH et de l'article 14 du PIDCP, les principes de bonne administration de la justice en matière pénale contenus dans les articles 6 et 7 de la CEDH et dans l'article 14 du PIDCP s'appliquent, notamment le traitement du recours contre la décision définitive de l'autorité administrative par une instance

³¹ Voir également la circulaire COL 1/2006 du Collège des Procureurs généraux près les Cours d'appel (version remaniée du 23 novembre 2011) sur les sanctions administratives dans les communes, p. 46.

³² Cass., 27 mars 2013, P.12.1945.F.

³³ Voir également la circulaire COL 1/2006 du Collège des Procureurs généraux près les Cours d'appel (version remaniée du 23 novembre 2011) sur les sanctions administratives dans les communes, p. 46.

³⁴ A. MAST, J. DUJARDIN, M. VAN DAMME en J. VANDE LANOTTE, *Overzicht van het Belgisch administratief recht*, 21^e éd., Mechelen, Kluwer, 2017, n° 16, 14-16.

³⁵ Voir notamment l'article 5 de la loi du 24 juin 2013 relative aux sanctions administratives communales, lequel dispose que le conseil communal ne peut prévoir simultanément une sanction pénale et une sanction administrative pour les mêmes infractions à ses règlements et ordonnances.

³⁶ Cour constitutionnelle, 26 avril 2007, n° 67/2007, note S. VANDROMME et E. DE BOCK, *R.W.* 2008-2009, 526-533; GwH 18 juin 2008, n° 91/2008; GwH 19 décembre 2013, n° 181/2013. Dans le même sens : CEDH (Grande Chambre), *Zolotoukhin c. Russie* du 10 février 2009, avec note H. MOCK, *Rev.Trim.dr.h.* 2009, pp. 866-881 et note W. VERRIJDT, *R.W.* 2011-12, pp. 500-502, confirmé dans CEDH, *Tomsovic c. Croatie* du 18 octobre 2011. Voir également l'avis n° 46870/2 du 8 juillet 2009 de la section législation du Conseil d'État sur un avant-projet de loi relative au statut des établissements de paiement, à l'accès à l'activité de prestataire de services de paiement et à l'accès aux systèmes de paiement (*Doc. parl.*, Chambre, 2008-2009, n° 52-2182/1, pp. 88-90 et avis n° 52.870/2 du 5 mars 2013 sur un avant-projet de loi visant à renforcer la protection des utilisateurs de produits et services financiers ainsi que les compétences de l'Autorité des services et marchés financiers, et portant des dispositions diverses (*Doc. parl.*, Chambre, 2012-2013, n° 2872/1), 108-111).

³⁷ CEDH (Grande Chambre), 15 novembre 2016, A. et B. c. Norvège, n°s 24130/11 et 29758/11, <http://hudoc.echr.coe.int/eng/?i=001-168973>; Cass., 21 septembre 2017, F.15.0081.N ; voir également G. NINANE, « Le principe *non bis in idem* et l'arrêt A et B contre Norvège de la Cour européenne des droits de l'homme du 15 novembre 2016 », dans F. TULKENS (éd.), *Le droit administratif répressif, fiscal et indemnitaire*, Bruxelles, Larcier, 2018, n°s 7-10 et n°s 11-12, 11-20.

³⁸ J. PUT, *Administratieve sancties in het socialezekerheidsrecht*, Bruges, Die Keure, 1998, 139 et suivantes, cité dans I. BOONE et G. VAN HAEGENBORGH, *Les sanctions administratives*, rapport annuel de la Cour de cassation, 2004, p. 189.

judiciaire indépendante et impartiale ayant pleine juridiction, le droit au silence, la présomption d'innocence, le délai raisonnable et le principe *non bis in idem*³⁹.

5. Le juge auquel on demande de se pencher sur une sanction administrative ayant un caractère pénal au sens de l'article 6 de la CEDH doit examiner la légalité de cette sanction et, plus particulièrement, examiner si cette sanction est conciliable avec les conditions impératives des conventions internationales et du droit interne, en ce compris les principes généraux du droit. Ce droit de contrôle doit, en particulier, permettre au juge d'examiner si la sanction n'est pas disproportionnée à l'infraction de sorte qu'il peut examiner si l'administration pouvait raisonnablement infliger une amende administrative d'une telle importance. À cet égard, le juge peut ainsi tenir compte spécialement de la gravité de l'infraction, du taux des sanctions déjà infligées et de la manière dont il a été statué dans des affaires similaires, mais il doit tenir compte à cet égard de la mesure dans laquelle l'administration elle-même était liée par rapport à la sanction. En d'autres termes, le juge doit être habilité à réformer la décision sur une base factuelle et juridique⁴⁰. Ce droit de contrôle n'implique toutefois pas que le juge puisse annuler ou réduire des amendes sur la base d'une appréciation subjective de ce qu'il estime être raisonnable, pour de simples raisons d'opportunité et contre les règles légales⁴¹.
6. Le *recours juridictionnel* contre l'imposition d'une sanction administrative revêt *normalement un caractère suspensif*, mais le législateur ou le législateur décréteil n'est pas obligé d'accorder un effet suspensif à un recours exercé contre une décision administrative (donc également contre une sanction administrative), sauf si un tel effet suspensif est nécessaire pour empêcher l'exécution de mesures considérées comme contraires à la Convention européenne des droits de l'homme et dont les conséquences sont potentiellement irréversibles⁴².
7. Dans la mesure où les juridictions ordinaires ne sont pas habilitées à contrôler tout ce qui relève de la compétence de l'administration, l'acte juridique par lequel une sanction administrative est imposée peut être attaqué par un *recours en annulation* sur la base de l'article 14, § 1^{er}, des lois sur le Conseil d'État. Dans ce cas, le Conseil d'État vérifiera, dans le cadre du contentieux objectif, si la sanction administrative a ou non été prise par excès de pouvoir et peut annuler la sanction administrative, mais ne peut, à l'instar de la juridiction ordinaire, moduler directement la sanction⁴³. En dépit de ce constat, la Cour constitutionnelle, la Cour de cassation et le Conseil d'État sont d'avis que les justiciables doivent disposer d'une réelle garantie juridictionnelle devant une juridiction indépendante et impartiale qui réponde à la qualification prescrite par l'article 6.1 de la CEDH⁴⁴.
8. Seule l'administration peut transiger sur la sanction administrative imposée⁴⁵.

Droit matériel

³⁹ I. BOONE et G. VAN HAEGENBORGH, *Les sanctions administratives*, rapport annuel de la Cour de cassation, 2004, pp. 194-195.

⁴⁰ Cass., 13 février 2009, *R.W.* 2010-2011, pp. 665-666.

⁴¹ Cass., 24 janvier 2002, *R.W.* 2002-2003, pp. 1017-1018, avec note ; Cass., 21 janvier 2005 ; Cass., 16 février 2006 ; Cass., 16 février 2007, *R.D.F.* 2007, p. 943, avec note de G. GOOSSENS ; Cass., 13 février 2009, *R.W.* 2010-2011, pp. 666-673 ; voir également I. BOONE et G. VAN HAEGENBORGH, *Les sanctions administratives*, dans le Rapport annuel de la Cour de cassation, 2004, pp. 236-237.

⁴² Cour constitutionnelle, 18 octobre 2006, n° 151/2006 avec renvoi à la CEDH, 5 février 2002, *Conka c. Belgique*, n° 51564/99, <http://hudoc.echr.coe.int/eng?i=001-64585>.

⁴³ Cass., 15 octobre 2009, repris dans l'arrêt n° 205.212 du 15 juin 2010 du Conseil d'État, *Emery Worldwide Airlines Inc.*

⁴⁴ Cour constitutionnelle, 30 mars 2011, n° 44/2011 ; Cass., 15 octobre 1999, *Arr.Cass.* 2009, n° 584 ; Conseil d'État, 20 janvier 2011, n° 210.529, *Karroua* ; Conseil d'État, 6 juillet 2012, n° 220.211, *Van Waeyenberghe et sprl Vandemoortel* ; 14 octobre 2013, n° 225.080, *SA Vh-trans* ; voir également l'avis n° 49.958/1/V de la section législation du Conseil d'État sur un avant-projet de décret portant organisation de l'accueil préscolaire (*Parl. St.* VI. Parl., 2011-2012, n° 1395/1, pp. 111-113).

⁴⁵ Cass., 8 novembre 1949, *Pas.* 1950, I, 131.

1. La complicité est-elle sanctionnée si un comportement est seulement constitutif d'une infraction administrative ?

Comme expliqué dans l'aperçu, les règles de la procédure pénale et les principes du droit pénal belge, comme la complicité ne s'appliquent pas lors de l'imposition d'une sanction administrative.

Principes généraux

2. Les sanctions administratives relèvent-elles des principaux généraux du droit administratif ou des principes généraux du droit pénal ? (comme la proportionnalité, nullum crimen sine lege, la légalité, la lex mitior, la non-rétroactivité, etc.)?

Comme expliqué dans l'aperçu, les principes de bonne administration de la justice contenus dans les articles 6 et 7 de la CEDH et dans l'article 14 du PIDCP, notamment le traitement du recours contre la décision définitive de l'autorité administrative par une instance judiciaire indépendante et impartiale ayant pleine juridiction, le droit au silence, la présomption d'innocence, le délai raisonnable et le principe *non bis in idem* s'appliquent à la sanction administrative à caractère pénal qui constitue une action pénale au sens de l'article 6 de la CEDH et de l'article 14 du PIDCP.

Droit procédural

10. Est-ce que les droits procéduraux caractéristiques en matière pénale s'appliquent-ils en cas de sanctions/infractions administratives (comme la présomption d'innocence, le droit d'être entendu, le droit d'accès au dossier, le droit de garder silence)?

Comme expliqué dans l'aperçu, les principes de bonne administration de la justice contenus dans les articles 6 et 7 de la CEDH et dans l'article 14 du PIDCP, notamment le traitement du recours contre la décision définitive de l'autorité administrative par une instance judiciaire indépendante et impartiale ayant pleine juridiction, le droit au silence, la présomption d'innocence, le délai raisonnable et le principe *non bis in idem* s'appliquent aux sanctions administratives revêtant un caractère pénal au sens de l'article 6 de la CEDH et de l'article 14 du PIDCP.

11. Quels types d'autorités sont impliqués dans la décision d'imposer des sanctions administratives ?

Comme indiqué à la question 1, il peut s'agir de l'administration ou du parquet.

12. Les autorités administratives ayant pouvoir de sanction respectent-elles les principes d'indépendance et d'impartialité ? la décision relative à la sanction est-elle susceptible de faire l'objet d'une revue judiciaire complet (sur le fond et les faits)? Quelles autorités judiciaires/tribunaux sont chargées de contrôler les sanctions administratives?

Les autorités administratives ne sont pas toujours indépendantes et impartiales. Cette qualité appartient à un juge (indépendant et impartial).

La mise en œuvre administrative par les autorités administratives n'est pas contraire à l'article 6 de la CEDH, lequel ne fait pas obstacle à ce que des parties à la CEDH traitent administrativement notamment des infractions mineures.

Toutefois, en raison de sa nature, une procédure administrative ne peut toutefois remplir toutes les garanties de l'article 6 de la CEDH. Afin de ne pas hypothéquer les effets de l'article 6 de la CEDH, la Cour européenne des droits de l'homme exige que, consécutivement à la phase administrative préalable, l'intéressé ait l'opportunité de porter son affaire devant une instance offrant les garanties de l'article 6 de la CEDH. Certains droits (comme notamment le traitement d'une affaire dans des délais raisonnables) doivent toutefois être également pris en considération lors de la phase administrative de la procédure, car, dans le cas contraire, le respect de ceux-ci deviendrait illusoire⁴⁶.

Pour l'examen détaillé de la possibilité de porter l'affaire devant une instance offrant les garanties de l'article 6 de la CEDH, il peut être renvoyé à l'aperçu introduisant le point III.

IV. Coopération et coordination

21. Au niveau national, les autorités respectives se coordonnent-elles/coopèrent-elles lorsqu'elles infligent des sanctions pénales et administratives ?

Comme expliqué dans l'aperçu, au point I, le système de traitement administratif sans dépénalisation, dans la variante des normes fédérales, comporte deux sous-catégories. Ces sous-catégories consistent, d'une part, en un système donnant la priorité au ministère public et, d'autre part, en un système donnant la priorité à l'administration. Cette réglementation porte sur la manière dont les instances qui requièrent des sanctions pénales et imposent des sanctions administratives coordonnent leurs actions, coopèrent et s'harmonisent entre elles.

22. Au niveau européen, les autorités respectives se coordonnent-elles/coopèrent-elles lorsque des procédures/sanctions administratives sont applicables dans un Etat et des dispositions pénales dans l'autre ? Veuillez également mentionner ici les situations dans lesquelles seules les sanctions administratives peuvent être imposées à une personne morale dans un Etat alors que le droit de l'autre Etat prévoit la responsabilité pénale des personnes morales.

22.1. Si oui, au moyen de quel(s) mécanisme(s) / instruments juridiques?

1. Ordre juridique du Conseil de l'Europe

L'ordre juridique du *Conseil de l'Europe* comporte la Convention européenne sur la valeur internationale des jugements répressifs⁴⁷. À l'article 4, la Convention prescrit ce qui suit : « 1. *Une sanction ne peut être exécutée par un autre État contractant que si en vertu de la loi de cet État et en cas de commission dans cet État le fait pour lequel la sanction a été prononcée constituerait une infraction et que l'auteur y serait punissable.*

2. Si la condamnation réprime plusieurs infractions dont certaines ne réunissent pas les conditions prévues au paragraphe 1, l'État de condamnation indique la partie de la sanction applicable aux infractions qui réunissent ces conditions. »

⁴⁶ La CEDH a formulé tout cela de la manière suivante : « *Eu égard au grand nombre des infractions légères, notamment dans le domaine de la circulation routière, un État contractant peut avoir de bons motifs de décharger ses juridictions du soin de les poursuivre et de les réprimer. Confier cette tâche, pour de telles infractions, à des autorités administratives ne se heurte pas à la Convention pour autant que l'intéressé puisse saisir de toute décision ainsi prise à son encontre un tribunal offrant les garanties de l'article 6.* » (CEDH, 21 février 1984, *Öztürk c. Allemagne*, n° 8544/79, <http://hudoc.echr.coe.int/eng?i=001-62111>, § 56).

⁴⁷ Cette Convention a été ratifiée par la loi du 6 avril 2010 portant assentiment à la Convention européenne sur la valeur internationale des jugements répressifs, faite à La Haye, le 28 mai 1970, *MB* du 21 septembre 2010.

Bien qu'il ne soit pas explicitement fait mention de *personnes morales*, il résulte de cette disposition que des États requis n'ont pas l'obligation d'exécuter une sanction étrangère lorsque cette dernière a été imposée à une personne morale et que l'État requis ne connaît aucune responsabilité civile de la personne morale. La pertinence pratique de la disposition doit être évaluée sur la base des ratifications de la Convention⁴⁸.

2. *Ordre juridique de l'Union européenne*

Dans l'ordre juridique de l'*Union européenne*, la loi du 5 août 2006 est d'application pour l'application du principe de reconnaissance mutuelle de décisions judiciaires en matière pénale, d'exécution de décisions de saisie, de confiscation et de sanctions pécuniaires.

La loi originelle du 5 août 2006 relative à l'application du principe de reconnaissance mutuelle des décisions judiciaires en matière pénale entre les États membres de l'Union européenne (ci-après « la loi »)⁴⁹ est entrée en vigueur le 17 septembre 2006 et avait pour objet de transposer en droit belge la décision-cadre 2003/577/JAI du Conseil du 22 juillet 2003 relative à l'exécution dans l'Union européenne des décisions de gel de biens ou d'éléments de preuve⁵⁰. Cette loi a été modifiée par la loi du 19 mars 2012 modifiant la loi du 5 août 2006 relative à l'application du principe de reconnaissance mutuelle des décisions judiciaires en matière pénale entre les États membres de l'Union européenne (I)⁵¹ et la loi du 5 août 2006 modifiant la loi du 5 août 2006 relative à l'application du principe de reconnaissance mutuelle des décisions judiciaires en matière pénale entre les États membres de l'Union européenne (II)⁵².

La révision vise la transposition en droit belge des 3 décisions-cadres de l'Union européenne :

- la décision-cadre 2005/214/JAI du Conseil du 24 février 2005 concernant l'application du principe de reconnaissance mutuelle aux sanctions pécuniaires⁵³ ;
- la décision-cadre 2006/783/JAI du Conseil du 6 octobre 2006 relative à l'application du principe de reconnaissance mutuelle aux décisions de confiscation⁵⁴ ;
- et, partiellement, la décision-cadre 2009/299/JAI du Conseil du 26 février 2009 portant modification des décisions-cadres 2002/584/JAI, 2005/214/JAI, 2006/783/JAI, 2008/909/JAI et 2008/947/JAI, renforçant les droits procéduraux des personnes et favorisant l'application du principe de reconnaissance mutuelle aux décisions rendues en l'absence de la personne concernée lors du procès⁵⁵.

Dans les relations avec les États membres de l'UE, cette loi déroge au droit commun en matière d'entraide judiciaire, tel que régi en particulier par la loi du 20 mai 1997 sur la coopération internationale en ce qui concerne l'exécution de saisies et de confiscation⁵⁶ et par la loi du 9 décembre 2004 sur l'entraide judiciaire en matière pénale et modifiant l'article 90ter du Code d'instruction criminelle⁵⁷. La loi (article 1/1) prévoit aussi expressément que l'article 873, alinéa 2, du Code judiciaire (selon lequel, à moins que les conventions internationales n'en disposent autrement, l'exécution des commissions rogatoires émanant des autorités judiciaires étrangères ne peut avoir lieu qu'après avoir été autorisée par le ministre de la Justice) ne s'applique pas en l'occurrence.

⁴⁸ Il existe à ce jour 23 ratifications : https://www.coe.int/fr/web/conventions/full-list/-/conventions/treaty/070/signatures?p_auth=32lnulCv.

⁴⁹ MB du 7 septembre 2006; *Doc. parl.*, Chambre, DOC 51-2106/001 à 003; *Doc. parl.*, 2005-2006, 3-1672/1 à 1672/4.

⁵⁰ JOUE, L 196/45 du 2 août 2003.

⁵¹ MB du 4 avril 2012 et *err. MB* du 23 avril 2012; *Doc. parl.*, Chambre, 53-1703/001 à 005 ; *Doc. parl.*, Sénat 5-1278/1 à 5.

⁵² MB du 4 avril 2012 et *err. MB* du 23 avril 2012 ; *Doc. parl.*, Chambre, 53-1703/001 à 002 et 53-1833/001; *Doc. parl.*, Sénat, 5-1279/001.

⁵³ JOUE, L 076/16 du 22 mars 2005.

⁵⁴ JOUE, L 328/59 du 24 novembre 2006.

⁵⁵ JOUE, 081/24 du 27 mars 2009.

⁵⁶ MB du 3 juillet 1997.

⁵⁷ MB du 24 décembre 2004.

Le champ d'application des dispositions relatives aux sanctions pécuniaires ne se limite pas aux procédures pénales, mais porte aussi sur les procédures de nature administrative, pour autant qu'il y ait une possibilité de recours devant un juge compétent notamment, mais pas exclusivement, en matière pénale (cf. article 2/1, 5°, de la loi). L'exposé des motifs cite un exemple dans lequel le tribunal de police peut statuer en degré d'appel sur une amende administrative imposée par une commune. Le tribunal opère alors un simple contrôle de légalité, mais ce type d'amende est couvert car il s'agit d'un tribunal compétent notamment en matière pénale.

Ainsi, les décisions prises en vertu de la loi du 24 juin 2013 relative aux sanctions administratives communales ou d'autres sanctions administratives à caractère pénal en relèvent. Ces sanctions administratives prises en vertu de cette loi peuvent revêtir un caractère pénal ou administratif. Les sanctions administratives sont couvertes, car elles sont susceptibles de faire l'objet d'un recours devant le tribunal de police.

Plus spécifiquement en ce qui concerne la question des *personnes morales*, il en découle que les sanctions administratives imposées à des personnes morales à l'étranger peuvent être exécutées en Belgique dans le cadre des moyens disponibles en matière de reconnaissance mutuelle.

En ce qui concerne la responsabilité pénale de la personne morale, il est possible, sur la base de l'article 24 du Code d'instruction criminelle, suivant les règles classiques du droit pénal/de la procédure pénale, que les autorités judiciaires belges puissent poursuivre en Belgique des auteurs d'infractions (y compris les personnes morales) commises en dehors du territoire belge (qui y sont sanctionnées par des sanctions administratives)⁵⁸. Ces poursuites à l'encontre de la personne morale ne seront naturellement possibles que si la règle de compétence prévue par la loi du 17 avril 1878 contenant le Titre préliminaire du Code de procédure pénale est respectée ainsi que celle du principe de protection (de l'État), à l'article 6, 1° et 2°, à l'article 10, 1° et 2°, ou à l'article 10^{quater} du Titre préliminaire, le principe de la personnalité passive, à l'article 10, 1°*bis*, du Titre préliminaire et le principe d'universalité, à l'article 12*bis* du Titre préliminaire.

Mentionnons également que, outre la coopération judiciaire en matière pénale, une coopération administrative est également possible entre les États membres de l'Union européenne. Plusieurs règlements et directives conférant une base légale à une telle coopération. À titre d'exemple, il peut être renvoyé au règlement n° 904/2010 du conseil du 7 octobre 2010 concernant la coopération administrative et la lutte contre la fraude dans le domaine de la taxe sur la valeur ajoutée⁵⁹. Le raisonnement est que, durant ces enquêtes administratives, des faits peuvent être découverts, pour lesquels il existe des indices montrant que des infractions pénales ont été commises..

22. 2. Des problèmes se sont-ils produits ? Lesquels ?

Nous n'avons pas connaissance de problèmes particuliers qui se seraient posés ou d'une éventuelle étude scientifique récente qui aurait analysé ce phénomène et en aurait publié les résultats.

⁵⁸ Cf. D. VANDERMEERSCH, « La dimension internationale », dans M. NIHOUL (dir.), *La responsabilité pénale des personnes morales en Belgique: une évaluation de la loi du 4 mai 1999 instaurant la responsabilité pénale des personnes morales en Belgique après cinq années d'application*, Bruxelles, La Chartre, pp. 241-273.

⁵⁹ JOUE, L 268/1.

CROATIA

I. General questions

3. Does your national law provide for administrative offences, allowing to impose administrative sanctions against natural persons, which are comparable to criminal sanctions? If so, what categories/types of administrative sanctions comparable to criminal sanctions exist in your legal system (e.g. punitive and/or preventive measures, such as fines, disqualifications, etc.)?

Croatian law prescribes for administrative offences.

Sanctions comparable with criminal sanctions are fine and, as an exception, imprisonment up to 30 days. Besides, safeguard measures, seizure of instrumentalities used to commit a punishable act and the seizure of proceedings of crime.

4. How do you define an administrative and a criminal offence/sanction?

Croatian law defines administrative offences and criminal offences in an indirect manner providing the behaviour which represents defines administrative offences and criminal offences and providing also administrative sanctions and criminal sanctions for administrative offences and criminal offences.

- 4.1. How do you distinguish the two?

Criminal offences and criminal-law sanctions shall be prescribed only for such conduct whereby personal freedoms and rights of man as well as other rights and social values guaranteed and protected by the Constitution of the Republic of Croatia and international law are violated or jeopardised in such a manner that it would not be possible to achieve their protection without criminal-law enforcement.

Misdemeanors and the sanctions for misdemeanors are provided just for the behaviours which violates or endangers the public order, social discipline or social values guaranteed and protected by the Constitution of the Republic of Croatia, international law and laws in such a manner that its protections is not possible without misdemeanor sanctioning and the protection of which is not realized under the coercion for criminal offences.

- 4.2. Has the *Engel* jurisprudence influenced the categorisation of sanctions in your national system?

Yes, the Engel case influenced the categorisation of certain sanctions in croatian legal system.

- 4.3. If so, to what extent?

Croatian legal system prescribes administrative offences and administrative sanctions regarding the subjects employed in civil service, police, military forces. Also, administrative offences and administrative sanctions are provided for behaviours which represent the violate the fair competition.

5. 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 the respective added value of administrative and criminal sanctions? Please provide representative examples.

Croatian legal system prescribes administrative sanctions in cases of less serious offences and according to the significance of the interest protected.

Criminal offences and criminal-law sanctions shall be prescribed only for such conduct whereby personal freedoms and rights of man as well as other rights and social values guaranteed and protected by the Constitution of the Republic of Croatia and international law are violated or jeopardised in such a manner that it would not be possible to achieve their protection without criminal-law enforcement.

The aforementioned enables the conclusion of respective added value of of administrative and criminal sanctions.

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

6.1. Art. 4 of the Convention on the protection of the environment through criminal law (ETS 172).⁶⁰

Republic of Croatia did not ratify the aforementioned convention. Furthermore, it is noted, that based on the data provided on the web site of the Council of Europe, not even one country ratified the convention and that it still has not entered into force. But, the Republic of Croatia, as a member of the European union, through the Criminal code, implemented the Directive 2008/99/EZ on the protection of the environment through criminal law which under the Article 3, titled Offences requires that the member states provide that conducts constitute a criminal offence, when unlawful and committed intentionally or with at least serious negligence, which conducts predominantly correspond the conducts described as criminal offences or administrative offences under the Article 4 of the convention. Also, croatian law prescribes the protection of the environment with a set of misdemeanors under the Law on the protection of the environment, which also implemented the Directive 2008/99/EZ.

6.2. Art. 78 (3) of the Council of Europe Convention on preventing and combating violence against women and domestic violence (ETS 210).⁶¹

Republic of Croatia signed and ratified the convention. Article 78 paragraph 3 of the convention prescribes that for the conducts of Articles 33 and 34 of the convention instead of criminal sanctions non-criminal sanctions can be provided. Republic of Croatia sanctioned the psychological violence described under the Article 33 of the convention by providing criminal offence Coercion and criminal offence Threat in the Criminal code. Psychological violence is also sanctioned under the Law on the protection from domestic violence which prescribes that the purpose of providing, utterance and the application of misdemeanour sanction is the special protection of the family and its member who are endangered and exposed to violence, compliance with the legal system and the prevention of the repetition of domestic violence by the appropriate sanctioning of the perpetrator and which contains the misdemeanours regarding domestic violence.

Stalking, described under the Article 34 of the convention Republic of Croatia also sanctioned through the Criminal code, providing the criminal offence Stalking.

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.

Regarding the fact that the Republic of Croatia ratified the Council of Europe Convention on preventing and combating violence against women and domestic violence and that it in its internal legislature implemented the provisions, the content of which corresponds the provision under the Article 4 of the Convention on the protection of the environment through criminal law other examples of the implementation of the Conventions of the Council of Europe which allow the adoption of administrative sanctions against natural persons will not be outlined.

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?

Croatian legislation prescribes the conducts and offences for which it is possible to utter just the administrative sanctions. For the violation of the market competition the Law on the protection of market competition prescribes the possibility of utterance of administrative-criminal measure which are uttered by the Agency the protection of market competition. They are sanctions sui generis.

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

⁶⁰ <https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168007f3f4>

⁶¹ <https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168008482e>

Croatian legal system allows the combination and cumulations of criminal and administrative offences. Namely, the particular laws of explicitly provide that, under certain conditions, criminal responsibility does not exclude the responsibility for administrative offences. Therefore, the conclusion is made that the utterance of punishment or a criminal sanction for a certain criminal offence which constitutes an administrative offence does not a priori exclude the possibility the utterance of the administrative sanction in the procedure regarding the administrative offence.

Law on the protection of market competition prescribes that the utterance of the administrative-criminal measure is not of influence on the criminal responsibility on the person to which such a measure was uttered.

Even though it is not explicitly provided by the Law on the execution of prison sentence, the criminal prosecution and the sentence for the criminal offence Failure to Report the Commission of a Criminal Offence provided by the Criminal code would not exclude the possibility to establish the responsibility for the serious infringement which is committed by the civil servant who does not denounce criminal offences in connection with the civil service, which are being prosecuted ex officio and utterance of punishment for such an infringement, regarding the factual description of these offences.

9. In your view: is the *ne bis in idem* applicable in case both tracks apply? Can you give examples of relevant national case law in this respect?

In the Republic of Croatia, the courts look after the compliance with the *ne bis in idem* principle ex officio.

The principle of *ne bis in idem* is applicable in a situation in which the same person would be prosecuted in a criminal matter and sentenced for the criminal offence which originates from the same occurrence and conduct from which the procedure for an administrative offence originated.

III. Identification of main differences between administrative and criminal tracks

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

Substantive law

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

In the Croatian legal system, aiding and abetting is sanctioned in such a situation.

Example

Law on the protection of market competition

Criteria for the utterance of administrative-criminal measure

Article 64

(2) When uttering an administrative-criminal measure the Agency (for the protection of market competition) takes into account all the mitigating and aggravating circumstances...

(5) As aggravating circumstances of the Paragraph 2 of this article are regarded particularly:

3. the role of initiator or abettor of other entrepreneurs on the violation of this law and the Article 101 od 102 Treaty on the functioning of the European union, that is all the conducts of the entrepreneur made in with the purpose of assuring the participation of other entrepreneurs in a violation.

General principles

11. Are administrative sanctions governed by general principles of administrative law or general principles of criminal law (such as proportionality, nullum crimen sine lege, legality, lex mitior, non-retroactivity etc)?

Administrative sanctions are governed by general principles of criminal law.

Procedural law

12. Do typical criminal procedural rights apply in case of administrative offences/sanctions (such as presumption of innocence, right to be heard, right of access to the case-file, right to remain silent)?

In case of administrative offences typical criminal procedural rights are being applied. Application of these rights is explicitly provided for the proceeding being led for administrative offences and upon the utterance of administrative sanctions.

However, Agency for the protection of market competition, which imposes the administrative-criminal measures is a public authority that acts according to the Law on the general administrative procedure. This general act contains relevant provisions which mostly guarantees the same rights the defendant has in a criminal proceeding. This refers to the right to be heard and to state the opinion on all the facts, evidence and legal matters, which implies the right to remain silent. Furthermore, according to this law, a party has the right to be informed on the course of a proceeding and to inspect the case file. The public authority has to take care of the principle of linearity, which means the right of a party can be limited by the conduct of a public authority only in cases provided by law and only if such a conduct is necessary for achieving the purpose established by law and linear to the cause which aims to be achieved. Also, the party has the right of access to a lawyer. As opposed to the presumption of innocence as one of the basic principles of criminal procedure, the Law on the general administrative procedure does not contain the equal provision.

13. What kind of authorities are involved in the decision to impose administrative sanctions?

In the Republic of Croatia administrative sanctions are imposed by misdemeanour courts, government bodies such a procedure is in their jurisdiction. These government bodies include customs administration, tax administration, police and financial inspectorate.

For the utterance of administrative-criminal sanctions provided by the Law on the protection of market competition responsible is the Agency for protection of market competition, which is the public authority.

14. Do administrative authorities vested with a sanctioning power comply with the principles of independence and impartiality? Is the decision on the sanction subject to a full judicial review (in law and in facts)? Which judicial authorities/courts are in charge of reviewing administrative sanctions?

Administrative authorities, in situation when they are in the Republic of Croatia vested with a sanctioning power, are in obligation to adhere to certain principles on which the procedural conduct is based according to the Law on the general administrative procedure. With regard to the independence and impartiality of administrative bodies of exceptional importance are the principle of legality, principle of the establishment of substantive truth and the principle of autonomy and the free assessment of evidence. The decisions of administrative bodies on the administrative sanctions are subject to a full judicial review by the administrative courts.

IV. Cooperation and coordination

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

Respective authorities, responsible for imposing criminal and administrative authorities cooperate and coordinate their work. The obligation for such a cooperation is provided under the provisions on legal assistance, as an assistance in an execution of certain action or as an obligation to deliver the documentation which they have in their possession.

22. At the European level, do respective authorities coordinate / cooperate when administrative procedures / sanctions are applicable in one State and criminal law provisions in the other? Please refer here also to situations where only administrative sanctions may be imposed against a legal person in one State whereas the law of the other State prescribes for criminal liability of legal persons.

Respective authorities coordinate / cooperate at the European level, when such a situation occurs.

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

Mostly, it is done with bilateral and multilateral conventions or agreements on mutual legal assistance, which also includes assistance in administrative proceedings.

22. 2. Have problems occurred? Which ones?

The problems consist mainly in lengthy procedure.

CYPRUS

I. General questions

15. Does your national law provide for administrative offences, allowing to impose administrative sanctions against natural persons, which are comparable to criminal sanctions? If so, what categories/types of administrative sanctions comparable to criminal sanctions exist in your legal system (e.g. punitive and/or preventive measures, such as fines, disqualifications, etc.)?

- There are administrative sanctions which could be imposed by an administrative authority or a governmental department when there is a violation of specific provisions of a specific legislation.

- There are measures, such as fines and disqualifications.

16. How do you define an administrative and a criminal offence/sanction?

- A criminal sanction is a sanction imposed by a court, after a conviction, according to the criminal law and the criminal procedure rules.

- An administrative sanction (usually an administrative fine) is imposed by a competent authority (other than courts) according to a specific legislation (other than the criminal law) in order

16.1. How do you distinguish the two?

See above.

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

Yes.

16.3. If so, to what extent?

The Engel criteria are used by the courts in order to interpret for example whether a sanction is considered as a criminal one or whether a procedure in front of a competent authority, which could impose sanctions, can be characterised as a criminal procedure.

17. 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 the respective added value of administrative and criminal sanctions? Please provide representative examples.

All of the following are relevant: significance of the interests protected, speedier procedures, specialised laws which require , disciplinary actions, etc.

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

18.1. Art. 4 of the Convention on the protection of the environment through criminal law (ETS 172).⁶²

Both criminal and administrative sanctions.

⁶² <https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168007f3f4>

18.2. Art. 78 (3) of the Council of Europe Convention on preventing and combating violence against women and domestic violence (ETS 210).⁶³

Criminal sanctions.

18.3. 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.

We have ratified the above conventions.

II. Separate or combined tracks of sanctions

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

Yes

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

Yes.

21. In your view: is the *ne bis in idem* applicable in case both tracks apply? Can you give examples of relevant national case law in this respect?

The *ne bis in idem* principle is applicable

III. Identification of main differences between administrative and criminal tracks

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

Substantive law

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

Not, usually.

General principles

23. Are administrative sanctions governed by general principles of administrative law or general principles of criminal law (such as proportionality, *nullum crimen sine lege*, legality, *lex mitior*, non-retroactivity etc)?

They are governed by all principles of administrative law, but not all principles of criminal law (e.g. the principle of proportionality is applied but the principle of *nullum crimen sine lege* is not applied with the same manner as in criminal law).

⁶³ <https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168008482e>

Procedural law

24. Do typical criminal procedural rights apply in case of administrative offences/sanctions (such as presumption of innocence, right to be heard, right of access to the case-file, right to remain silent)?

Some typical criminal procedural rights apply in case of administrative sanctions but not all of them.

25. What kind of authorities are involved in the decision to impose administrative sanctions?

Governmental departments, administrative authorities, independent authorities etc.

26. Do administrative authorities vested with a sanctioning power comply with the principles of independence and impartiality? Is the decision on the sanction subject to a full judicial review (in law and in facts)? Which judicial authorities/courts are in charge of reviewing administrative sanctions?

Authorities vested with a sanctioning power do have to comply with the principles of independence and impartiality.

Usually, the decision on the sanction is subject to a judicial review (in law).

The Supreme Court is in charge of reviewing administrative sanctions.

IV. Cooperation and coordination

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

No.

22. At the European level, do respective authorities coordinate / cooperate when administrative procedures / sanctions are applicable in one State and criminal law provisions in the other? Please refer here also to situations where only administrative sanctions may be imposed against a legal person in one State whereas the law of the other State provides for criminal liability of legal persons.

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

22.2. Have problems occurred? Which ones?

CZECH REPUBLIC

I. General questions

27. Does your national law provide for administrative offences, allowing to impose administrative sanctions against natural persons, which are comparable to criminal sanctions? If so, what categories/types of administrative sanctions comparable to criminal sanctions exist in your legal system (e.g. punitive and/or preventive measures, such as fines, disqualifications, etc.)?

The Czech legal system distinguishes criminal offences and administrative offences in the narrow sense (hereinafter referred to as “administrative offences”).

Administrative offence is the socially harmful illegal act explicitly identified as administrative offence by the law and which presents the characteristics set out under the law if it is not a criminal offence. It follows it is an illegal act which shows a certain extent of social harmfulness (lower than criminal offence) which characteristics are set out by law.

On the contrary criminal offence is an illegal act identified as punishable by criminal law and which presents the characteristics set out under such law.

Generally it can be stated that certain type of conduct allows imposing administrative sanctions which are comparable to criminal sanctions in terms of content and impact of the sanction. However, the purpose of the sanction is different. For example, monetary penalty which can be imposed under criminal law has its equivalent in fine in the area of administrative law. The impact of these both sanctions is similar – to affect offender’s property circumstances. Similarly, disqualification and forfeiture of a thing or of a substitute value may be imposed for administrative offence as well as criminal offence. The prohibition of entry to sporting, cultural and other social events – similar measure may be imposed for administrative offences as protective measure (not as a sanction in its legal sense). Under adequate restriction (not as a penalty in its legal sense) which may be imposed in the area of criminal law along with penalty not connected with imprisonment the offender may be imposed an obligation to abstain from contact with a certain person or certain range of persons or obligation to undergo appropriate probation program. These two adequate restrictions have its equivalent in the area of administrative law (protective measure for committed administrative offence).

Administrative offences in the wide sense represent an umbrella term which comprises these types of administrative offences:

- 1) administrative offences in the narrow sense which represent the vast majority of administrative offences in the wide sense,
- 2) administrative disciplinary offences,
- 3) administrative procedural offences.

Among the most significant administrative offenses are those under Act No. 250/2016 Coll., On Liability for Offenses and Procedure on Offenses. An administrative punishment under Section 35 of Act No. 250/2016 Coll. can be imposed for an offense (admonition, fine, prohibition of activity, forfeiture of an item or substitute value, publication of a decision on offense).

Protective measures (restrictive measures, seizure of an item) pursuant to Section 51 of Act No. 250/2016 Coll. also have some features of sanctions of a criminal nature. These can be imposed on perpetrator of an offense or imposed on another person. There are also many types of sanctions for so-called other administrative offenses - administrative procedure offenses (violation of procedural duties in an administrative procedure), administrative disciplinary offenses (offenses of persons belonging to a particular public institution – e.g. public administration employees) and payment offenses (violation of certain duties in tax law). These sanctions may also, to varying degrees, show some features of sanctions of a criminal nature (e.g. a fine pursuant to Section 62 of Act No. 500/2004 Coll., the Code of

Administrative Procedure, disciplinary measure pursuant to Section 89 of Act No. 234/2014 Coll., On Civil Service, penalties pursuant to Section 251 of Act No. 280/2009 Coll., Tax Code, etc.).

28. How do you define an administrative and a criminal offence/sanction?

The basic definition of administrative offence (in the narrow sense) and criminal offence are described in the answer to question no. 1.

The notion "administrative offences in the wide sense" is not defined, it is a theoretical term. Administrative offence is not generally defined by law. In jurisprudence, it is usually defined as an offence whose features is prescribed by law and is dealt with by an administrative body which imposes a sanction prescribed on them by a rule of administrative law. However, there are legal definitions of some specific types of administrative offenses (for example, the definition of an offense in Section 5 of Act No. 250/2016 Coll.).

The administrative offence (in its narrow sense) is subordinated to the notion of "administrative offences in the wide sense" and is defined in Section 5 of the Act No. 250/2016 Coll., on Liability for Administrative Offences and Proceedings concerning Administrative Offences. Administrative offence is the socially harmful illegal act explicitly identified as administrative offence by the law and which presents the characteristics set out under the law if it is not a criminal offence.

The legal definition of criminal offence is provided for in Section 13 of the Act No. 40/2009 Coll., Criminal Code. According to this definition criminal offence is an illegal act identified as punishable by criminal law and which presents the characteristics set out under such law.

Sanction is generally understood as a penalty or other measure which serves for ensuring and enforcement of law. **Administrative sanction** is a sanction which is imposed for administrative offences in the wide sense. With regard to fragmentation of the administrative law regulation different notions are used concerning the sanctions for administrative offence, e.g. with regard to administrative offences (in the narrow sense) the term administrative penalty is used. It has mainly repressive as well as preventative function. Administrative sanction is imposed by administrative authority and usually causes property or other harm to offender. It represents the reaction anticipated by law in relation to violation of specific obligation set out by administrative law. **Criminal sanction** is a legal consequence stipulated by law for a certain illegal conduct. Penalty represents the means of state's coercion used by state for protection of interests protected by Criminal Code, for protection of society against criminal offences and their offenders. It is a detriment to liberty, property or other rights of convicted person which may be imposed only by court. In the national criminal law criminal sanctions are understood as penalties and protective measures defined by Criminal Code. Criminal sanctions as well as administrative sanctions may be imposed on the grounds of law only.

28.1. How do you distinguish the two?

The most important factor is a statutory denotation of an offense (see answer to question 2).

There are also many other differences - for instance in the procedural framework (criminal offenses are dealt with in criminal procedure, administrative offenses in administrative procedure), jurisdiction (criminal offenses are dealt with by a court, administrative offenses by an administrative body), in a statutory denotation of a sanction imposed ("punishment" for a criminal offense, "administrative punishment" for an offense, or administrative sanction for another administrative offense), typical seriousness (in general, it is agreed that criminal offense are the most serious anti-social acts), in severity of a sanction imposed (imprisonment may be imposed only for a criminal offense), in the kind of interest or values protected by law (criminal offenses are usually directed against the most important legally protected interests - such as life, health, personality, property; on the other hand, administrative offenses are usually, but not always, directed against the proper functioning of public administration).

Imposition of sanctions for administrative offences as well as for criminal offences is governed by principle of individualization of the sanction. Sanctions shall be imposed with respect to nature and seriousness of the criminal offence or administrative offence committed. When determining the type and severity of the sanction, aggravating and mitigating circumstances, personal and family circumstances of the offender, personal, family, property and other relations of the offender and his or her previous way of life and the possibility of his or her personal reform shall be taken into account.

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

We believe that the "categorization of sanctions" in national law was not affected by this jurisprudence. However, when deciding specific cases by administrative bodies and courts, the question sometimes arises as to whether a particular offense has the nature of a criminal charge within the meaning of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and whether the associated procedural guarantees provided by the Convention are applicable.

28.3. If so, to what extent?

29. 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 the respective added value of administrative and criminal sanctions? Please provide representative examples.

Crucial criterion for whether a certain conduct shall be considered as a criminal or administrative offence is generally the extent of social harmfulness, its seriousness and dangerousness for the society. Decisive is therefore the will of legislator and the extent in which legislator assign importance for a certain illegal act.

The advantages of administrative sanctions include:

- The administrative offenses procedure is generally simpler, faster and more operative than criminal procedure (the administrative procedure regarding these offenses is subject to relatively less complex procedural rules than judicial proceedings - cf. Act No. 500/2004 Coll. and Act No. 141/1961 Coll., on Judicial Criminal Procedure (Criminal Procedure Act)]. At the same time, however, there is no restriction of standard of legal protection of persons concerned, as a decision of an administrative body may be subject to judicial review under Act No. 150/2002 Coll., Code of Administrative Justice.
- It seems practical that administrative bodies, such as those monitoring compliance with duties in particular areas of public administration (eg in a construction sector), also impose sanctions regarding breaches of these duties.
- In contrast to judges in criminal procedure, officials are specialized in particular areas of public administration, and they continue to use their expertise in dealing with administrative offenses. On the other hand, unlike judges, they do not have to have universal legal education, pass Judge Exam, etc., which allows for greater flexibility in selection of employees of public administration.
- Transferring part of criminal jurisdiction to public administration prevents judicial overload.

Criminal sanctions shall be used only if other means of law (e.g. of administrative law or of civil law) are insufficient (*ultima ratio* principle).

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

30.1. Art. 4 of the Convention on the protection of the environment through criminal law (ETS 172).⁶⁴

The Czech Republic has not signed nor ratified this Convention. .

⁶⁴ <https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168007f3f4>

30.2. Art. 78 (3) of the Council of Europe Convention on preventing and combating violence against women and domestic violence (ETS 210).⁶⁵

The Czech Republic has signed this Convention on 2 May 2016. It was not ratified yet.

30.3. 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.

For example, the offense pursuant to Section 7 (3) of Act No. 251/2016 Coll., On Certain Offenses, which is committed by one who a) restricts or prevents a member of a national minority from exercising the rights of persons belonging to national minorities, or b) causes other harm inter alia for his membership of a national minority.

The mentioned provision can be considered a partial implementation of the Framework Convention for the Protection of National Minorities (promulgated under No. 96/1998 Coll.) and other international legal acts. According to Article 6 (2) of the Convention, The Parties undertake to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity.

II. Separate or combined tracks of sanctions

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

In this context, it is worth mentioning in particular offenses under Act No. 250/2016 Coll. An offense is only the act which is expressly denoted as offense in the law and is not a criminal offense (Section 5 of Act No. 250/2016 Coll.). It is clear, therefore, that a criminal punishment cannot be imposed in addition to administrative punishment. Double prosecution and punishment are excluded (Section 77 of Act No. 250/2016 Coll.). However, this does not change the fact that offenses may also consist of minor breach or threat to certain values that are simultaneously protected by criminal law - see answer to question 3.

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

The application of criminal liability does not generally preclude the application of other types of liability (e.g. civil liability). However, it is not possible to combine criminal and administrative sanctions within administrative proceedings for the same act (conduct).

This combination is possible if there is a criminal offense and an administrative offense which is not a subject to "criminal proceedings" under Article 4 Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms. This may include, for example, a single act of criminal offense and administrative disciplinary offense (disciplinary offense of a civil servant under Act No. 234/2014 Coll., Etc.).

33. In your view: is the *ne bis in idem* applicable in case both tracks apply? Can you give examples of relevant national case law in this respect?

Ne bis in idem is applicable if there is a criminal offense and an administrative offense which are both subject to "criminal proceedings" under Article 4 Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms. In the context of the relation between criminal offense and offense, the law addresses this issue explicitly. Firstly, if the criminal proceedings was terminated (by acquittal or by conviction), it is prohibited to initiate administrative proceedings for the same illegal act committed and to qualify it as administrative offence. Secondly, if the administrative proceeding is terminated, it is not

⁶⁵ <https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168008482e>

possible to initiate other administrative proceedings for the same illegal act even though if the act is evaluated as other administrative offence than in first case. Thirdly, if the administrative proceeding is terminated by decision of a competent administrative authority, it is prohibited to initiate criminal proceedings for this illegal act and to convict a person.

From the case law we can mention the key decision of the Supreme Administrative Court of 24.11.2015 No. 4 Afs 210/2014 - 57 , which deals with the nature of the penalty under to Act No. 280/2009 Coll., belonging to so-called payment offenses. According to the Supreme Administrative Court, the penalty is a punishment; Articles 6 and 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms must be applied.

Another decision of Supreme Court of the Czech Republic No. 15 Tdo 832/2016 states that *“legally effective decision which terminates one of the tax or criminal proceedings which are proceedings of criminal nature in the sense of so called Engel criteria does not constitute ne bis in idem situation under the presumption there is a not only sufficiently narrow factual connection but also time connection at the same time. Decisive factors for determination whether such factual connection is given are: whether both of the proceedings pursue the same purpose, whether a combination of such proceedings represents predictable consequence of the same conduct or whether the sanction imposed in the first proceedings was taken into account in the second proceedings (...).”*

III. Identification of main differences between administrative and criminal tracks

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

Substantive law

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

Pursuant to Section 13 (4) of Act No. 250/2016 Coll., where a law so provides, the offender is also a natural person who deliberately causes in another person decision to commit an offence (abettor) or makes possible or easier committing offense by another person (aider) if it is a finished offense or an attempt to commit it, if an attempt is sanctioned.

In the case of other administrative offenses than offenses under Act No. 250/2016 Coll., aiding and abetting is not sanctioned.

General principles

35. Are administrative sanctions governed by general principles of administrative law or general principles of criminal law (such as proportionality, nullum crimen sine lege, legality, lex mitior, non-retroactivity etc)?

In the case of administrative offenses having the nature of a criminal charge under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, specifically offenses under to Act No. 250/2016 Coll., both the administrative and criminal law principles apply (including those mentioned above).

Procedural law

36. Do typical criminal procedural rights apply in case of administrative offences/sanctions (such as presumption of innocence, right to be heard, right of access to the case-file, right to remain silent)?

Standard procedural principles of criminal law apply within administrative proceedings only partially. Criminal proceedings is based on the principle of publicity and on the oral principle

whereas administrative proceedings is normally non-public and written – however, if legal conditions are met, administrative proceedings may be exceptionally also public and oral.

Criminal procedural rights as described a (such as presumption of innocence, right to be heard, right of access to the case-file, right to remain silent) are applicable in criminal proceedings as well as in administrative proceedings. Other principles applicable in both proceedings are e.g. right to interpreter, free assessment of evidence and others.

37. What kind of authorities are involved in the decision to impose administrative sanctions?

Sanctions are imposed by administrative bodies - in particular administrative bodies of the state, municipalities, regions, other public administration corporations; natural and legal persons to whom the execution of public administration has been conferred.

38. Do administrative authorities vested with a sanctioning power comply with the principles of independence and impartiality? Is the decision on the sanction subject to a full judicial review (in law and in facts)? Which judicial authorities/courts are in charge of reviewing administrative sanctions?

The impartiality of officials is guaranteed within the framework of the regulation of basic principles of activities of administrative bodies [Section 7 (1) of Act No. 500/2004 Coll.]. The issue in question is further developed by the regulation of exclusion of officials from considering and deciding cases due to official's bias (Section 14 of Act No. 500/2004). Relations between officials within the same administrative body as well as relations between administrative authorities are generally based on superiority and subordination. Therefore, independence of administrative bodies is not guaranteed, with the exception of the so-called independent administrative authorities (e.g. the Office for Personal Data Protection or the Czech Telecommunication Office). However, courts having jurisdiction over an complaint against a decision of an administrative body are independent.

A decision imposing a sanction for an administrative offense may be challenged by a complaint under Section 65 of Act No. 150/2002 Coll., which is decided by a regional court in administrative judiciary. The decision of the regional court may be challenged by a cassation complaint to the Supreme Administrative Court. The court examines the legal and factual circumstances of the case (it may, for example, repeat or add evidence produced by the administrative body - Section 77 (2) of Act No. 150/2002 Coll.). The decision of the Supreme Administrative Court may be challenged by a constitutional complaint, if the complainant finds that, in connection with the imposition of a sanction, his constitutionally guaranteed rights have been violated. The constitutional complaint is decided by the Constitutional Court.

IV. Cooperation and coordination

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

Sanctions for administrative offenses and criminal offenses are imposed by competent public authorities (administrative bodies and bodies involved in criminal procedure) relatively independently. Certain forms of co-operation in dealing with these offenses are, however, applied. For example, if, during investigation of suspicion of committing an offense, the administrative body finds out the facts suggesting that a criminal offense has been committed, it is obliged to hand over the case to bodies involved in criminal procedure (Section 64 of Act No. 250/2016 Coll.). Furthermore, it may be mentioned that an administrative body may postpone the case or terminate the offense procedure if the administrative sanction that can be imposed for the offense is insignificant in addition to the sentence imposed on the accused for another act in criminal procedure - Section 76 (b) and Section 86 (5) of Act No. 250/2016 Coll. There is also a duty of state authorities to comply with requests of bodies involved in criminal procedure in the execution of their tasks and to communicate the facts indicating that a criminal offense has been committed (Section 8 (1) of Act No. 141/1961 Coll.).

22. At the European level, do respective authorities coordinate / cooperate when administrative procedures / sanctions are applicable in one State and criminal law provisions in the other? Please refer here also to situations where only administrative sanctions may be imposed against a legal person in one State whereas the law of the other State provides for criminal liability of legal persons.

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

In relations between the Member States of the European Union, Article 50 of the Charter of Fundamental Rights of the European Union applies: "No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.". In our view, this rule is also applicable to a relation between criminal procedure in one State and the administrative offense procedure in the other State having the nature of "criminal proceedings" under to Article 4 Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms. This is the case if the matter falls within the scope of the Charter of Fundamental Rights of the European Union, as defined in Article 51. A similar provision is contained in Article 54 of the Convention implementing the Schengen Agreement.

In relations with other countries, however, double prosecution and punishment (*bis in idem*) is not generally excluded. However, there are some exceptions. For example, if the perpetrator committed an offense against property or against civil cohabitation abroad, it will be dealt with in the Czech Republic only if such an offense has not been dealt with abroad. National law does not distinguish whether this conduct was dealt with abroad in criminal procedure or administrative procedure [Section (3) (b) of Act No. 250/2016 Coll.].

22. 2. Have problems occurred? Which ones?

We are not familiar with any specific problems.

ESTONIA

I. General questions

39. Does your national law provide for administrative offences, allowing to impose administrative sanctions against natural persons, which are comparable to criminal sanctions? If so, what categories/types of administrative sanctions comparable to criminal sanctions exist in your legal system (e.g. punitive and/or preventive measures, such as fines, disqualifications, etc.)?

In principle there are no administrative offences in Estonia. The Penal Code (hereafter "PC") distinguishes between two types of offences: criminal offences and misdemeanours:

- A criminal offence is an offence which is provided for in the PC and the principal punishment prescribed for which in the case of natural persons is a pecuniary punishment or imprisonment and in the case of legal persons a pecuniary punishment.
- A misdemeanour is an offence which is provided for in the PC or another Act and the principal punishment prescribed for which is a fine, detention or deprivation of driving privileges.

Misdemeanours and criminal offences are both a part of criminal law and the general part of the Penal Code applies to both. The procedure is regulated in separate acts (Code of Misdemeanour Procedure and Code of Criminal Procedure). Misdemeanours are similar in nature to administrative offences in other States. First, they are less serious than criminal offences (eg traffic violations but also various violations of rules and regulations of a specific area, including the financial sector). Second, the sanctions are normally imposed by administrative authorities (whereas only a court can impose sanctions for criminal offences). If the imposition of a sanction by an administrative authority is challenged in court, it would be reviewed by a court having jurisdiction in criminal matters.

Thus in the context of this questionnaire, misdemeanours are considered as "administrative offences".

There are a few measures that might be classified as sanctions that are applied outside the sphere of criminal law. However these are not referred to as administrative sanctions:

- The imposition of a parking fine (in Estonian *viivistasu*, which directly translates to delay-charge (*viivis*=delay; *tasu*=charge)) in accordance with § 188 of the Traffic Act.

The fine can be issued by a parking officer (representative of the rural municipality or city government (local authority)) when the parking charge is not paid or is paid at a lower rate; the paid parking time has been exceeded; the document proving the right to paid parking has not been filled in correctly; or the document proving the right to paid parking has not been placed in accordance with the Traffic Act. A parking fine must be paid by the owner of the power-driven vehicle or its trailer (if the authorised user of a power-driven vehicle or its trailer has been entered in the motor register, the parking fine must be paid by the authorised user). The parking fine is imposed in administrative proceedings. If a person finds that their rights have been violated by a parking fine decision, they may file an intra-authority appeal with the rural municipality or city government or an appeal with an administrative court against the decision.

Parking in an unauthorised place on the other hand is a misdemeanour.

The relevant legislation in English can be found in §§ 188-189 of the Traffic Act: <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/525062018012/consolide>

- Penalty payment (in Estonian *sunniraha* which would roughly translate to coercive money (*sund/sunni*=coercive ; *raha*=money; similar to *Zwangsgeld* in German). Certain administrative authorities can impose a penalty payment for failure to perform an obligation imposed by a precept within the term indicated in the warning (precept means

an administrative act which imposes on a person an obligation to perform a required act or refrain from a prohibited act – e.g. a precept to demolish a hazardous building). The penalty payment can not be imposed as a punishment but merely to secure fulfilment of an obligation. Penalty payment is imposed in administrative proceedings. An appeal can be lodged in the administrative court. For more see § 10 of Substitutive Enforcement and Penalty Payment Act: <https://www.riigiteataja.ee/en/eli/522012015001/consolide>.

- Procedural fines or procedural detention
 - In criminal or misdemeanour proceedings:

The Code of Criminal Procedure (hereafter “CCP”) allows for a fine of up to 3200 euros to be imposed on a person for various procedural violations (e.g. violation of a prohibition to leave the residence, failure to appear when summoned, violation of order in court session). In pre-trial proceedings the fine is imposed by the preliminary investigation judge at the request of a prosecutor's office. In court proceedings the fine is imposed by the court. In addition, the court can impose a detention for failure to appear (up to 5 days) or for violating order in court session (up to 10 days). See for instance § 98(3), § 128(4), 138(1), § 138¹ and § 267 of the CCP:

<https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/509012019001/consolide>

In misdemeanour proceedings, the court has similar rights to impose fines for failure to appear or for violating order in court session. See § 43(1) and § 88(2) of the Code of Misdemeanour Procedure: <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/509012018006/consolide>

The fine or detention is imposed within criminal/misdemeanour proceedings but the violation itself is not an offence (as defined in the PC). The procedure of imposing the fine or detention is not thoroughly regulated. The fine or detention can be appealed.

- In civil court proceedings the court has a right to impose procedural fines up to 3200 euros for violations of procedure (eg court orders). The court can also impose detention up to 7 or 14 days for certain violations. In cases where collection of a fine is impossible, the fine may be substituted by detention of up to three months. For more, see the Code of Civil Procedure § 45-48, for a detention up to 14 days see also § 266(2): <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/514122018001/consolide>
- In administrative court proceedings, the court has similar powers to impose either fines or detention for various violations of procedure. See § 77 of the Code of Administrative Court Procedure: <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/512122017007/consolide>
- In bankruptcy proceedings, the court may impose a fine, compelled attendance or arrest on a debtor in the event of non-compliance with a direction of the court or in order to secure performance of an obligation provided by law if the debtor hinders the bankruptcy proceedings by various acts. The maximum length of detention is three months. If a debtor is sentenced to detention for failure to perform an obligation, the debtor shall be released after he or she has performed the obligation. See § 89 of the Bankruptcy Act: <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/521062018001/consolide>

- Disciplinary sanctions (e.g. fines for trustees in bankruptcy; disciplinary measures (including detention) for members of the defence forces).

There are other measures like withdrawal of a licence etc (especially in the financial sector) that are imposed in administrative proceedings and not as a form of sanction but rather as a preventive measure.

40. How do you define an administrative and a criminal offence/sanction?

40.1. How do you distinguish the two?

- They are distinguished by the respective sanctions. A criminal offence is an offence which is provided for in the PC and the principal punishment prescribed for which in the case of natural persons is a pecuniary punishment (up to 500 daily rates) or imprisonment (1 month up to 20 years or life imprisonment) and in the case of legal persons a pecuniary punishment (up to 16 000 000 euros).
- A misdemeanour is an offence which is provided for in the PC or another Act and the principal punishment prescribed for which is a fine (up to 300 fine units, which is equivalent to 1200 euros), detention (up to 30 days) or deprivation of driving privileges.

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

The *Engel* jurisprudence has not influenced the categorisation of sanctions between misdemeanours and criminal offences since both are classified as criminal in domestic law.

40.3. If so, to what extent?

N/A

41. 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 the respective added value of administrative and criminal sanctions? Please provide representative examples.

Criminal offences are more serious violations. Misdemeanours are offences that are best characterised as infringements of regulations in a specific area (e.g. traffic, banking regulations etc). Misdemeanours are less serious and usually there is less harm to the protected legal interest.

There are examples where the same act can either be a misdemeanour or a criminal offence depending on specific features: For example a theft of property up to 200 euros is a misdemeanour. Theft of property exceeding 200 euros is a criminal offence. Driving under the influence of alcohol is a misdemeanour up to a specific blood alcohol level, from which point on it is punished as a criminal offence. Possession of small quantities of narcotics is a misdemeanour and if the quantity surpasses what is deemed small, it is a criminal offence.

Misdemeanour proceedings are speedier, do not involve the prosecutor and in most cases can be dealt with in extra-judicial proceedings. The procedural requirements (e.g. the mandatory participation of a lawyer etc) are also less stringent.

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

42.1. Art. 4 of the Convention on the protection of the environment through criminal law (ETS 172).⁶⁶

Art 4 of the Convention is transposed through misdemeanours that are stipulated in area-specific laws (Nature Conservation Act, Waste Act, and Radiation Act).

42.2. Art. 78 (3) of the Council of Europe Convention on preventing and combating violence against women and domestic violence (ETS 210).⁶⁷

By criminal sanctions (§§ 120, 121 and 157³ of the PC).

⁶⁶ <https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168007f3f4>

⁶⁷ <https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168008482e>

42.3. 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.

N/A

II. Separate or combined tracks of sanctions

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

Yes. Offences are either misdemeanours or criminal offences, not both (see also the second part of answer no 3). The legislator does not knowingly sanction one act as both a misdemeanour and a criminal offence. For example the majority of traffic violations are only misdemeanours and not criminal offences.

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

No. § 3(5) of the PC stipulates that if a person commits an act which comprises the necessary elements of both a misdemeanour and a criminal offence, the person shall be punished only for the criminal offence. For example if a person commits drunk driving, which is a criminal offence but at the same time runs a red light, which would be a misdemeanour, he or she would only be punished for the criminal offence. If no punishment is imposed for the criminal offence, the person may be punished for the misdemeanour.

45. In your view: is the *ne bis in idem* applicable in case both tracks apply? Can you give examples of relevant national case law in this respect?

The PC precludes punishing the same act twice as a misdemeanour and a criminal offence (§ 2(3) and § 3(5) of the PC). The *ne bis in idem* principle applies.

III. Identification of main differences between administrative and criminal tracks

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

Substantive law

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

In case of misdemeanours, aiding and abetting is not sanctioned (§ 23 of the PC).

General principles

47. Are administrative sanctions governed by general principles of administrative law or general principles of criminal law (such as proportionality, nullum crimen sine lege, legality, lex mitior, non-retroactivity etc)?

Misdemeanours are governed by general principles of criminal law. Both misdemeanours and criminal offences are regulated in the PC and share the general part of the PC. The general principles referred to in the question also apply in case of misdemeanours.

Procedural law

48. Do typical criminal procedural rights apply in case of administrative offences/sanctions (such as presumption of innocence, right to be heard, right of access to the case-file, right to remain silent)?

Yes.

49. What kind of authorities are involved in the decision to impose administrative sanctions?

Various administrative authorities (bodies conducting extra-judicial proceedings) that are competent supervisory authorities. The Police and Border Guard Board deals with the majority of cases. Sanctions can also be imposed by local governments, Consumer Protection Board, Financial Supervisory Authority, State Agency of Medicines etc.

50. Do administrative authorities vested with a sanctioning power comply with the principles of independence and impartiality? Is the decision on the sanction subject to a full judicial review (in law and in facts)? Which judicial authorities/courts are in charge of reviewing administrative sanctions?

The administrative authorities do not necessarily comply with the principles of independence and impartiality. The decision is subject to a full judicial review (*ab ovo*) review by a court having jurisdiction in criminal matters and the court complies with the principles of independence and impartiality.

IV. Cooperation and coordination

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

Yes, cooperation is possible between different bodies conducting extra-judicial proceedings in misdemeanour proceedings. Cooperation and exchange of evidence is also possible between criminal and misdemeanour proceedings.

22. At the European level, do respective authorities coordinate / cooperate when administrative procedures / sanctions are applicable in one State and criminal law provisions in the other? Please refer here also to situations where only administrative sanctions may be imposed against a legal person in one State whereas the law of the other State provides for criminal liability of legal persons.

Certain forms of cooperation are possible without it being necessary for the infringement to be classified as a criminal offence in Estonia.

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

In the European Union, Directive 2014/41/EU of the European Parliament and of the Council regarding the European Investigation Order in criminal matters sets forth the possibility for cooperation in certain situations where the act is punishable by an administrative authority (art 4 of the Directive).

In the European Union, the mutual recognition of financial penalties is also possible in some cases where the fine might be a criminal penalty in one State and an administrative penalty in the other State (as per Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties).

There is also a EU Directive for cooperation regarding the recovery of administrative fines related to claims, taxes, duties and other measures (Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures).

The EU has also adopted a directive facilitating cross-border exchange of information on road-safety-related traffic offences (Directive (EU) 2015/413 of the European Parliament and of the Council of 11 March 2015 facilitating cross-border exchange of information on road-safety-related traffic offences).

22. 2. Have problems occurred? Which ones?

N/A.

DENMARK

I. General questions

1. Does your national law provide for administrative offences, allowing to impose administrative sanctions against natural persons, which are comparable to criminal sanctions? If so, what categories/types of administrative sanctions comparable to criminal sanctions exist in your legal system (e.g. punitive and/or preventive measures, such as fines, disqualifications, etc.)?

Answer: No. Danish legislation does not provide for administrative offences or administrative sanctions, which are comparable to criminal sanctions.

However, the public prosecution service or, in certain areas (such as work environment and taxation) an administrative authority, may inform a defendant that a matter may be settled without trial if the defendant admits being guilty of the offence and accepts to pay a fine of a fixed amount (fixed penalty notice).

If the case is not settled with the defendant's acceptance of the fixed penalty notice, the case must undergo ordinary criminal prosecution. Therefore, a fixed penalty notice does not constitute an administrative sanction.

2. How do you define an administrative and a criminal offence/sanction?

Answer: Please refer to the answer to question 1.

2.1. How do you distinguish the two?

Answer: Please refer to the answer to question 1.

2.2. Has the *Engel* jurisprudence influenced the categorization of sanctions in your national system?

Answer: Please refer to the answer to question 1.

2.3. If so, to what extent?

-

3. 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 the respective added value of administrative and criminal sanctions? Please provide representative examples.

Answer: None, please refer to the answer to question 1.

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

4.1. Art. 4 of the Convention on the protection of the environment through criminal law (ETS 172)

Answer: This convention has not been ratified in Denmark.

4.2. Art. 78 (3) of the Council of Europe Convention on preventing and combating violence against women and domestic violence (ETS 210).

Answer: Denmark has reserved the right to apply non-criminal sanctions, instead of criminal sanctions, for the behaviours referred to in Article 34 of the Convention. Accordingly, stalking as defined in the Convention is sanctioned by a restraining or exclusion order pursuant to the Restraining Order Act.

4.3. 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

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

Answer: Please refer to the answer to question 1.

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

Answer: Please refer to the answer to question 1.

7. In your view: is the ne bis in idem applicable in case both tracks apply? Can you give examples of relevant national case law in this respect?

Answer: Please refer to the answer to question 1.

III. Identification of main differences between administrative and criminal tracks

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

Substantive law

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

Answer: Please refer to the answer to question 1.

General principles

9. Are administrative sanctions governed by general principles of administrative law or general principles of criminal law (such as proportionality, nullum crimen sine lege, legality, lex mitior, non-retroactivity etc)?

Answer: Please refer to the answer to question 1.

Procedural law

10. Do typical criminal procedural rights apply in case of administrative offences/sanctions (such as presumption of innocence, right to be heard, right of access to the case-file, right to remain silent)?

Answer: Please refer to the answer to question 1.

11. What kind of authorities are involved in the decision to impose administrative sanctions?

Answer: Please refer to the answer to question 1.

12. Do administrative authorities vested with a sanctioning power comply with the principles of independence and impartiality? Is the decision on the sanction subject to a full judicial review (in law and in facts)? Which judicial authorities/courts are in charge of reviewing administrative sanctions?

Answer: Please refer to the answer to question 1.

IV. Cooperation and coordination

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

Answer: Please refer to the answer to question 1.

22. At the European level, do respective authorities coordinate / cooperate when administrative procedures / sanctions are applicable in one State and criminal law provisions in the other? Please refer here also to situations where only administrative sanctions may be imposed against a legal person in one State whereas the law of the other State provides for criminal liability of legal persons.

Answer: Please refer to the answer to question 1.

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

-

22.2. Have problems occurred? Which ones?

FRANCE

I. Questions générales

Votre droit interne prévoit-il des infractions administratives, permettant d'imposer des sanctions administratives à des personnes physiques, qui sont comparables à des sanctions pénales?

51. Si tel est le cas, quelles catégories/types de sanctions administratives comparables aux sanctions pénales existent dans votre système légal (par exemple mesures punitives et/ou préventives, telles que des amendes, déchéances etc.) ?

Le droit français connaît bien des sanctions administratives, dont le champ tend à s'accroître.

Le Conseil d'Etat dresse ainsi le constat selon lequel le champ des sanctions administratives « *s'est étendu à pratiquement toutes les activités professionnelles et sociales : activités économiques et financières, impôts et cotisations sociales, santé publique, travail et formation professionnelle, culture, transports et circulation...* »⁶⁸.

Les sanctions administratives sont nécessairement exclusives de toute privation de liberté. On peut les présenter en trois catégories : la sanction morale, la sanction privative de droits et la sanction pécuniaire⁶⁹.

S'agissant de la « **sanction morale** », elle comprend pour l'essentiel l'avertissement et le blâme. Par exemple, en matière de lutte contre le dopage, l'Agence française de lutte contre le dopage, peut prononcer à l'encontre d'un sportif un avertissement à titre de sanction (C. sport, art. L. 232-23).

Concernant la **sanction privative de droits**, il s'agit principalement du retrait d'une autorisation ou d'un agrément pouvant être infligé à titre temporaire ou définitif (e.g. C. santé publ., art. L.1245-1, L. 2131-3, L. 2142-3). Cela peut également consister en une interdiction d'exercer dans le cadre des professions et activités réglementées.

S'agissant, enfin, de la **sanction pécuniaire**, l'amende apparaît comme l'une des principales sanctions administratives. Plusieurs autorités administratives indépendantes disposent de la faculté d'infliger des amendes (Conseil supérieur de l'audiovisuel, Autorité de la concurrence, Autorité des marchés financiers, Commission nationale de l'informatique et des libertés...).

On exclut en général la qualification de « sanction administrative » s'agissant des mesures de police, des mesures conservatoires ou préparatoires et des sanctions contractuelles⁷⁰, dès lors qu'aucune d'entre elles ne présente fondamentalement une nature répressive.

52. Comment définissez-vous une sanction administrative et une sanction/infraction pénale ?

Sanction administrative

Le Conseil constitutionnel a défini la sanction administrative comme « *une décision unilatérale prise par une autorité administrative agissant dans le cadre de prérogatives de puissance publique* » et qui « *inflige une peine sanctionnant une infraction aux lois et règlements* »⁷¹. Il utilise également la notion de « *sanction ayant le caractère d'une punition* ».

⁶⁸ Conseil d'Etat, « Le juge administratif et les sanctions administratives », dossier thématique mis en ligne le 9 janvier 2017.

⁶⁹ GUYOMAR (M.), *Les sanctions administratives*, Paris : L.G.D.J., 2014, pp. 39-40.

⁷⁰ GUYOMAR (M.), *Les sanctions administratives, op. cit.*, pp. 19-26.

⁷¹ Cons. const., n° 89-260 DC du 28 juillet 1989, *Loi relative à la sécurité et à la transparence du marché financier*.

Le Conseil d'Etat définit de même la sanction administrative comme « *une décision administrative émanant d'une autorité administrative qui vise à réprimer un comportement fautif* »⁷².

La doctrine s'est également saisie de la question des sanctions administratives. Certains auteurs proposent notamment de les définir comme des « *acte[s] administratif[s] unilatéra[ux] à contenu punitif* »⁷³ constituant l'expression du « *pouvoir répressif accordé à l'administration pour punir des comportements sociaux considérés comme des infractions à une réglementation préexistante* »⁷⁴.

Sanction pénale

La sanction pénale prend la forme d'une peine infligée au délinquant en réponse à l'infraction qu'il a commise. Elle est prononcée par une juridiction répressive dans le respect des règles de droit pénal et de procédure pénale. Les articles 130-1 et suivants du code pénal définissent la nature et le régime des peines applicables.

Plusieurs classifications peuvent être envisagées :

- en fonction de leur gravité : peines contraventionnelles, correctionnelles et criminelles⁷⁵;
- en fonction de leur nature :
 - o peines principales, complémentaires et alternatives ;
 - o peines privatives ou restrictives de liberté, peines privatives ou restrictives de droits, peines patrimoniales.

52.1. Comment faites-vous la distinction entre les deux?

La sanction pénale et la sanction administrative ont en commun la fonction de réprimer un comportement fautif. Un tel comportement peut faire l'objet d'une répression exclusivement administrative ou exclusivement pénale ; dans certains cas, il peut être à la fois réprimé sur le plan administratif et au niveau pénal.

La répression administrative « *frappe le comportement qui n'est pas celui d'un délinquant ou du criminel mais celui qui méconnaît les règles édictées par l'administration* »⁷⁶ tandis que la répression pénale a « *pour objet de permettre à l'Etat, par la manifestation de la vérité et le prononcé d'une peine, d'assurer la rétribution de la faute commise par l'auteur de l'infraction et le rétablissement de la paix sociale* »⁷⁷.

La distinction repose sur deux critères.

1. Critère matériel

Comme indiqué *supra*, les sanctions administratives sont nécessairement exclusives de toute privation de liberté⁷⁸, contrairement aux sanctions pénales.

2. Critère organique

⁷² Conseil d'Etat, « Le juge administratif et les sanctions administratives », *op. cit.*

⁷³ MOREAU (J.), *Droit administratif*, Paris : P.U.F., 1989, n° 155 ; VAN LANG (A.), GONDOUIN (G.), INSERGUET-BRISSET (V.), *Dictionnaire de droit administratif*, Paris : Colin, 1997, p. 257.

⁷⁴ MODERNE (F.), *Sanctions administratives et justice constitutionnelle*, Paris : Economica, 1993, p. 5.

⁷⁵ L'article 111-1 du code pénal classant les infractions suivant leur gravité en crimes, délits et contraventions.

⁷⁶ DELARUE (J.-M.), « Actualité de la problématique de la sanction administrative », *AJDA*, 20 octobre 2001.

⁷⁷ GUYOMAR (M.), *Les sanctions administratives*, *op. cit.*, p. 30 ; Article 130-1 du code pénal : « (...) la peine a pour fonctions : 1° de sanctionner l'auteur de l'infraction ; 2° de favoriser son amendement, son insertion ou sa réinsertion ».

⁷⁸ Cons. const., n°89-260 DC du 28 juillet 1989 précité.

Si la sanction pénale constitue en principe une **décision juridictionnelle** prononcée par une juridiction répressive, la sanction administrative, en revanche, revêt la forme d'une **décision administrative émanant d'une autorité administrative**.

Le caractère juridictionnel de la sanction est ainsi un critère de distinction déterminant en ce qu'il permet une distinction parfaitement claire entre les deux champs⁷⁹.

Les sanctions administratives sont en principe soumises au contrôle du juge administratif, tandis que les sanctions pénales relèvent de la compétence du juge judiciaire.

52.2. La jurisprudence *Engel* a-t-elle influencé la catégorisation des sanctions dans votre système national ?

52.3. Si oui, dans quelle mesure ?

Le Conseil d'Etat a fait sienne l'interprétation de la notion d'« *accusation en matière pénale* » développée par la Cour européenne des droits de l'Homme pour examiner les trois critères alternatifs, tenant à la qualification de la mesure en droit interne, à la nature de l'infraction et à la sévérité de la sanction que la personne concernée risque d'encourir. Il peut être repris les termes du dossier thématique du Conseil d'Etat tel que cité supra.

Ainsi, il a considéré que relevaient du champ pénal de l'article 6 § 1 de la Convention EDH :

- les pénalités fiscales dès lors qu'elles présentent le caractère d'une punition tendant à empêcher la réitération des agissements qu'elles visent et n'ont pas pour objet la seule réparation pécuniaire d'un préjudice⁸⁰ ; ainsi que
- les sanctions pécuniaires prononcées par la Commission bancaire⁸¹, par le Conseil des marchés financiers⁸², par le Conseil de la discipline de la gestion financière⁸³, par la Commission des sanctions de l'Autorité des marchés financiers⁸⁴ et par l'Office des migrations internationales⁸⁵.

53. Dans quels cas votre système national recourrait-il à des sanctions administratives (infraction moins grave, infractions intentionnelles/négligence, importance de l'intérêt protégé, procédures plus rapide, etc.) ? Quelle est la valeur ajoutée respective des sanctions administratives et pénales? Merci de fournir des exemples représentatifs.

Le Conseil d'Etat a considéré que « *le développement des sanctions administratives s'explique par des préoccupations essentiellement pratiques* »⁸⁶. La juridiction suprême administrative, tout comme la doctrine française, estiment que les sanctions administratives répondraient à un besoin d'efficacité et de rapidité de la répression d'une part, et d'adaptation et de technicité de la sanction d'autre part.

Ainsi, l'administration dispose d'un pouvoir répressif inhérent à son action toutes les fois que la sanction pénale semble inappropriée car trop lourde à mettre en œuvre ou trop éloignée de la mission habituelle du juge pénal.

⁷⁹ Dans certains cas précis toutefois, le pouvoir de sanction administrative peut être confié à une autorité juridictionnelle, comme la Cour de discipline budgétaire et financière (art. L. 313-1 du Code des juridictions financières), le Conseil supérieur de la magistrature dans sa formation compétente à l'égard des magistrats du siège (CE, Ass., 12 juillet 1969, *L'Etang*, n° 72480) et certaines instances ordinales intervenant en matière disciplinaire (CE, 30 décembre 2014, n° 381245, s'agissant de la chambre disciplinaire de l'ordre des médecins). Inversement, certaines mesures pénales peuvent être prises sans intervention préalable du juge. C'est le cas, par exemple, des amendes forfaitaires dans le cadre de la législation routière.

⁸⁰ CE, Avis, Sect., 31 mars 1995, *Ministre du budget c/ Auto-Industrie Méric*, n°164008, Rec.

⁸¹ CE, 29 novembre 1999, *Société Rivoli Exchange*, n° 194721, Rec.

⁸² CE, Ass., 3 décembre 1999, *Didier*, n°207434, Rec.

⁸³ CE, 31 mars 2004, *Société Etna Finance et M. P.*, n° 243579, T.

⁸⁴ CE, 24 février 2005, *Société GSD gestions et M. G.*, n° 269001, Rec.

⁸⁵ CE, Sect., 28 juillet 1999, *GIE Mumm-Perriet-Jouet*, n° 188973, Rec.

⁸⁶ Conseil d'État, « Les pouvoirs de l'administration dans le domaine des sanctions », p. 70.

Le recours à la sanction administrative permet notamment de pallier le risque « *d'affadissement* » de la répression pénale et assure ainsi une meilleure « *cohérence entre la sévérité des sanctions et la gravité des infractions* »⁸⁷.

Le Conseil d'Etat a par ailleurs mis en exergue le fait que, « *dans certaines matières techniques à la réglementation complexe, les personnes commettent des infractions plus par ignorance de la loi que par volonté d'y échapper. La sanction administrative est alors beaucoup moins traumatisante (...)* »⁸⁸.

Enfin, la répression administrative peut trouver sa légitimité dans la compétence technique de l'autorité titulaire d'un pouvoir de sanction. Cette dernière assure le respect des normes qu'elle édicte et paraît ainsi mieux à même de juger ce qui est nécessaire au respect de ces normes souvent très techniques et des conséquences des sanctions prononcées.

54. En matière de sanctions pénales/administratives, comment avez-vous appliqué les dispositions ci-dessous du Conseil de l'Europe :

54.1. Art. 4 de la Convention sur la protection de l'environnement par le droit pénal (STE 172)

Cette convention n'a pas été ratifiée par la France.

54.2. Art. 78 (3) de la Convention sur la prévention et la lutte contre la violence à l'égard des femmes et la violence domestique (STE 210).⁸⁹

Cette convention a effectivement été ratifiée le 04/07/2014 et elle est entrée en vigueur le 01/11/2014 sans qu'aucune réserve n'ait été émise conformément à l'article 78 (3) qui offre aux Etats Parties la possibilité de prévoir des sanctions non pénales pour réprimer les comportements visés aux articles 33 et 34 de la convention. En droit français, les faits de violences relèvent exclusivement du droit pénal.

54.3. Si vous n'avez ratifié aucune de ces conventions, merci de donner un autre exemple de mise en œuvre de Conventions du CdE permettant l'adoption de sanctions administratives à l'encontre de personnes physiques.

La convention mentionnée au 4.2 a été ratifiée.

II. Voies de sanctions distinctes ou combinées

55. Existe-t-il des types d'infractions établies dans votre législation nationale qui prévoient des sanctions administratives uniquement ?

Certains comportements ne sont effectivement réprimés que par le biais d'une sanction administrative, et non d'une sanction pénale.

Dans certains cas, c'est le fruit d'un processus de « dépénalisation ». Tel est le cas, par exemple, pour certaines dispositions du code de la consommation (articles L. 242-10 et suivants du code de la consommation relatifs aux modalités de publicité, à la vente à distance et hors établissement) ou du code de la santé publique (article L. 6241-1 du code de la santé publique : sanction d'un laboratoire de biologie médicale qui continue de fonctionner alors qu'il ne répond plus aux conditions ayant présidé son ouverture).

56. Votre droit interne permet-il une combinaison de sanctions pénales et administratives ? Existe-t-il des domaines où ces deux types de sanction coexistent ?

Le régime juridique français permet la coexistence de la répression pénale et administrative. Un même fait peut donner lieu à un cumul de qualifications, à un cumul de poursuites et à un cumul de sanctions de nature différente.

⁸⁷ DE BRESSON (J.-J.), « Inflation des lois pénales et législations et réglementations techniques », RSC, 1985.

⁸⁸ Conseil d'Etat, « Les pouvoirs de l'administration dans le domaine des sanctions », *op. cit.*, p. 70.

⁸⁹ <https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168008482e>

Dans l'étude précitée « *Les pouvoirs de l'administration dans le domaine de la sanction* », le Conseil d'Etat envisageait le cumul des sanctions pénales et administratives dans trois hypothèses : (1) lorsque le recours à une sanction administrative est provisoire dans l'attente du prononcé d'une sanction pénale (e.g. suspension d'un permis de conduire), (2) lorsqu'il existe une différence de nature entre les sanctions administratives et pénales (par exemple, lorsque la sanction administrative est pécuniaire et la sanction pénale une peine d'emprisonnement) ou (3) lorsque la sanction pénale présente un caractère exceptionnel (infraction à caractère frauduleux notamment).

A titre d'exemple, le code du travail sanctionne divers manquements qui sont également constitutifs d'infractions pénales. Ainsi, des faits constitutifs de travail dissimulé, de marchandage ou encore de prêt illicite de main d'œuvre, outre les sanctions pénales prévues, peuvent être sanctionnés par la suspension des aides publiques en matière d'emploi, de formation professionnelle et de culture ou par la fermeture administrative provisoire de l'établissement. Ces sanctions administratives peuvent être mises en œuvre par l'autorité administrative compétente cumulativement avec des poursuites pénales du fait de leur complémentarité avec ces dernières.

Le Conseil constitutionnel a par ailleurs considéré le principe du cumul de sanctions administratives et pénales conforme au principe de nécessité des délits et des peines pour sanctionner certains faits constitutifs de fraude fiscale. Il a estimé en effet que « *le recouvrement de la nécessaire contribution publique et l'objectif de la lutte contre la fraude fiscale justifient l'engagement de procédures complémentaires dans les cas des fraudes les plus graves* »⁹⁰. Il a précisé que ce cumul ne devait s'appliquer qu'aux cas les plus graves de dissimulation frauduleuse de sommes soumises à l'impôt et que le montant global des sanctions prononcées ne devait pas dépasser le montant le plus élevé de l'une des sanctions encourues⁹¹.

S'agissant de l'articulation dans le prononcé de ces sanctions, le Conseil d'Etat a jugé que l'autorité administrative peut sanctionner un agent public pour des faits constitutifs d'un manquement disciplinaire sans attendre l'issue de la procédure pénale engagée au titre de mêmes faits⁹². Bien plus, l'autorité administrative ne peut subordonner sa décision sur l'action disciplinaire à l'intervention d'une décision définitive du juge pénal⁹³.

Ainsi il appartient en principe au juge disciplinaire de statuer sur une plainte dont il est saisi sans attendre l'issue d'une procédure pénale en cours concernant les mêmes faits. Cependant, ce juge peut surseoir à statuer si une telle mesure est utile à la qualité de l'instruction ou à la bonne administration de la justice⁹⁴.

57. Selon vous: le principe *ne bis in idem* est-il applicable lorsque les deux moyens de sanctions s'appliquent ? Pouvez-vous donner des exemples de jurisprudence pertinente à cet égard dans votre droit interne ?

La France a émis une réserve à l'article 4 du protocole n° 7 à la Convention de sauvegarde des droits de l'homme et des libertés fondamentales stipulant que le principe *non bis in idem* ne s'applique qu'aux infractions qui relèvent en droit français de la compétence des tribunaux statuant en matière pénale.

Aux termes de la jurisprudence du Conseil constitutionnel, « *le principe de nécessité des délits et des peines ne fait pas obstacle à ce que les mêmes faits commis par une même personne puissent faire l'objet de poursuites différentes aux fins de sanctions de nature administrative ou pénale en application de corps de règles distincts devant leur propre ordre de juridiction* ». Le Conseil Constitutionnel impose une limite au cumul des sanctions pénale et administrative : « *Si l'éventualité que soient engagées deux procédures peut conduire à un cumul de sanctions, le*

⁹⁰ Cons. const., n°2016-545 et 2016-546 QPC du 24 juin 2016, considérant 20.

⁹¹ *Ibid.*, considérant 24.

⁹² CE, 27 juillet 2009, *Ministre de l'Education nationale c/ Melle A*, n° 313588 ; CE, 22 mars 1999, *Soudain*, n° 186336.

⁹³ CE, Sect., 28 janvier 1994, *Conseil départemental de l'ordre des médecins de Meurthe-et-Moselle c/ L'Hermitte*, n° 126512.

⁹⁴ CE, Ass., 30 décembre 2014, n° 381245.

principe de proportionnalité implique qu'en tout état de cause le montant global des sanctions éventuellement prononcées ne dépasse pas le montant le plus élevé de l'une des sanctions encourues »⁹⁵.

Dans une décision du 18 mars 2015, le Conseil constitutionnel a ainsi considéré que le principe *non bis in idem* n'empêche pas des poursuites consécutives en matière pénale et administrative sous certaines conditions, mais a jugé contraire à la Constitution le cumul de sanctions prononcées du chef de délit d'initié par l'autorité judiciaire et pour manquement d'initié par l'Autorité des marchés financiers⁹⁶.

Le Conseil a précisé sa jurisprudence en 2016 en jugeant, en matière de fraude fiscale, que « *le principe de nécessité des délits et des peines ne saurait interdire au législateur de fixer des règles distinctes permettant l'engagement de procédures conduisant à l'application de plusieurs sanctions afin d'assurer une répression effective des infractions* », et qu'ainsi « *les contribuables auteurs des manquements les plus graves [pouvaient] faire l'objet de procédures complémentaires*»⁹⁷.

En 2017 s'agissant du cumul de sanctions administratives et pénales en cas d'emploi illégal d'un travailleur étranger, le Conseil constitutionnel a estimé que l'article L. 8253-1 du code du travail qui sanctionne l'employeur d'un étranger non autorisé à exercer une activité salariée à acquitter une contribution spéciale, et l'article L. 8256-2 du même code qui punit ces mêmes faits d'une peine d'emprisonnement et d'une amende, ne contrevenaient pas à ce principe *non bis in idem*. Certes, les sanctions pécuniaires pouvant être prononcées sont comparables dans leur montant dans les deux cas. En revanche, le juge pénal peut condamner l'auteur d'une infraction à une peine d'emprisonnement. Pour cette raison, les faits prévus et réprimés sont susceptibles de faire l'objet de sanctions de nature différente, de sorte que la loi ne méconnaît pas le principe *non bis in idem*⁹⁸.

III. Identification des grandes différences entre la voie administrative et la voie pénale

Veillez identifier les principales conséquences découlant de l'application de la voie administrative :

Droit matériel

58. La complicité est-elle sanctionnée si un comportement est seulement constitutif d'une infraction administrative ?

A notre connaissance, il n'existe pas de principe général prévoyant la sanction de la complicité d'un comportement fautif susceptible de donner lieu à une sanction administrative. En revanche, le fait d'apporter son aide à un comportement fautif peut, en tant que tel et si cela est prévu, donner lieu à une sanction administrative.

A titre d'illustration, la loi du 23 octobre 2018 a introduit dans le code général des impôts un article 1740 A bis permettant de prononcer une amende à l'encontre d'un tiers qui aurait intentionnellement fourni une prestation à son client lui permettant directement de commettre des agissements, manquements ou manœuvres particulièrement graves en matière fiscale ou sociale.

⁹⁵ Cons. const., n°2014-453/454 QPC et n°2015-462 QPC du 18 mars 2015, considérant 19 ; n°2016-545 et 2016-546 QPC du 24 juin 2016, considérant 24.

⁹⁶ Cons. const., n°2014-453/454 QPC et n°2015-462 QPC du 18 mars 2015, considérants 21 à 28.

⁹⁷ Cons. const., n°2016-545 et 2016-546 QPC du 24 juin 2016, considérant 21.

⁹⁸ Cons. const., QPC n°2016-621 du 30 mars 2017.

Le rapport du Sénat sur ce projet de loi indique à cet effet qu'« *il s'agit en quelque sorte du pendant, en matière administrative, du délit de complicité pour fraude fiscale en matière pénale* »⁹⁹.

Principes généraux

59. Les sanctions administratives relèvent-elles des principaux généraux du droit administratif ou des principes généraux du droit pénal ? (comme la proportionnalité, nullum crimen sine lege, la légalité, la lex mitior, la non-rétroactivité, etc.)

Le régime juridique applicable à la répression administrative est largement inspiré des principes applicables aux sanctions pénales, sous réserve de certains tempéraments propres.

Le Conseil constitutionnel a en effet jugé que les exigences tenant au respect du principe de légalité des délits et des peines, du principe de nécessité des peines, du principe de non-rétroactivité de la loi pénale d'incrimination plus sévère ainsi que du principe du respect des droits de la défense ne concernent pas seulement les peines prononcées par les juridictions répressives mais s'étendent à toute sanction ayant le caractère d'une punition même si le législateur a laissé le soin de la prononcer à une autorité de nature non judiciaire¹⁰⁰.

La légalité des délits et des peines

Le principe de légalité des délits et des peines s'applique aux sanctions administratives.

S'agissant du principe de légalité des délits, le Conseil constitutionnel a précisé « *qu'appliquée en dehors du droit pénal, l'exigence d'une définition des infractions sanctionnées se trouve satisfaite, en matière administrative, par la référence aux obligations auxquelles le titulaire d'une autorisation administrative est soumis en vertu des lois et règlements* »¹⁰¹.

S'agissant du principe de légalité des peines, le Conseil a jugé, à l'occasion de l'examen de peines disciplinaires infligées aux officiers publics et ministériels, que « *le principe de légalité des peines impose au législateur de fixer les sanctions disciplinaires en des termes suffisamment clairs et précis pour exclure l'arbitraire* »¹⁰².

La jurisprudence du Conseil d'Etat va dans le même sens : « *le principe de légalité des délits et des peines s'applique aux sanctions administratives au même titre qu'aux sanctions pénales* »¹⁰³. Toutefois, le principe de légalité des délits ne s'applique pas aux sanctions disciplinaires que l'autorité administrative a le pouvoir d'édicter à l'égard des agents publics placés sous son autorité¹⁰⁴.

Si, lorsqu'il est appliqué aux sanctions administratives, le principe de légalité des délits et des peines ne fait pas obstacle à ce que les infractions soient définies par référence aux obligations auxquelles est soumise une personne en raison de l'activité qu'elle exerce, de la profession à laquelle elle appartient ou de l'institution dont elle relève, il implique, en revanche, que les sanctions soient prévues et énumérées par un texte¹⁰⁵.

⁹⁹ Rapport n° 602 (2017-2018) de M. Albéric de MONTGOLFIER, fait au nom de la commission des finances, déposé le 27 juin 2018, p. 16.

¹⁰⁰ Cons. const., n° 88-248 DC du 17 janvier 1989, considérants 17-18.

¹⁰¹ Cons. const., n° 88-248 DC du 17 janvier 1989 précité.

¹⁰² Cons. const., n° 2014-385 QPC du 28 mars 2014, considérant 6.

¹⁰³ CE, 9 octobre 1996, *Société Prigest*, n° 170363 (s'agissant de l'application aux sanctions prononcées par la commission des opérations de bourse).

¹⁰⁴ CE, 9 avril 2010, *M. M.*, n° 312251, T.

¹⁰⁵ CE, Ass., 7 juillet 2004, *Ministère de l'Intérieur c/M. Benkerrou*, n°255136 (s'agissant d'une sanction professionnelle infligée à un conducteur de taxi); CE, Sect., 12 octobre 2009, *Petit*, n° 311641, (s'agissant d'une sanction infligée à un commissaire aux comptes).

Dans la vérification du respect du principe de légalité des délits, le juge administratif contrôle la prévisibilité raisonnable de l'existence d'un manquement et de la sanction qu'il est susceptible d'entraîner¹⁰⁶.

La nécessité et la proportionnalité des peines

Le principe de la nécessité des peines découle de l'article 8 de la Déclaration de 1789 et garantit la proportionnalité des sanctions à la gravité des infractions. Le respect de ce principe ne concerne pas seulement les peines prononcées par les juridictions répressives mais s'étend à toute sanction ayant le caractère d'une punition, y compris donc aux sanctions administratives. Cela a été affirmé tant par le Conseil constitutionnel¹⁰⁷ que par le Conseil d'Etat¹⁰⁸.

L'application immédiate de la loi plus douce

Le principe de l'application immédiate de la loi plus douce a pour corollaire la non-rétroactivité de la règle répressive plus sévère et « *s'étend nécessairement à toute sanction ayant le caractère d'une punition même si le législateur a cru devoir laisser le soin de la prononcer à une autorité de nature non judiciaire* »¹⁰⁹. Le Conseil d'Etat fait également application de ce principe aux sanctions administratives¹¹⁰. Le juge administratif doit ainsi faire application d'une loi nouvelle plus clémente entrée en vigueur entre la date à laquelle les faits ont été commis et celle à laquelle il statue¹¹¹.

La responsabilité personnelle et la personnalité des peines

Le Conseil d'Etat a affirmé que « *le principe constitutionnel de responsabilité personnelle en matière pénale est applicable aux sanctions administratives et disciplinaires* »¹¹². Consacré au rang de principe général du droit¹¹³ puis érigé en règle de valeur constitutionnelle¹¹⁴, le principe de la personnalité des peines s'applique également aux sanctions administratives.

Enfin, selon le Conseil constitutionnel, le principe d'individualisation des peines implique, s'agissant de la répression de la fraude fiscale, que la majoration des droits, lorsqu'elle constitue une sanction ayant le caractère d'une punition, ne puisse être appliquée que si l'administration, sous le contrôle du juge, l'a expressément prononcée en tenant compte des circonstances propres à chaque espèce¹¹⁵.

Droit procédural

¹⁰⁶ CE, 18 février 2011, *Banque d'Orsay*, n° 322786 : « *Lorsque l'AMF (Autorité des marchés financiers) sanctionne un manquement à une obligation professionnelle, le juge vérifie si la règle en cause est suffisamment claire, de sorte qu'il apparaisse de façon raisonnablement prévisible par les professionnels concernés, eu égard aux textes définissant leurs obligations professionnelles et à l'interprétation en ayant été donnée jusqu'alors [...], que le comportement litigieux constitue un manquement à ces obligations* ».

¹⁰⁷ Cons. const., n° 87-237 DC du 30 décembre 1987, n° 88-248 DC du 17 janvier 1989 et n° 92-307 DC du 25 février 1992 ; CE, 28 juillet 1999, *Syndicats des médecins libéraux*, n° 202606, n°203438, n°203487, n° 203541 et n° 203589.

¹⁰⁸ CE, 30 mai 2012, n°351551.

¹⁰⁹ Cons. const., n°82-155 DC du 30 décembre 1982 et n°90-227 DC du 25 juillet 1990.

¹¹⁰ A l'exception de la discipline des agents publics du fait de la non-application du principe de légalité des délits.

¹¹¹ CE, 23 avril 1997, *Préfet de l'Isère c. Société routière du Midi*, n° 183970 pour le contentieux des contraventions de grande voirie ; CE Ass., 16 février 2009, *Société Atom*, n°274000 pour les sanctions administratives prononcées à l'encontre d'un administré.

¹¹² CE, Avis, 29 octobre 2007, *Société sportive professionnelle « LOSC Lille Métropole »*, n° 307736.

¹¹³ CE, Sect., 8 janvier 1954, *Dame Louquet*, *Rec. Leb.* p. 22.

¹¹⁴ CE, Sect., 22 novembre 2000, *Société Crédit Agricole Indosuez Chevreux*, n° 207697.

¹¹⁵ Cons. const., n° 2010-103 QPC du 17 mars 2011.

13. Est-ce que les droits procéduraux caractéristiques en matière pénale s'appliquent-ils en cas de sanctions/infractions administratives (comme la présomption d'innocence, le droit d'être entendu, le droit d'accès au dossier, le droit de garder silence)?

La présomption d'innocence

La règle de la présomption d'innocence découle de l'article 9 de la Déclaration de 1789.

Le Conseil d'Etat a admis que les personnes faisant l'objet d'une répression administrative bénéficient de la présomption d'innocence tant au regard du droit interne que de l'article 6, § 2, de la Convention EDH¹¹⁶.

Il a également jugé que l'article 6, § 2, de la Convention EDH est invocable dans le cadre du contentieux fiscal indépendamment de la nature de l'autorité investie du pouvoir de sanction¹¹⁷.

Le respect des droits de la défense

Le respect des droits de la défense s'impose même sans texte à toutes les sanctions administratives. Il s'agit d'un principe général du droit¹¹⁸, ultérieurement érigé en principe fondamental reconnu par les lois de la République¹¹⁹.

Le principe des droits de la défense implique notamment :

- Le fait qu'aucune sanction ne peut être infligée sans que la personne ait été mise à même tant de présenter ses observations sur les faits qui lui sont reprochés que d'avoir accès au dossier la concernant¹²⁰ ;
- Le droit au défenseur de son choix dès l'origine de la procédure de sanction¹²¹ et la faculté de solliciter l'audition de témoins¹²² ;
- La motivation en fait comme en droit au stade du prononcé de la sanction afin de permettre à l'intéressé de contester la mesure prise¹²³ ;
- La possibilité d'exercer un recours hiérarchique et contentieux contre la sanction.

14. Quels types d'autorités sont impliqués dans la décision d'imposer des sanctions administratives ?

La répression administrative est traditionnellement confiée par le législateur aux autorités de l'Etat, c'est-à-dire les autorités ministérielles et leurs représentants, le plus souvent les préfets.

Sont également titulaires d'un pouvoir de sanction des organismes investis de missions disciplinaires et/ou de contrôle, de surveillance et de régulation. Il s'agit entre autres de juridictions administratives spécialisées (comme la Cour de discipline budgétaire et financière ou le Conseil supérieur de la magistrature) et d'autorités administratives indépendantes.

Les autorités administratives indépendantes dotées d'un pouvoir de sanction sont notamment les suivantes :

- Le Conseil supérieur de l'audiovisuel (L. n° 86-1067, 30 sept. 1986) ;
- L'Autorité de la concurrence (C. com., art. L462-6) ;
- L'Autorité des marchés financiers (C. monét. Fin., art. L.621-15 et s.) ;

¹¹⁶ CE, 14 mars 2005, *Gollnisch*, n° 278435.

¹¹⁷ CE, 24 mars 2006, *SA Martell & Co*, n° 257330.

¹¹⁸ CE, Sect., 5 mai 1944, *Trompier-Gravier*, *Rec. Leb.* p.133 ; CE, Sect., 26 février 1971, *Sieur Roze*, n° 73120.

¹¹⁹ Cons. const., n° 2006-535 DC du 30 mars 2006.

¹²⁰ Cons. const., 17 janvier 1989, déc. n°88-248 DC ; CE, *Avis*, 22 novembre 1995, n°171045 ; CE, 26 mars 1982, n° 20569.

¹²¹ CE, 9 février 2004, *Président du Sénat*, n° 257746 ; CE, 7 avril 2006, *Rodriguez*, n° 257624.

¹²² CE, 29 mars 2010, *M. Piard*, n° 323354.

¹²³ CE, 29 décembre 2000, *Treyssac*, n° 197739 202564 202565 (s'agissant de la révocation d'un sous-préfet) ; CE, 11 février 2011, *Société générale*, n°316508.

- La Commission nationale de l'informatique et des libertés (L. n° 2004-801, 6 août 2004) ;
- L'Autorité de régulation des communications électroniques et des postes (C. P et CE, art. L-36-11) ;
- L'Autorité de contrôle des nuisances aéroportuaires (C. aviation, art. L227-4) ;
- L'Autorité de régulation des jeux en ligne (L. n° 2010-476, 12 mai 2010) ;
- L'Autorité de régulation des activités ferroviaires et routières (L. n° 2009-1503, 8 déc. 2009)

15. Les autorités administratives ayant pouvoir de sanction respectent-elles les principes d'indépendance et d'impartialité ? la décision relative à la sanction est-elle susceptible de faire l'objet d'une revue judiciaire complet (sur le fond et les faits)? Quelles autorités judiciaires/tribunaux sont chargées de contrôler les sanctions administratives?

Indépendance et impartialité

Les autorités administratives titulaires d'un pouvoir de sanction sont soumises au respect des principes d'indépendance et d'impartialité subjective comme objective.

Le principe d'impartialité est un principe général du droit et s'impose donc à toute autorité administrative, en particulier dans l'exercice de son pouvoir de sanction¹²⁴.

Ce principe a d'ailleurs valeur constitutionnelle. En effet, si pendant un temps le Conseil constitutionnel a semblé réserver l'application du principe d'impartialité issu de l'article 16 de la Déclaration de 1789 aux seuls organismes exerçant des « fonctions juridictionnelles »¹²⁵, sa jurisprudence a depuis évolué et, désormais, il exige le respect de ce principe par toute autorité administrative « *non soumise au pouvoir hiérarchique du ministre* » et exerçant un pouvoir de sanction¹²⁶.

a) Le cumul des fonctions

Dans sa décision *COB*¹²⁷ *c/Oury* du 5 février 1999, la Cour de cassation a jugé que le rapporteur chargé de l'instruction de l'affaire ne pouvait pas participer ensuite au délibéré sans méconnaître le principe d'impartialité.

A la faveur de deux affaires, le Conseil d'Etat a quant à lui distingué trois fonctions dans le cadre des procédures répressives¹²⁸, à savoir :

- la fonction d'accusation qui correspond au déclenchement de la procédure ;
- la fonction d'instruction ; et
- la fonction de jugement entendue *lato sensu*, c'est-à-dire la fonction correspondant au prononcé de la sanction.

Pour le Conseil d'Etat, le cumul des fonctions d'instruction et de jugement ne saurait être systématiquement prohibé au nom de l'impartialité objective. En revanche, la fonction d'accusation qui se traduit par la faculté de saisir l'organe investi du pouvoir de sanction, de formuler ou d'élargir les griefs et de classer l'affaire, est incompatible avec celle de jugement. Elle comprend en effet un préjugement qui révèle un risque de partialité objective.

¹²⁴ CE, Sect., 27 avril 1988, n°66650 ; CE, Ass., 3 décembre 1999, Didier, n°207434.

¹²⁵ Cons. const., 2 décembre 2011, 2011-200 QPC.

¹²⁶ Cons. const., 9 mars 2017, n° 2016-616/617 QPC, s'agissant de la Commission nationale des sanctions.

¹²⁷ La Commission des Opérations de Bourse et le Conseil des marchés financiers ont fusionné au sein de l'Autorité des marchés financiers, créée par la loi du 1^{er} août 2003.

¹²⁸ CE, Ass., 3 décembre 1999, *M. Didier* (relative au Conseil des marchés financiers), n°207434 ; CE, Sect., 3 décembre 1999, *M. Leriche* (sanction disciplinaire du conseil national de l'Ordre des médecins), n°195512.

Ainsi, dans sa décision *Didier* du 3 décembre 1999, le Conseil d'Etat a estimé que la participation du rapporteur devant le Conseil des marchés financiers statuant en matière disciplinaire, aux débats et au vote à l'issue desquels le Conseil inflige des sanctions, ne méconnaît pas le principe d'impartialité, dès lors que ce rapporteur n'est pas à l'origine de la saisine, ne participe pas à la formulation des griefs, n'a pas le pouvoir de classer l'affaire ou, au contraire, d'élargir le cadre de la saisine et que sa mission d'investigation ne l'habilite pas à faire des perquisitions, des saisies, ni à procéder à toute autre mesure de contrainte au cours de l'instruction.

Cette interprétation de l'article 6, § 1, de la Convention EDH par le Conseil d'Etat a été confortée par la décision d'irrecevabilité rendue par la Cour EDH dans cette affaire. La Cour a en effet estimé que le cumul des fonctions d'instruction et de jugement était compatible avec le respect de l'impartialité garanti à l'article 6, § 1, de ladite convention eu égard à la nature et à l'étendue des tâches du rapporteur durant la phase d'instruction¹²⁹.

Le Conseil constitutionnel a développé la même jurisprudence, notamment dans deux contentieux mettant en cause la Commission bancaire¹³⁰, aujourd'hui devenue l'Autorité de contrôle prudentiel et de résolution, et l'Autorité de régulation des communications électroniques et des postes¹³¹.

Contrôle juridictionnel des sanctions

Plusieurs voies de recours permettent de soumettre les sanctions administratives au contrôle du juge administratif. Le justiciable à qui l'administration a infligé une sanction peut la contester devant le juge administratif, par les différentes voies de recours que sont le recours pour excès de pouvoir et le recours de plein contentieux¹³². La voie de recours ouverte dépend du type de sanction contestée, étant observé que le champ du recours de plein contentieux s'étend.

Notons toutefois que la compétence du juge administratif en matière de sanctions administratives n'est pas totale ; le juge judiciaire est ainsi par exemple compétent pour apprécier la légalité des sanctions prononcées par l'Autorité de la concurrence (loi n°87-499 du 6 juillet 1987).

En outre, depuis 1987, le Conseil constitutionnel fait de la possibilité d'obtenir la suspension de l'exécution d'une sanction administrative une garantie de rang constitutionnel. Il considère que *« compte tenu de la nature non juridictionnelle du Conseil de la concurrence, de l'étendue des injonctions et de la gravité des sanctions pécuniaires qu'il peut prononcer, le droit pour le justiciable formant un recours contre une décision de cet organisme de demander et d'obtenir, le cas échéant, un sursis à l'exécution de la décision attaquée constitue une garantie essentielle des droits de la défense »*¹³³. Les procédures de référé-suspension peuvent ainsi trouver à s'appliquer.

Le contrôle exercé par le juge administratif sur les sanctions administratives s'est approfondi :

- en étendant le nombre d'actes susceptibles de lui être déférés (notamment s'agissant des sanctions infligées à des détenus : alors que pendant longtemps les décisions de l'administration pénitentiaire étaient considérées comme des mesures d'ordre intérieur donc insusceptibles de recours, la ligne de partage entre une telle mesure et l'acte susceptible d'annulation a ensuite reposé sur un critère de gravité que le juge appréciait

¹²⁹ CEDH, 27 août 2002, *Didier c. France*, n°581888/00.

¹³⁰ Cons. const., n° 2011-200 QPC du 2 décembre 2011 : *« les dispositions contestées, en organisant la Commission bancaire sans séparer en son sein, d'une part, les fonctions de poursuite des éventuels manquements des établissements de crédit aux dispositions législatives et réglementaires qui les régissent et, d'autre part, les fonctions de jugement des mêmes manquements, qui peuvent faire l'objet de sanctions disciplinaires, méconnaissent le principe d'impartialité des juridictions »*.

¹³¹ Cons. const., n° 2013-331 QPC du 5 juillet 2013 : le principe d'impartialité était méconnu car n'était pas assurée la séparation au sein de l'Autorité entre, d'une part, les fonctions de poursuite et d'instruction des éventuels manquements et, d'autre part, les fonctions de jugement des mêmes manquements.

¹³² Le recours pour excès de pouvoir consiste en un contrôle de la légalité de la décision administrative exclusivement alors que le recours de plein contentieux prend la forme d'un contrôle plus complet qui permet au juge administratif de réformer ou modifier l'acte prononçant la sanction.

¹³³ Cons. const., 23 janvier 1987, n°86-224 DC.

à compter de 1995 au regard de la nature et de l'importance des effets de la sanction. Depuis 2007, le juge raisonne par catégories de décisions ce qui a permis une nouvelle extension du champ d'intervention du juge. Ainsi désormais depuis 2014, toute sanction disciplinaire prise à l'encontre des détenus, y compris un avertissement, constitue un acte faisant grief susceptible de faire l'objet d'un recours pour excès de pouvoir¹³⁴ ;

- en se livrant à un contrôle de plus en plus approfondi de la sanction (en excès de pouvoir, passage du contrôle restreint au contrôle de proportionnalité de la sanction prononcée au manquement en matière de sanctions professionnelles¹³⁵, des sanctions prononcées par le ministre de la justice à l'encontre des magistrats du parquet¹³⁶, des sanctions infligées par une fédération sportive pour faits de dopage¹³⁷ et sur la décision de révoquer un maire¹³⁸. Cette évolution s'est achevée avec les décisions *Dahan* depuis lesquelles le juge de l'excès de pouvoir exerce un contrôle normal sur les sanctions infligées aux agents publics et aux détenus¹³⁹. Par ailleurs, on observe un accroissement du glissement du recours pour excès de pouvoir au recours de plein contentieux (e.g. des sanctions administratives prononcées par Pôle Emploi en matière de revenu de remplacement des demandeurs d'emploi¹⁴⁰, des sanctions de retrait de points du permis de conduire¹⁴¹ ou encore des décisions de retrait de carte de séjour des résidents¹⁴²).

IV. Coopération et coordination

21. Au niveau national, les autorités respectives se coordonnent-elles/coopèrent-elles lorsqu'elles infligent des sanctions pénales et administratives ?

L'existence, la nature et le quantum des sanctions éventuellement prononcées par ailleurs fait évidemment partie des critères pris en compte.

En outre, lorsque pour un même fait, les autorités pénales et administratives sont amenées à prononcer de manière cumulative des sanctions, des mécanismes de coordination peuvent être prévus par les textes.

Ainsi, le code du travail, en cas de constatation d'une infraction de travail illégal, prévoit que la mesure de fermeture administrative d'établissement d'une durée de trois mois pouvant être prononcée par l'autorité administrative s'articule avec la fermeture judiciaire de l'établissement prononcée à titre de peine complémentaire : la première est levée de plein droit en cas de décision de relaxe ou de non-lieu au pénal, et en cas de condamnation, sa durée s'impute sur une éventuelle peine complémentaire de fermeture.

De la même manière, et toujours en matière de travail illégal, la sanction administrative d'exclusion temporaire des marchés publics s'articule avec l'exclusion prononcée à titre de peine complémentaire.

En outre, dans les cas où la jurisprudence a prohibé l'application cumulative des sanctions administratives et pénales en application du principe *non bis in idem*, plusieurs mécanismes existent afin d'assurer la bonne coordination des sanctions.

Ainsi, à la suite de la décision du Conseil Constitutionnel du 18 mars 2015, la loi n° 2016-819 du 21 juin 2016, tout en maintenant une voie répressive administrative et une voie répressive pénale, proscrie désormais tout cumul de poursuites en matière de répression des abus de marché et, afin de déterminer la voie répressive la plus appropriée, organise une procédure de concertation et d'arbitrage entre l'autorité judiciaire et l'autorité des marchés financiers. Chacune

¹³⁴ CE, 21 mai 2014, *Garde des sceaux, ministre de la justice c/ Mme G*, n° 359672.

¹³⁵ CE, Sect., 22 juin 2007, *Patrick Arfi*, n° 272650.

¹³⁶ CE, 27 mai 2009, *H.*, n° 310493, Rec.

¹³⁷ CE, 2 mars 2010, *Fédération française d'athlétisme*, n° 324439, T.

¹³⁸ CE, 2 mars 2010, *D.*, n° 328843, Rec.

¹³⁹ CE, Ass., *M. D.*, n° 347704, Rec. ; CE, 1^{er} juin 2015, *M. B.*, n° 380449, Rec.

¹⁴⁰ CE, 23 février 2011, *C.*, n° 332837, T.

¹⁴¹ CE, Avis, 9 juillet 2010, *B.*, n° 336556, Rec.

¹⁴² CE, 10 juin 2009, *Z.*, n° 318898, T.

des deux autorités doit s'informer mutuellement lorsqu'elles entendent engager des poursuites et une procédure de règlement des conflits positifs de compétence est prévue.

De même pour certaines infractions au droit pénal du travail et en application de la jurisprudence du Conseil Constitutionnel du 18 mars 2015 validant le cumul des sanctions sous réserve, le Ministère de la justice¹⁴³ a attiré l'attention des magistrats du parquet sur la nécessité d'échanger avec l'autorité administrative au préalable afin de décider de la mise en œuvre alternative de la sanction pénale ou administrative.

22. Au niveau européen, les autorités respectives se coordonnent-elles/coopèrent-elles lorsque des procédures/sanctions administratives sont applicables dans un Etat et des dispositions pénales dans l'autre ? Veuillez également mentionner ici les situations dans lesquelles seules les sanctions administratives peuvent être imposées à une personne morale dans un Etat alors que le droit de l'autre Etat prévoit la responsabilité pénale des personnes morales.

22.1. Si oui, au moyen de quel(s) mécanisme(s) / instruments juridiques?

Dans le cadre de la décision d'enquête européenne prévue par la directive 2014/41/UE du 3 avril 2014, l'article 694-29 du code de procédure pénale prévoit que « *cette décision peut concerner, dans l'Etat d'émission, soit des procédures pénales, soit des procédures qui ne sont pas relatives à des infractions pénales mais qui sont engagées contre des personnes physiques ou morales par des autorités administratives ou judiciaires pour des faits punissables dans l'Etat d'émission au titre d'infractions aux règles de droit et par une décision pouvant donner lieu à un recours devant une juridiction compétente, notamment en matière pénale* ». Ces dispositions concernent principalement l'Allemagne, dont le droit permet notamment le prononcé en matière d'infractions routières de sanctions administratives pouvant faire l'objet d'un recours devant une juridiction.

22. 2. Des problèmes se sont-ils produits ? Lesquels ?

Aucun problème n'a été porté à notre connaissance.

¹⁴³ Circulaire du Ministère de la justice du 18 juillet 2016, n° 2016-00031.

GERMANY

I. General questions

62. Does your national law provide for administrative offences, allowing to impose administrative sanctions against natural persons, which are comparable to criminal sanctions? If so, what categories/types of administrative sanctions comparable to criminal sanctions exist in your legal system (e.g. punitive and/or preventive measures, such as fines, disqualifications, etc.)?

German law does not recognise the terms “administrative offences” and “administrative sanctions” as such. A fundamental distinction is made between the following sanctioning options and categories:

Criminal law (sanction: custodial sentence, fine, driving ban as an ancillary penalty, as well as ancillary consequences such as the loss of the capacity to hold, or be elected to, public office and the right to vote)

Law governing regulatory offences (sanction: regulatory fine, ancillary consequences: confiscation of objects, possible driving ban in the case of traffic offences).

In addition, behaviour which is prohibited by law can also lead to sanctioning via other administrative law channels (e.g. a prohibition on trading in the event of trader unreliability, section 35 (1) of the Act Regulating the Conduct of Trade).

“Core criminal law”, which in its broadest sense also comprises the law governing regulatory offences, is codified in the Criminal Code [*Strafgesetzbuch* – StGB] and the Act on Regulatory Offences [*Gesetz über Ordnungswidrigkeiten* – OWiG]. Furthermore, many criminal provisions and regulatory fine provisions can be found in over 400 specialist statutes and an even greater number of statutory instruments (known as “supplementary criminal law”).

63. How do you define an administrative and a criminal offence/sanction?

63.1. How do you distinguish the two?

A regulatory offence can be distinguished from a criminal offence based on the type of imposed sanction; they represent completely separate categories (cf. decisions of the Federal Constitutional Court 27, 18, 30). While criminal offences always result in a criminal penalty, the regulatory fine as a punishment for a regulatory offence does not express a judgment of socio-ethical disapproval and lacks the “severity of State punishment” (cf. decisions of the Federal Constitutional Court 22, 78, 81; 27, 18, 33; 45, 272, 288; Federal Court of Justice 11, 266; NJW 93, 3081).

One key difference between regulatory fine proceedings and criminal proceedings is that in criminal proceedings the sanction can be imposed only by a judge, while in regulatory fine proceedings it is generally the administrative authority that issues the regulatory fine order in lieu of a judge (section 35 (1) OWiG).

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

No.

63.3. If so, to what extent?

64. 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 the respective added value of administrative and criminal sanctions? Please provide representative examples.

Regulatory offences are violations which entail a considerably lower degree of wrongdoing (KK OWiG/*Rogall* before section 1 margin no. 1). In 1968, for example, the traffic violations that previously constituted criminal offences were re-classified as regulatory offences. The resulting “decriminalisation” was significantly influenced by the large number of violations. The OWiG reform of 1968 aimed mainly at harmonising supplementary criminal law and easing the burden in this area (cf. Bundestag printed paper V/1319 p. 51).

In summary, therefore, it can be said that the law governing regulatory offences is used particularly when the behaviour violating the legal order is reprehensible only to a lesser degree.

Examples of this include the following: Where a person kills wild game without reasonable justification for doing so, a regulatory fine can be imposed on him pursuant to section 69 (3) no. 7 of the Act on Nature Conservation and Landscape Management [*Bundesnaturschutzgesetz* – BNatSchG]. If, in addition, the act is accompanied by a violation of another person’s hunting rights, it will constitute the criminal offence of poaching under section 292 StGB.

As a further example, section 71 BNatSchG also contains certain criminal provisions. Here, for instance, the regulatory offence (e.g. capturing wild game, section 69 (2) no. 1 letter a BNatSchG) is supplemented by the strict protection afforded to the animal in question; together, they form the elements of a criminal offence (see section 71 (1) no. 1 BNatSchG).

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

65.1. Art. 4 of the Convention on the protection of the environment through criminal law (ETS 172).¹⁴⁴

Germany has not ratified this Convention.

65.2. Art. 78 (3) of the Council of Europe Convention on preventing and combating violence against women and domestic violence (ETS 210).¹⁴⁵

Article 78 (3) of the Council of Europe Convention on preventing and combating violence against women and domestic violence sets forth a particular type of reservation with regard to Articles 33 (psychological violence) and 34 (stalking). According to that provision, States Parties may reserve the right to provide for non-criminal sanctions, instead of criminal sanctions, for the behaviours referred to in the above-mentioned Articles. Germany has not availed itself of this possibility. German criminal law contains comprehensive rules on criminal sanctions for the behaviours described in Articles 33 and 34.

65.3. 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

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

¹⁴⁴ <https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168007f3f4>

¹⁴⁵ <https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168008482e>

Yes. For example, minor offences under traffic law (speeding, parking violations) which can be sanctioned with a cautionary fine.

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

Pursuant to section 21 OWiG, if an act constitutes both a criminal offence and a regulatory offence, only the criminal sanction is to be imposed. The incidental consequences stipulated in the other statute may be imposed. If a criminal penalty is not imposed, the act can still be punished as a regulatory offence. This rule is based on the assumption that a criminal penalty always has a greater effect than a regulatory fine, and that the degree of wrongdoing involved in a criminal offence generally exceeds that of a regulatory offence.

In addition, the “*ne bis in idem*” principle only applies to the law governing regulatory offences to a limited extent. Pursuant to section 81 (1) OWiG, a court may re-classify a legally effective regulatory fine order as a criminal offence during proceedings. However, the court must take the administrative sanction (i.e. the regulatory offence) into account during sentencing (cf. decisions of the Federal Constitutional Court 21, 378, 388).

68. In your view: is the *ne bis in idem* applicable in case both tracks apply? Can you give examples of relevant national case law in this respect?

Yes, the principle applies subject to the limitation described above. Pursuant to section 84 (1) OWiG, an offence can no longer be prosecuted as a regulatory offence if a court has already rendered a decision on the offence as a criminal offence or as a regulatory offence.

For example, Berlin Higher Regional Court ruled (in its decision of 12 October 2018 – 3 Ws (B) 250/18) that an insult (as a criminal offence under section 185 StGB) committed immediately after a traffic violation (as a regulatory offence) would also preclude prosecution of the regulatory offence.

Cologne Higher Regional Court (NStZ-RR 2017, 150-151) also ruled that an existing, legally effective judgment for drug possession (as a criminal offence) would preclude prosecution in regulatory fine proceedings for driving a motor vehicle under the influence of an intoxicating substance. This would require an internal connection between the offences e.g. if the purpose of the journey were to maintain or safeguard possession of the drugs.

III. Identification of main differences between administrative and criminal tracks

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

Substantive law

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

Under the law governing regulatory offences, the concept of “perpetrator” is unified, with no distinction between other forms of participation (e.g. co-perpetrator, instigator, accessory). Each participant is deemed to have committed a regulatory offence regardless of how he/she contributed to fulfilling the factual elements of the offence (section 14 OWiG).

General principles

70. Are administrative sanctions governed by general principles of administrative law or general principles of criminal law (such as proportionality, *nullum crimen sine lege*, legality, *lex mitior*, non-retroactivity etc)?

General constitutional principles are of equal importance for criminal provisions and regulatory fine provisions. In particular, the principle of legal clarity and certainty set out in Article 103 (2) of the Basic Law [*Grundgesetz – GG*] (non-constitutional manifestation in section 3 OWiG) is applied, as is the principle of guilt and the principle of proportionality with its prohibition of excessive punishment. Furthermore, the principle of *lex mitior* is also applicable under the law governing regulatory offences, cf. section 4 (3) OWiG.

The principle of legality, however, is not applicable under the German law governing regulatory offences. Regulatory offences are prosecuted in accordance with the principle of discretionary prosecution, cf. section 47 (1) OWiG. It therefore lies within the authority's duty-bound discretion to prosecute the offence.

Procedural law

71. Do typical criminal procedural rights apply in case of administrative offences/sanctions (such as presumption of innocence, right to be heard, right of access to the case-file, right to remain silent)?

The provisions of general statutes on criminal proceedings, namely the Code of Criminal Procedure [*Strafprozessordnung – StPO*], the Courts Constitution Act [*Gerichtsverfassungsgesetz – GVG*] and the Youth Courts Act [*Jugendgerichtsgesetz – JGG*], apply *mutatis mutandis* to regulatory fine proceedings. This means that the presumption of innocence in particular also applies in regulatory fine proceedings (derived from the rule-of-law principle). Likewise, prohibitions on the gathering and using of evidence also apply.

72. What kind of authorities are involved in the decision to impose administrative sanctions

In regulatory fine proceedings, the decision is initially taken by the administrative authority with local and substantive jurisdiction (section 36 OWiG). Following an objection to the regulatory fine notice, the proceedings are transferred to the competent public prosecutor's office, which then submits the files to the competent local court for decision (sections 67 et seqq. OWiG).

73. Do administrative authorities vested with a sanctioning power comply with the principles of independence and impartiality? Is the decision on the sanction subject to a full judicial review (in law and in facts)? Which judicial authorities/courts are in charge of reviewing administrative sanctions?

The administrative authorities are independent and impartial in their decisions and act in accordance with the law. The decisions taken by administrative authorities can be reviewed by a court. Depending on the content of the decision, this can either be the local courts (objection to a regulatory fine notice under OWiG) or administrative courts (rescission of a burdensome administrative act, cf. example of revoking a trade permit, see question 2 above).

During objection proceedings against regulatory fines, both legal and factual aspects are examined (cf. section 71 (2) OWiG, according to which the court may order evidence to be taken).

As a rule, it is possible to file an appeal against a burdensome administrative act. An action then has to be brought during the subsequent proceedings.

IV. Cooperation and coordination

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

Criminal law takes precedence. In criminal proceedings, the public prosecutor's office has primary competence, cf. section 40 OWiG. If a regulatory offence has been committed and there are indications that the offence also constitutes a criminal offence, the administrative authority will transfer the case to the public prosecutor's office. If the public prosecutor's office dispenses with initiating criminal proceedings, it will send the case back to the administrative authority, cf. section 41 OWiG.

22. At the European level, do respective authorities coordinate / cooperate when administrative procedures / sanctions are applicable in one State and criminal law provisions in the other? Please refer here also to situations where only administrative sanctions may be imposed against a legal person in one State whereas the law of the other State provides for criminal liability of legal persons.

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

In Germany, it is possible to provide legal assistance in "criminal matters" regardless of whether the offence in question is regulated by criminal or administrative procedure. The Act on International Legal Assistance in Criminal Matters [*Gesetz über die internationale Rechtshilfe in Strafsachen* – IRG] explicitly includes administrative offences provided that a court of criminal jurisdiction can determine the sentence (section 1 (2) IRG, comparable to Article 1 (3) of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS 082)). This means that, as a rule, all instruments of legal assistance can be called upon for international cooperation in matters of criminal law.

22. 2. Have problems occurred? Which ones?

The different types of offence (criminal offence or administrative offence) generally cause few problems in the field of mutual legal assistance. The permissible powers of intervention for assisting in the prosecution may vary in administrative or criminal proceedings.

There have been instances of mutual legal assistance requests – e.g. regarding the German criminal offences of social benefit fraud (section 263 StGB) or the non-payment and misuse of wages and salaries (section 266a StGB) – being rejected in the past by certain requested States Parties with reference to the fact that the procedure in their State is governed by administrative law and does not provide for any coercive measures for data collection that would be comparable to criminal law. This mainly applies to mutual legal assistance proceedings involving Turkey.

IRELAND

Introduction

Ireland is a common law jurisdiction with a written constitution. Procedure in civil, criminal and administrative proceedings in the Irish courts is subject to the requirements for fair procedures and the other rights of persons protected by the Constitution of Ireland/ Bunreacht na hÉireann 1937¹, primary² and secondary legislation³ and the common law established by precedent. The Irish courts also rely on the precedential value from the jurisprudence of other common law States, for example, the English courts. Such interpretation may only occur subject to the supremacy of constitutional rights.

Articles 34, 37 and 38 of the Irish Constitution bear particular relevance in respect of the question of imposition of administrative sanctions.⁴ In the context of Ireland's membership of the EU, Article 29.6⁵ of the Constitution is relevant, providing as it does for the supremacy of EU law over domestic law. Accordingly, notwithstanding Irish Constitutional provisions, it is clear that where administrative sanctions are necessitated under EU law, they are operable in Ireland. This will have been seen recently in the financial services sector and under the General Data Protection Regulation.

Outside of an EU context, however, the constitutional context set by Articles 34, 37 and 38 gave rise to widespread misgivings as to whether the use of administrative financial sanctions would entail the "administration of justice", a domain reserved for judges and the Courts. Consequently, the use of on the spot fines or fixed penalty notices for parking, speeding and other minor road traffic matters,

1 See Article 40.3.2° which provides: "The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen". This provision has been interpreted by the courts to require procedure rights such as the right to cross-examine, by counsel, one's accusers: see *In re Haughey* [1971] 1 I.R. 218. For jurisprudence on procedural rights arising under the "right to a good name" see also *Maguire v Ardagh* [2002] 1 I.R. 419 and *M v Medical Council* [1984] I.R. 485. . Under the Constitution, the determination of all matters with a constitutional dimension arises in the High Court, the Court of Appeal and the Supreme Court ("the Superior Courts").

2 Including the *European Convention on Human Rights Act 2003* which introduces *the Convention for the Protection of Human Rights and Fundamental Freedoms* done at Rome on the 4th day of November, 1950 into Irish law.

3 Including for example rules of court which are made by Superior Courts Rules Committee, constituted pursuant to the provisions of the *Courts of Justice Act 1936*, section 67, and reconstituted pursuant to the provisions of the *Courts of Justice Act 1953*, section 15, by virtue of the powers conferred upon us by the *Courts of Justice Act 1924*, section 36, the *Courts of Justice Act, 1936*, section 68 (as applied by the *Courts (Supplemental Provisions) Act 1961*, section 48), the *Courts (Supplemental Provisions) Act 1961*, section 14.

4 Article 34.1 provides that "*Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public*". Article 37.1 provides that "*Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution*". Article 38 provides that "*No person shall be tried on any criminal charge save in due course of law*".

5 Article 29.6° provides that "*No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State, before, on or after the entry into force of the Treaty of Lisbon, that are necessitated by the obligations of membership of the European Union referred to in subsection 5 of this section or of the European Atomic Energy Community, or prevents laws enacted, acts done or measures adopted by:*

(i) *the said European Union or the European Atomic Energy Community, or institutions thereof,*

(ii) *the European Communities or European Union existing immediately before the entry into force of the Treaty of Lisbon, or institutions thereof, or*

(iii) *bodies competent under the treaties referred to in this section, from having the force of law in the State*".

littering, together with, in the Revenue sphere, tax geared civil penalties, all provided an opportunity to an offender/recipient of sanction to acquiesce in the sanction proposed or else face court action which could (i.e. a judicial discretion vested) impose the proposed or a higher sanction or penalty.

The case of *Purcell v Central Bank of Ireland*⁶ addressed these concerns in 2016. The applicant challenged the jurisdiction of the Central Bank to hold an inquiry under its Administrative Sanctions Procedure (ASP inquiry). It was argued by the applicant that the ASP inquiry engaged in the exercise of judicial power, contrary to Article 34 of the Constitution. In order to succeed in this argument, all 5 of the *indicia* of the administration of justice, as set out by the High Court in *McDonald v Bord na gConz*⁷, would have to have been satisfied. Under this test, the administration of justice may be taken to have the following characteristics or requirements:

- i. a dispute or controversy as to the existence of legal rights or a violation of the law;
- ii. the determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty;
- iii. the final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties;
- iv. the enforcement of those rights or liabilities or the imposition of a penalty by the
- v. court by the executive power of the State which is called in to enforce its judgment; and
- vi. the making of an order by the Court which as a matter of history is an order characteristic of courts in this country.

In *Purcell*, the High Court (Hedigan J) examined each of these 5 criteria as applied to the administrative sanctions procedure of the Central Bank, and rejected the argument that the ASP inquiry involved the administration of justice. In fact, the Court concluded that the ASP inquiry met none of the criteria concerning the administration of justice.

Of particular relevance to administrative financial sanctions is the fourth criterion. When applying the test, the High Court drew attention to the fact that the imposition of any sanction by an Inquiry is not self-executing. Sanctions imposed are not enforceable as a judgment. Section 33AW(2) of the *Central Bank Act 1942* provides that any monetary penalty or costs order only takes effect when the decision is confirmed by an order of the court of competent jurisdiction.

Purcell also considered whether the potential financial sanction could be characterised as the imposition of a criminal penalty. In finding that it did not, the Court relied on the fact that Part IIIA of the 1942 Act provided separately for criminal offences. It noted that the role of a criminal trial is something completely distinct from financial regulation. The function of a criminal trial is solely to determine whether an accused is guilty or not guilty of a specified offence.

Finally, and in relation to Article 38 of the Constitution, it was submitted by the applicant that Part IIIC of the 1942 Act goes beyond mere investigatory powers. The High Court rejected this, finding that the procedure was in fact merely an inquiry to determine whether contraventions of the legislation had occurred.

Purcell has now settled the issue of whether administrative financial sanctions are constitutionally permissible, even where not necessitated by EU law. The assessment of whether a non-judicial regime is engaged (impermissibly) in the “administration of justice” will, however, be a fact and context specific enquiry to be engaged in by a court where the regime is constitutionally challenged. *Purcell* is cited as supporting administrative sanctions within the financial and analogous sectors and has been cited by Ireland’s Law Reform Commission⁸, in support of expanding the use of administrative sanctions in the financial and regulatory sector.

I. General questions

1. Does your national law provide for administrative offences, allowing to impose administrative sanctions against natural persons, which are comparable to criminal sanctions? If so, what categories/types of administrative sanctions comparable to criminal sanctions exist in your legal system (e.g. punitive and/or preventive measures, such as fines, disqualifications, etc.)?

Administrative financial sanctions are currently provided for in legislation concerning financial services, taxation, regulation of property services, broadcasting and energy regulation. They are imposable both against natural and legal persons. It is important to note, in respect of administrative financial sanctions, that they are imposed in respect of “contraventions” of specific legislative or administrative provisions. They are not phrased as “offences”, a term reserved for contraventions of criminal law which “offences” may only be tried, as required by Article 38 of the Constitution, “in due course of law”. Criminal offences require to be tried before a Judge. It is however permissible for matters, which might also potentially amount to an offence under criminal law, to be dealt with by way of administrative sanction

2. How do you define an administrative and a criminal offence/sanction?

2.1. How do you distinguish the two?

Administrative sanctions are more clearly defined by what they are not than what they are. They do not entail the administration of justice (see treatment above) and accordingly do not require to be tried in a court of law. Criminal offences require to be tried in a court of law.

2.2. Has the Engel jurisprudence influenced the categorisation of sanctions in your national system?

Not considerably. The categorisation of and permissibility of sanctions has been broadly dealt with on an analysis of the provisions of the Irish Constitution above referred to and has largely focussed on an analysis of whether a particular regime is engaged in “the administration of justice”.

2.3. If so, to what extent?

See 2.2. above

3. 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 the respective added value of administrative and criminal sanctions? Please provide representative examples.

See reply to 1 above. It has been acknowledged by the Law Reform 2018 Report, cited above, that administrative sanctions can give rise to speedier process and be significantly more cost effective.

6 [2016] IEHC 514

7 [1965] IR 217

8 Law Reform Commission Report on Regulatory Powers and Corporate Offences, October 2018

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

4.1. Art. 4 of the Convention on the protection of the environment through criminal law (ETS 172).⁹

This has not been signed or ratified by Ireland.

4.2. Art. 78 (3) of the Council of Europe Convention on preventing and combating violence against women and domestic violence (ETS 210).¹⁰

This Convention was signed by Ireland on 5th November, 2015. Active preparation for ratification is underway, entailing significant legislative change so as to update Ireland’s Domestic Violence legislation. The existing legislation criminalises, subject to prosecution and enforcement under the criminal code, contraventions and offences relating to domestic violence and coercion. The subject matter is not such as to be deemed appropriate in this jurisdiction for administrative sanctions, requiring enforcement under the criminal code. It is not proposed to provide for administrative sanctions in any further legislation required as precursor to ratification.

4.3. 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

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

Yes. For example, section 1053 of the Taxes Consolidation Act, 1997 (“TCA”), provides that the sanction for fraudulently making incorrect tax returns is not criminal in nature, it is an administrative financial sanction calculated in accordance with the provisions of s.1053 (in case of a natural person – twice the amount of tax owed together with potential penalty of €315). If the penalty is not paid, recovery can be sought through civil proceedings in the High Court. Separate provision is made, however, under section 1078 of the TCA which renders criminal and subject to prosecution through the court process a range of offences one of which is correlates to the prohibited behaviour also caught by section 1053 – “A person shall, without prejudice to any other penalty to which the person may be liable, be guilty of an offence under this section if the person...knowingly or wilfully delivers any incorrect return, statement or accounts or knowingly or wilfully furnishes any incorrect information in connection with any tax”.

The Central Bank ASP procedure treated of in Purcell provides for administrative sanctions only. Where conduct might also comprise a criminal offence it is not dealt with as such under an ASP inquiry, it is dealt with by prosecution, where prosecution is deemed appropriate.

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

Yes, see 5 above for an example.

9 <https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168007f3f4>
10 <https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168008482e>

7. In your view: is the ne bis in idem applicable in case both tracks apply? Can you give examples of relevant national case law in this respect?

Yes, EU law, directly applicable and having supremacy in the Irish legal order supplies examples. The principle of ne bis in idem, as provided for under Article 50 of the Charter, is directly applicable. This was recently confirmed by the Grand Chamber of the Court of Justice in Case C-537/16 *Garlsson Real Estate SA*. Member State law can provide for the possibility of criminal penalties as well as administrative penalties in respect of the same conduct, and where such legislation is silent on the extent, if any, to which penalties under both regimes can be applied concurrently, the principle of ne bis in idem laid down by Article 50 of the Charter is directly applicable and applies to prohibit a person being subjected to an additional penalty. The recent decision of the Grand Chamber of the Court of Justice in Case C-524/15 *Menci*, confirms that it is also possible in certain circumstances to provide for a system whereby penalties of a criminal nature can be imposed concurrently under criminal law and an administrative penalties regime.

III. Identification of main differences between administrative and criminal tracks

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

Substantive law

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

No. Aiding and abetting, if not a proscribed contravention itself, is not separately sanctioned in Irish administrative sanction regimes.

General principles

9. Are administrative sanctions governed by general principles of administrative law or general principles of criminal law (such as proportionality, nullum crimen sine lege, legality, lex mitior, non-retroactivity etc)?

Yes. Constitution of Ireland imposes fair procedures requirements under Article 40.3.1°. See *Fingleton v Central Bank of Ireland*¹¹ where the High Court determined that a person subject to Central Bank ASP had a right to a fair hearing which, it held, had not been impaired in that case, fair procedures having been elaborately provided for in the provisions of the Central Bank Act, 1942 and the guidelines drawn up by the Central Bank thereunder, coupled with appeal to an independent tribunal and further appeal to the High Court.

¹¹ [2016] IEHC 1

Procedural law

10. Do typical criminal procedural rights apply in case of administrative offences/sanctions (such as presumption of innocence, right to be heard, right of access to the case-file, right to remain silent)?

Yes. The level of procedural protection afforded may depend upon the nature of the sanction. If it is punitive¹², due process protections may apply. Likewise, if the sanction is “excessive and disproportionate to the administrative objectives to be achieved”¹³.

11. What kind of authorities are involved in the decision to impose administrative sanctions?

State bodies such as the Central Bank, Registrar of Companies, Broadcasting Authority, Communications Regulator, Commission for Energy Regulation, Property Services Regulatory Authority and the Revenue Commissioner. Most bodies mentioned operate in the sphere of regulation.

12. Do administrative authorities vested with a sanctioning power comply with the principles of independence and impartiality? Is the decision on the sanction subject to a full judicial review (in law and in facts)? Which judicial authorities/courts are in charge of reviewing administrative sanctions?

The bodies are subject to fair procedures requirements which include obligations of independence and impartiality. In several cases an appeal is provided for on law and on fact to an appeals tribunal (see, for example, the Central Bank Acts). Most cases will also provide for a statutory appeal to the High Court on a point of law and/or involvement of the High Court to confirm, affirm or vary the sanction to be imposed. Separately, it is open to aggrieved parties, where the body imposing the sanction is viewed as not acting in accordance with law or fair procedures, to seek leave from the High Court for Judicial Review. In circumstances where the High Court has already considered the matter, a fresh Judicial Review is unlikely to be entertained.

The High Court and, on appeal, the Court of Appeal and Supreme Court, are the courts charged with Judicial Review oversight of administrative sanctions.

IV. Cooperation and coordination

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

Regulators and prosecutors in Ireland act separately and independently of one another.

22. At the European level, do respective authorities coordinate / cooperate when administrative procedures / sanctions are applicable in one State and criminal law provisions in the other? Please refer here also to situations where only administrative sanctions may be imposed against a legal person in one State whereas the law of the other State provides for criminal liability of legal persons.

This Department is not aware of cross-border co-ordination or co-operation in respect of administrative sanctions.

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

22. 2. Have problems occurred? Which ones?

¹² Per the Supreme Court in *Enright v Ireland* [2003] 2 IR 321, where the majority found that it was not a punishment for sex offenders to be required to register on a register of sex offenders and, therefore, the retroactivity of the relevant legislation, which applied equally to offenders convicted before its passing and after its passing, did not offend against the Constitution

¹³ In *Registrar of Companies v Anderson* [2005] 1 IR 21 the Supreme Court held that fees imposed for late filing of company annual reports (which the Court classified as an "administrative penalty") did not constitute criminal penalty such as to offend against ne bis in idem or double jeopardy.

LATVIA

I. General questions

1. Does your national law provide for administrative offences, allowing to impose administrative sanctions against natural persons, which are comparable to criminal sanctions? If so, what categories/types of administrative sanctions comparable to criminal sanctions exist in your legal system (e.g. punitive and/or preventive measures, such as fines, disqualifications, etc.)?

Administrative sanctions are precisely regulated at national level. Latvian Administrative Violations Code Section 23 provides that for the commitment of an administrative violation administrative sanctions may be applied, such as a warning, a fine, the confiscation of the administrative violation object or the instrument of commitment, a forfeiture of special rights assigned to a person, a prohibition to obtain the right to drive a means of transport for a certain period of time, a prohibition for a specified period to obtain a license to drive a recreational craft, a forfeiture of rights to hold particular offices, or the forfeiture of rights to specified or all forms of commercial activities and administrative arrest.

Latvia also has an administrative procedure system that is regulated in the Administrative procedure law. Administrative procedure is a procedural mechanism for regulating legal relations between public government and natural persons. Although in administrative procedure institution can issue an administrative act that is a legal instrument that create consequences to the person (administrative acts establish, alter, determine or terminate specific legal relations or determine an actual situation), administrative procedure is not part of Latvian system of penalties, therefore only system of administrative violations is viewed in this questionnaire.

2. How do you define an administrative and a criminal offence/sanction?

Latvian Administrative Violations Code Section 22 provides that administrative sanction is the means of liability and shall be applied in order to educate a person, who has committed an administrative violation, in the spirit of law abiding and respecting provisions of social life, as well as in order to prevent the violator of the rights, as well as other persons, from committing new violations.

The Criminal Law Paragraph one of Section 35 provides that punishment as provided for in The Criminal Law is a compulsory measure which a court, within the limits of this Law, adjudges on behalf of the State against persons guilty of the commission of a criminal offence or in the cases provided for by law, determined by a public prosecutor by drawing up a penal order.

- a. How do you distinguish the two?

Mainly when determining whether or not there was a "criminal offence" or "administrative violation" criterion is the legal classification of the offence under national law. Factors like whether the legal rule has a punitive or deterrent purpose, nature of the offence can be taken also into consideration.

- b. Has the *Engel* jurisprudence influenced the categorisation of sanctions in your national system?
- c. If so, to what extent?

(Answer for 2.2. and 2.3.) Administrative Procedure Law Paragraph four of Section 15 directly states that when applying the legal norms of the European Union, institutions and courts must take into account European Court of Justice case law. Although, there is no direct reference to the application of the ECtHR case law, courts take it into account when they apply the European Convention of Human Rights.

According to previously mentioned, ECtHR case Engel and Others v. the Netherlands has influenced our national system. For example, Constitutional Court of the Republic of Latvia and Supreme Court has taken into account "Engel criteria" in many cases to determine whether or not there was a "criminal charge" (Judgment of the Supreme Court of March 12 2013, case No.SKA-88/2013; Judgment of Constitutional Court of November 5 2008, case No. 2008-04-01). Accordingly, "Engel criteria" has influenced the categorization of sanctions.

3. 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 the respective added value of administrative and criminal sanctions? Please provide representative examples.

Our national system uses administrative sanctions when the offence is not so serious as to deserve penal punishment. Administrative enforcement regime can be potentially more efficient, for example, the procedure is faster and less costly as compared to criminal proceedings, there are a great variety of measures that can be used (either an incentive effect or a coercive nature). Also, criminal liability is the most severe form of liability by the consequences to the person.

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

Latvia has not ratified any of mentioned conventions.

- a. Art. 4 of the Convention on the protection of the environment through criminal law (ETS 172).¹⁴⁶
- b. Art. 78 (3) of the Council of Europe Convention on preventing and combating violence against women and domestic violence (ETS 210).¹⁴⁷
- c. 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

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

There are many offences set out in our national law that provide for administrative sanctions only, for example, public intoxication (violation is set out in binding regulations of local governments), violation of prohibition on smoking, violation of regarding the use of the official language etc.

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

In Latvia, Latvian Administrative Violations Code, Criminal Law and Criminal Procedure Law stipulate the principle ne bis in idem. Latvian Administrative Violations Code Paragraph two of Section 9 provides that administrative liability shall arise regarding violations indicated in this Code, if criminal liability has not been provided for regarding these violations by the nature thereof in accordance with the laws in force.

Accordingly, either administrative or criminal sanction is excluded if one of them has been already effective.

¹⁴⁶ <https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168007f3f4>

¹⁴⁷ <https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168008482e>

7. In your view: is the *ne bis in idem* applicable in case both tracks apply? Can you give examples of relevant national case law in this respect?

Supreme Court of Latvia in judgment on November 22 2010, case No.SKA-428/2010 has declared that: " Tax fine can be considered a criminal penalty within the meaning of the European Convention for the Protection of Human Rights and Fundamental Freedoms. If a person is punished both with a tax fine and an administrative penalty for the same offense, the application of both penalties is contrary to the principle of *ne bis in idem*."

III. Identification of main differences between administrative and criminal tracks

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

Substantive law

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

Aiding and abetting in administrative enforcement regime is not sanctioned in national law.

General principles

9. Are administrative sanctions governed by general principles of administrative law or general principles of criminal law (such as proportionality, *nullum crimen sine lege*, legality, *lex mitior*, non-retroactivity etc)?

Administrative sanctions in our national law is governed by general principles, for example, *nullum crimen sine lege*, legality, non-retroactivity, principle of equality, right to the completion of proceedings in a reasonable term, right to the objective progress, right to defense etc.

Procedural law

10. Do typical criminal procedural rights apply in case of administrative offences/sanctions (such as presumption of innocence, right to be heard, right of access to the case-file, right to remain silent)?

Principles which are mentioned in Your question, such as, presumption of innocence, right to be heard, right of access to the case-file, are applied in administrative proceedings.

11. What kind of authorities are involved in the decision to impose administrative sanctions?

Latvian Administrative Violations Code Paragraph three of section 7 provides that administrative coercion measures shall be applied by authorized institutions and officials within the competence thereof and strictly in accordance with the law. For example, The State police institutions are entitled to examine administrative violation matters and to impose administrative sanctions, so as The State Revenue Service etc.

12. Do administrative authorities vested with a sanctioning power comply with the principles of independence and impartiality? Is the decision on the sanction subject to a full judicial review (in law and in facts)? Which judicial authorities/courts are in charge of reviewing administrative sanctions?

Only authorized institutions and officials within the competence and strictly in accordance with the law can impose administrative sanctions.

In our national system Latvia has some independent administrative bodies which are established and authorized to deal with the matters of economic and financial domain (for

example, Financial and Capital Market Commission, Competition Council) and some has functional independence (independence from institutionally higher authority).

Decision on the sanction is subject to a full judicial review - the court of first instance and the court of appellate instance.

Person who has been held administratively liable, as well as the victim may appeal a decision rendered by a higher authority to the district (city) court. A decision in an administrative violation matter may be appealed.

IV. Cooperation and coordination

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

Section 9 of Latvian Administrative Violations Code state that administrative liability arises regarding violations indicated in Latvian Administrative Violations Code, if criminal liability has not been provided for regarding these violations by the nature thereof in accordance with the laws in force. Section 37 of Latvian Administrative Violations Code states the possibility to impose administrative violation if the initiation of criminal proceedings has been refused. The section state if a refusal to initiate criminal proceedings has been received or criminal proceedings have been terminated, but the behaviour of the violator has the features of an administrative violation, the administrative sanction may be imposed not later than within one month from the day when the decision regarding refusal to initiate the criminal proceedings or regarding the termination thereof has been taken. Section 275 of Latvian Administrative Violations Code states that proceedings are terminated if the constituent elements of a criminal offence are found. In this case the casefiles are transferred to institution that is competent for initiating the criminal proceedings.

To implement in practice the above mentioned, authorities, irrespective of their subordination, provide all necessary information as is at their disposal. The cooperation of institutions is stated in laws and regulations of the institutions, for example – Section 7 of Law on Police states that State Police cooperates with other institutions, point 5.1. and 5.2. of regulation of Cabinet of Ministers "Regulation of State Environment Service" states that State Environment Service cooperates with other institutions and can obtain information and documents needed for their investigations. Institutions can also conduct agreements for cooperation (some of the agreements indicated by State Police are listed below).

According to the Criminal Procedure Law (CPL), Section 369 a reason for initiating criminal proceedings is the submission of information indicating the committing of a possible criminal offence to an investigating institution, Prosecutor's Office, or court (hereinafter - the institution responsible for the progress of criminal proceedings), or the acquisition of such information at an institution responsible for the progress of criminal proceedings. Section 386 lists all investigative bodies, while Section 387 of the CPL - the institutional jurisdiction of criminal proceedings. According to the Section 387 officials authorised by the State Police shall investigate any criminal offence, except the cases laid down in Paragraphs two to 10.1 of this Section, unless the Prosecutor General has assigned the performance thereof.

Cabinet Regulation No. 850 "Regulations Regarding the Criminal Procedure Information System" are issued pursuant to Section 372, Paragraph seven of the Criminal Procedure Law which sets out the amount of information to be submitted for registration in the Criminal Procedure Information System (hereinafter - System) regarding the initiated criminal proceedings, detected criminal offences, persons directing the proceedings, persons who have the right to assistance of a defence counsel and the victims; procedure for entering, utilisation and deletion of the information and terms for storage of the information; authorities which shall be granted the access to the information included in the System.

This normative act has been developed by providing for the creation of an information system aimed at the accumulation, processing, use and storage of information obtained during criminal proceedings; the creation of a single working environment for institutions providing or using the information accumulated in this system; providing statistical and informative reports; automated

information exchange with other national information systems. This enabled the automation of the criminal recordkeeping cycle by ensuring the registration, processing, storage, transmission and availability of data generated during criminal proceedings, providing for the rapid control of progress in criminal proceedings, ensuring the efficient exchange of necessary information (data) between law enforcement agencies, and the production of automated statistical reports.

Within the framework of Project No.HOME/2011/ISEC/AG/4000002542 "Development of National Criminal Intelligence Model" co-financed by European Commission basic principles of National Criminal Intelligence Model were developed. During this process law enforcement authorities with competence of crime prevention and crime combatting, as well as state security institutions (henceforth – law enforcement authorities) came to an agreement on the main cooperation principles in order to jointly analyze information in possession of law enforcement authorities on crime, on persons who committed crime, on factors influencing criminality, its dynamics and impact (threat) (henceforth – criminal intelligence information) in order to prevent crime, to detect crime and to determine persons who have committed crime, to objectively define priorities of crime prevention and crime combatting, as well as to reduce increase in crime and the consequences of it altogether. The Instruction of the Cabinet of Ministers No.1 "Order of cooperation of law enforcement agencies in crime prevention and crime combatting" was adopted on January 24, 2017 and came into effect on January 27, 2017. The aim of the Instruction is to determine a unified cooperation order for all state institutions with competence of crime prevention and crime combatting. Criminal intelligence model is effectively realized strategy for fight against crime, especially – organized crime based on results obtained in the process of criminal intelligence. Set of criminal intelligence model activities allows to prioritize work and to use resources of law enforcement authorities effectively. Effectiveness of activities and saving of resources is essential not only in each institution separately, but also it is important to achieve harmonized actions of all law enforcement authorities in the fight with crime.

For cooperation, several interdepartmental agreements have been concluded, including:

- interagency agreement on cooperation in the field of accident investigation (September 30, 2013) has been concluded between the State Police and the Investigation Bureau for Transport Accidents and Incidents;
- agreement between the State Revenue Service and the State Police about the use of the Automated Identification System for Vehicles and Containers of the State Revenue Service (May 30, 2014);
- agreement between the State Probation Service, the State Police and the Prison Administration Office, an interagency agreement on cooperation for the prevention of repeat offenses against moral and sexual integrity has been concluded (November 23, 2015);
- interagency agreement on cooperation in preventing the avoidance of child maintenance obligations (October 17, 2018) has been concluded between the Administration of the Maintenance Guarantee Fund, the State Police and the Latvian Public Prosecutor's Office;
- an agreement between the State Revenue Service and the State Police on the exchange of information and cooperation in detecting serious or very serious crimes committed or occurring in another investigative body (February 9, 2018);
- an agreement between the State Revenue Service and the State Police on the use of the Data Warehousing System (May 21, 2008);
- interagency agreement on the transfer and receipt of caller location data of public mobile telephone networks has been concluded between the State Enterprise "Electronic Communications Directorate" and the State Police (February 21, 2008);

- interagency agreement on cooperation on state border security on April 21, 2016 has been concluded between the State Border Guard, the State Revenue Service, the Food and Veterinary Service, the State Environmental Service and the State Police;
- interagency agreement on the operation of the State Police Liaison Officer in the diplomatic and consular representations of the Republic of Latvia abroad (February 24, 2016) has been concluded between the Foreign Ministry and the State Police;
- interagency agreement on the acquisition and inclusion of biometric data in the biometric data processing system (May 25, 2015) has been concluded between the KNAB, the Information Center of the Mol and the State Police;
- interagency agreement was concluded between the Prison Administration Office and the State Police regarding the transfer of the removed subscriber identification modules and mobile phones to the State Police for the inspection and retrieval of information contained therein with information technology resources (June 16, 2015);
- interagency agreement between the Enterprise Register and the State Police on the receipt of electronic services of the Enterprise Register of the Republic of Latvia (January 22, 2013);
- interagency agreement on forensic medical examination was concluded between the State Police and the State Forensic Medicine Expertise Center (August 7, 2013);
- interagency agreement between the State Probation Service and the State Police to provide information to the State Police in an online data transmission mode (January 8, 2013).

22. At the European level, do respective authorities coordinate / cooperate when administrative procedures / sanctions are applicable in one State and criminal law provisions in the other? Please refer here also to situations where only administrative sanctions may be imposed against a legal person in one State whereas the law of the other State provides for criminal liability of legal persons.

Authorities cooperate in many cases. For example, the competition authorities of the Member States have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information (Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty).

At the moment challenge is that until the entry into force of Administrative Liability Law (adopted by The Parliament on October 25th, 2018), in Latvia there is no mechanism to execute requests for legal aid for the recovery of property of an offense, which, according to the law of Latvia, is to be considered as an administrative violation.

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

22. 2. Have problems occurred? Which ones?

LITHUANIA

I. General questions

74. Does your national law provide for administrative offences, allowing to impose administrative sanctions against natural persons, which are comparable to criminal sanctions? If so, what categories/types of administrative sanctions comparable to criminal sanctions exist in your legal system (e.g. punitive and/or preventive measures, such as fines, disqualifications, etc.)?

In accordance with the Code of Administrative Offences of the Republic of Lithuania (hereinafter – the CAO), a natural person who commits an administrative offence may be subject to administrative penalties (Article 23 of the CAO) and administrative sanctions (Article 27 of the CAO), which shall be imposed together with an administrative penalty (their purpose is to give effect to administrative penalties). Administrative penalties – a fine and community service – are similar to the penal sanctions set out in Article 42 of the Criminal Code of the Republic of Lithuania (hereinafter – the CC). Some administrative sanctions provided for in the CAO are similar to penal sanctions set out in Article 67(2) of the CC, i.e. deprivation of the special right granted to a person, property confiscation and obligation to participate in programmes addressing violent behaviour or in other programmes/courses.

75. How do you define an administrative and a criminal offence/sanction?

The definition of an administrative penalty is provided for in Article 22 of the CAO. An administrative penalty means a coercive measure imposed by the State under the procedure set out by this Code on the person who commits an administrative offence. It is also stated that the purpose of administrative penalties is: (1) to dissuade persons from the commission of administrative offences or criminal offences and to affect administrative offenders so that they abide by laws and do not re-offend; (2) to punish the persons who have committed administrative offences; (3) to prevent or restrict the opportunity for the persons who have committed administrative offences to re-offend.

Article 41 of the CC defines a punishment as the coercive measure applied by the State by a court's judgment on the person who has committed a criminal offence or a criminal misdemeanour. The purpose of a punishment is (1) to prevent persons from committing criminal offences; (2) to punish the person who has committed a criminal offence; (3) to deprive the convicted person of the possibility to commit new criminal offences or to restrict such possibility; (4) to affect the persons who have served their sentence to ensure that they abide by laws and do not relapse into crime; (5) to ensure implementation of the principle of justice.

75.1. How do you distinguish the two?

The punishments imposed for criminal offences are more severe than administrative penalties. Although both the CAO and the CC provide for monetary fines, Article 25(2) of the CAO states that a fine between EUR 10 and EUR 6000 may be imposed on a person for administrative offences while Article 47(3) of the CC stipulates that a fine between EUR 750 and EUR 300,000 may be imposed on a natural person for a criminal offence.

As mentioned, community service may be imposed both in case of administrative and criminal liability. Under the CAO, community service is imposed only as an alternative administrative penalty when it is used to substitute a fine or part of a fine under the procedure set out by this Code. The fine imposed on a person may be replaced, in whole or in part, by community service by this Code taking into consideration a difficult financial situation of the person, other relative circumstances and whether the objective of the administrative penalty will be implemented. A fine is

replaced by community service considering that one hour of community service is equal to five euros of the fine. In accordance with the CC, community service is imposed by the court in the cases provided for in the Special Part of this Code, i.e. when one of the punishments provided for the commission of certain criminal offences is community service; community service may be imposed from one month up to one year; the punishment term is calculated in months. In accordance with the provisions of Article 47(7) and Article 65(1)(4) of the CC, if the person does not have funds to pay the fine imposed by the court, the court may, with consent of the sentenced person, replace this punishment by community service (a fine of EUR 50 is considered to be equivalent to six hours of community service).

The CAO does not provide for any penalties that would be related to deprivation or restriction of liberty.

Administrative liability does not lead to a criminal record of a person, which is characteristic of criminal liability, i.e. a judgment of conviction results in a criminal record for the person for the time period (which depends on the severity of the crime and on the form of guilt) specified by the CC; criminal record is taken into consideration by the court when imposing a punishment for the commission of a new criminal offence, when deciding whether to release the offender from punishment or criminal liability, also when recognising a person as a repeated offender; moreover, the rights of persons with criminal record may be restricted by law.

Administrative penalties for administrative offences are imposed by different public authorities (officials) or by the court, while punishments for criminal offences are imposed only by the court.

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

Yes.

75.3. If so, to what extent?

After the CAO came into force on 1 January 2017, i.e. after the Code of Administrative Law Violations of the Republic of Lithuania which was in force until that time was invalidated:

- a) the penalty related to a short-term deprivation of liberty, i.e. administrative arrest, has been removed from administrative penalties.
- b) in order to preserve the consistency between criminal and administrative liability, the amount of the monetary fine for administrative offences has been limited to EUR 6000.

76. 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 the respective added value of administrative and criminal sanctions? Please provide representative examples.

Administrative liability has been imposed for violations of law which are less dangerous for the public and/or cause less damage (for example, administrative penalties are applied for a theft, swindling, property appropriation or embezzlement, when the value of stolen, acquired, misappropriated or embezzled property does not exceed EUR 150; for violations of road traffic regulations, including the cases when such violations cause minor health impairment to a person or inflict minor property damage). Liability may be differentiated not only considering the damage caused by unlawful acts and its amount but also the methods of commission of such acts and other circumstances. Administrative liability most often applies for violations of law related to non-compliance with certain rules and requirements established in substantive law (for example, failure to comply with or violation of legislation regulating the radiation safety of

persons or the physical protection of the sources of ionising radiation, failure to comply with or violation of the Law on Noise Management of the Republic of Lithuania and other legal acts regulating noise management). The procedure for the application of administrative liability is simpler and faster compared to the application of criminal liability: criminal liability normally implies complicated criminal proceedings.

The existence of administrative liability creates preconditions for a simpler and faster application of liability for less dangerous violations of law. That can be seen from various procedural provisions established in the CAO. For example, in accordance with Article 616, paragraphs 1 and 3, administrative cases are heard out of court under the written procedure without summoning the persons involved in the administrative proceedings to the case hearing; when requested by an administratively liable person, an oral case hearing shall be held. Simplified administrative proceedings (i.e. drawing up of an administrative order and its enforcement by the administratively liable person) apply in case the person does not dispute the fact of commission of the administrative offence. In accordance with Article 610 of the CAO, an administrative order means the proposal written into an administrative offence protocol for the person to pay voluntarily a fine equal to half of the minimum fine within fifteen calendar days after the day of service of the administrative offence protocol or within third calendar days after the day of dispatching of the administrative offence protocol together with the administrative order, where an administrative offence protocol and an administrative order is drawn up in the absence of the administratively liable person; or to pay the minimum fine set out in the relevant article (paragraph of the article) which provides for liability for the administrative offence committed by the person, in case of certain offences, when a repeated administrative offence is committed. If the person complies with an administrative order, his/her administrative proceedings are closed, unless a resolution to impose an administrative sanction is passed in the case referred to in Article 33(1)(4) of this Code (Article 610(5) of the CAO).

It should also be noted that in many cases administrative offence cases are heard out of court, thus, courts are not overburdened with 'minor' cases, which leads to lower time and state budget costs.

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

77.1. Art. 4 of the Convention on the protection of the environment through criminal law (ETS 172).¹⁴⁸

Lithuania has not ratified this Convention yet.

77.2. Art. 78 (3) of the Council of Europe Convention on preventing and combating violence against women and domestic violence (ETS 210).¹⁴⁹

Lithuania has not ratified this Convention yet.

77.3. 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.

The CAO provides for administrative liability for the administrative offences referred to in Article 4 of the Convention on the Protection of the Environment through Criminal Law. Section XVIII 'Administrative Offences Related to Environmental Protection, Use of Natural Resources and Heritage Protection' establishes administrative liability of natural persons for various administrative offences related to environmental pollution, non-compliance with legal acts regulating environmental radiation security, non-compliance with legal acts regulating waste management, use of wild flora and fauna resources in breach of the established procedure, unlawful use of protected species of wild flora or mushrooms and the destruction of their habitats, violation of the protection and usage regime of protected territories, violation of management requirements of chemical substances and mixtures (preparations), violation of legal acts

¹⁴⁸ <https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168007f3f4>

¹⁴⁹ <https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168008482e>

regulating hunting and fishing, construction of facilities for business and other operations in breach of environmental protection requirements. Section XXIV 'Administrative Offences Related to Public Order' of the CAO establishes administrative liability for unlawful noise.

II. Separate or combined tracks of sanctions

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

Yes. For example, CAO Section 19 'Administrative Offences Related to Energy', Section 20 'Administrative Offences Related to Agricultural and Veterinarian Activities and Custody of Animals', Section 21 'Administrative Offences Related to Housing Sector, Management of Surrounding Environment, and Construction', Section 23 'Administrative Offences Related to Communications System'.

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

The relationship between administrative and criminal liability is regulated by Article 5(2) of the CAO: 'a person shall be liable for a violation of law, which has the characteristics of an administrative offence provided for in this Code, under the administrative procedure according to this Code, if the violation of law committed does not render the person criminally liable'. In accordance with Article 591(8) of the CAO, administrative proceedings may not be commenced and the commenced proceedings shall be cancelled, if an administrative fine has been imposed by a resolution of the court or an institution (official) out of court, or an administrative order has been enforced, or the resolution to terminate the administrative proceedings has not been revoked, or a pre-trial investigation has been commenced concerning that offence for the administratively liable person in relation to the same fact.

The course of investigation, when it is identified that an act has elements of a criminal offence, is regulated by Article 592 of the CAO. If it is identified after commencement of administrative proceedings that the act committed has criminal offence elements, the investigating official shall, by a reasoned resolution, hand over the material collected to the pre-trial investigation institution or to a prosecutor who shall decide under the procedure set out by the Code of Criminal Procedure of the Republic of Lithuania (hereinafter – the CCP) whether to start pre-trial investigation. Upon receipt of a notification from the pre-trial investigation institution or from the prosecutor about the opening of the pre-trial investigation, the administrative proceedings shall be terminated. If, upon receipt of the case-file and resolution from the authorised institution regarding the transfer of the administrative offence case-file for pre-trial investigation, the pre-trial investigation institution or the prosecutor refuse to open pre-trial investigation under the procedure set out by the CCP, the material collected shall be returned to the authorised institution and the administrative offence investigation shall be continued. If, upon receipt of an application or report about a potentially committed criminal offence, the pre-trial investigation institution or the prosecutor refuse to commence pre-trial investigation in the cases and under the procedure set out in the CCP, but identify some elements of an administrative offence in the act committed or identify elements of an administrative offence on their own, they shall hand over the material to an authorised institution by a reasoned resolution in order to commence administrative proceedings and draw up an administrative offence protocol. If a pre-trial investigation or a criminal case is discontinued in the cases and under the procedure set out by the CCP, however, the case file of the pre-trial investigation or the criminal case shows that there are elements of an administrative offence, a copy of the resolution to discontinue the pre-trial investigation or the criminal case shall, together with the whole certified copy of the investigation or the case file, be transferred to the authorised institution in order to commence administrative proceedings and draw up an administrative offence protocol.

In such a case, the evidence collected in the criminal case shall not be collected repeatedly, unless it is necessary to investigate additional circumstances.

80. In your view: is the *ne bis in idem* applicable in case both tracks apply? Can you give examples of relevant national case law in this respect?

The principle *ne bis in idem* is applicable and has been emphasised in the case law a number of times. The Constitutional Court of the Republic of Lithuania has ruled in the Ruling of 10 November 2005 in the case No 01/04 that the constitutional principle *ne bis in idem* also means, *inter alia*, that if a person, who has committed an act which is contrary to law, has been held administratively but not criminally liable, i.e. he was imposed a sanction – a penalty not for a crime but for an administrative violation of law – he cannot be held criminally liable for the said act.

For example, the chamber of judges has stated in cassation ruling No 2K-167-788/2015 that the administrative offence protocol drawn up with respect to G. G. on 4 July 2012 and the resolution in the administrative proceedings whereby he was sanctioned by a warning under Article 178(1) of the Code of Administrative Offences in force at that time for drinking vodka at that same time and in that same place does not allow holding G. G. guilty and sentencing him under Article 284(2) for using obscene (Russian, Lithuanian) curse words against the victims L. R. and A. A. G. while being intoxicated with alcohol in a public place. When the conflict broke out with the store owner A. A. G. who did not allow him to use alcohol by the store, G. G. swore at him by obscene words, threatened to beat, destroy, explode him or put his house and store on fire, unless an assessment is carried out and a reasoned conclusion is reached that the previous application of administrative liability in the given situation was inadequate and it is necessary to correct an error in the administration of justice. When this case was heard once again under the cassation procedure, the chamber of judges held that it was obvious from the circumstances identified in this case that they had considerable similarities and were intrinsically related to the circumstances identified at the same time and in the same place in the administrative offence cases of G. G. and D. S., therefore, there was no basis to commence criminal proceedings in relation to this event (Article 3(1)(8) of the Code of Criminal Procedure) and punish them once again for that same conduct (Supreme Court of Lithuania, Ruling No 2K-219-693/2016).

In the ruling of 2 October 2018 of the Supreme Court of Lithuania in the proceedings No 2AT-42-628/2018, the chamber of judges noted that Article 591(8) of the CAO establishes the principle *ne bis in idem*, which prohibits subjecting the same person to administrative liability or to administrative and criminal liability twice for the same conduct contrary to law. The chamber of judges held that the actions by J. J. , i.e. driving a vehicle without a driving licence, while being intoxicated with alcohol when 1.84 promiles of alcohol were identified in his blood, the causing of a traffic accident and fleeing from the scene of the event were, in principle, treated as one conduct by the courts and held that, in order not to breach the principle *ne bis in idem*, only criminal liability under Article 281(7) of the CC had to be applied to J. J. in that case as the most severe form of liability. The chamber of judges agreed that the criminal offence for which J. J. had been sentenced by a penal order of the court and for which the administrative proceedings had been terminated with respect to him in this case were related and not distant from each other in terms of place and time, however, held that the courts that heard the administrative case had not, in principle, analysed and expressed their position, as far as the principle *ne bis in idem* was concerned, whether these offences were identical (different) by their objective and subjective elements, whether the acts as such were sufficiently identical to be recognised as one conduct also taking into account a potential infringement of other requirements, which were set out in the Road Traffic Regulations and were not incriminated in the criminal case at issue. Considering the arguments stated above, the chamber of judges quashed the decisions of the courts of both instances and referred to administrative proceedings for hearing to a district court.

III. Identification of main differences between administrative and criminal tracks

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

Substantive law

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

No.

General principles

82. Are administrative sanctions governed by general principles of administrative law or general principles of criminal law (such as proportionality, nullum crimen sine lege, legality, lex mitior, non-retroactivity etc)?

When administrative fines are imposed, general principles of administrative liability apply which are also characteristic of criminal law. For example, Article 2(4) of the CAO states that only the person who commits an act prohibited by law which conforms to the characteristics of an administrative offence specified by this Code shall be liable under this Code. Article 3 of the CAO stipulates that the person who commits an administrative offence shall be liable according to the laws which were in force at the time of commission of that offence; the law mitigating or eliminating liability for administrative offences or otherwise mitigating the legal situation of an administratively liable person or a person on whom an unenforced administrative penalty has been imposed shall have a retroactive effect; the law establishing or aggravating liability for administrative offences or otherwise aggravating the legal situation of an administratively liable person or a person on whom an unenforced administrative penalty has been imposed shall not have a retroactive effect. Article 32(2) of the CAO states that administrative penalties and administrative sanctions shall be imposed in accordance with the principles of the rule of law, justice, promptness, reason and proportionality.

Procedural law

83. Do typical criminal procedural rights apply in case of administrative offences/sanctions (such as presumption of innocence, right to be heard, right of access to the case-file, right to remain silent)?

Yes, the majority of criminal procedural rights are applicable in case of administrative penalties. For example, Article 2(3) of the CAO states that a person shall be liable under this Code only in case he/she is guilty for the commission of an administrative offence. Following Article 577(2) of the CAO, an administratively liable person shall have the following rights: (1) to have access to the case-file; (2) take part during the case hearing under the oral procedure and give explanations; (3) to submit explanations in writing or by means of electronic communications where the case is heard under the written procedure; (4) to provide documents and items relevant for the case; (5) to make requests and challenges; (6) to use legal assistance by an attorney at law or any other authorised representative; (7) speak his/her mother tongue or the language he/she knows and use an interpreter's service, if he/she does not know the Lithuanian language; (8) to appeal against procedural decisions under the established procedure.

However, there are some differences if compared with criminal proceedings, for example, the CAO does not envisage the right to refuse to testify about the administrative offence potentially committed by the person himself/herself. However, Article 567(3) of the CAO states that it shall not be allowed in the investigation of an

administrative offence and during an administrative hearing to shift the burden of proof on the administratively liable person, as well as force his/her explanations and testimony as well as explanations and testimony of other persons involved in the administrative proceedings by violence, threats and other unlawful means. The CAO and the Code of Criminal Procedure provide a different regulation of the right to have a defence counsel. In accordance with Article 609(4) of the CAO, when an administrative offence report is drawn up, the administratively liable person shall be explained his/her rights and obligations and that shall be noted in the protocol. Article 50(1) of the Code of Criminal Procedure states that the pre-trial investigation officer, the prosecutor and the court shall explain to the suspect and the accused person about his/her right to have a defence counsel from the moment of his/her detention or from the first questioning and shall make it possible to exercise this right. A detained suspected person shall be provided with the opportunity to meet his/her defence counsel in the absence of others before the first questioning. A protocol shall be drawn up concerning the request of the suspected or the accused person to have a defence counsel or his/her refusal to have a defence counsel.

84. What kind of authorities are involved in the decision to impose administrative sanctions?

Article 614(1) of the CAO states that the court shall hear: (1) cases of administrative offences for which the sanction of any article or a part of any article of the Special Part of this Code provides for a fine the maximum amount whereof exceeds one thousand five hundred euros or cases of administrative offences for which any article of the Special Part of this Code may (or must) impose the confiscation of property for which legal registration is compulsory under legal acts of the Republic of Lithuania; (2) cases of administrative offences provided for in Article 224(1), Articles 322, 400, 505, 506, 507, 508 and Article 556(3) of this Code when a person is subjected to administrative liability for failure to comply with lawful requirements of officials, for preventing them from performing their duties, violation of their honour and dignity or for similar offences where such offences are committed against the officials of that same institution who drew up an administrative offence protocol; (3) cases of administrative offences provided for in Articles 119, 120, 204, 547 of this Code when no investigation of the administrative offence is undertaken and no administrative offence protocol is drawn up; (4) cases of administrative offences where the administratively liable person or the victim is a minor.

Other cases of administrative offences are heard out of court, i.e. they are heard by the authorities referred to in Article 589 of the CAO whose officers carried out an administrative offence investigation and drew up an administrative offence protocol (officers of different authorities referred to in Article 589 of the CAO, for example, officers of the police, the Military Police, the Customs of the Republic of Lithuania, the State Border Guard Service under the Ministry of the Interior, the Financial Crime Investigation Service under the Ministry of the Interior, the Competition Council of the Republic of Lithuania, state control authorities for environmental protection, State Food and Veterinary Service, State Anti-Fire Supervision Service, state supervision authorities for territorial planning, public administration bodies for the supervision of the use of structure, etc.).

85. Do administrative authorities vested with a sanctioning power comply with the principles of independence and impartiality? Is the decision on the sanction subject to a full judicial review (in law and in facts)? Which judicial authorities/courts are in charge of reviewing administrative sanctions?

Provisions on the principle of impartiality are established in the CAO:

Article 569(5) of the CAO states that the court and the authority (official) hearing administrative offence cases out of court shall assess evidence according to their own

inner belief based on comprehensive and impartial consideration of all circumstances of the case, following the law.

Article 615(3) of the CAO stipulates that administrative offence cases shall, on behalf of institutions, be heard by their heads, the persons authorised by the heads or collegial bodies. The same official normally may not investigate an administrative offence and issue a resolution in the administrative offence proceedings (hear the administrative offence case), except in the cases when that is impossible due to organisational obstacles or the institutional structure.

There is no general provision in the CAO concerning the independence of the authorities hearing administrative offence cases. The principle of independence is documented in special laws regulating the status of certain institutions, for example, in Article 17(1) of the Law on Competition of the Republic of Lithuania, which states that the Competition Council is an independent state authority accountable to the Seimas, implementing the national competition policy and supervising how this Law is enforced. The Competition Council makes decisions on its own and independently in the performance of the functions assigned to it; Article 3(2) of the Law on the Bank of Lithuania of the Republic of Lithuania states that the Government and other state authorities of the Republic of Lithuania shall respect the independence of the Bank of Lithuania and shall not seek to influence the Bank of Lithuania and its staff in discharge of their duties.

Resolutions to impose administrative penalties may be appealed to the court – in such a case, they are reviewed in their full extent (regarding points of law and facts).

Resolutions passed by institutions out of court may be appealed to a district court by the person in relation to whom the relevant resolution has been passed, by the victim (or their representatives) (Article 621 of the CAO). When adjudicating the case concerning a complaint against a resolution issued in administrative offence proceedings out of court, the court shall verify the lawfulness and justification of the resolution passed by the institution (Article 641 of the CAO).

Orders and rulings rendered by district courts after the hearing of administrative offence cases at the court of first instance may be appealed against by the administratively liable person, by the institution that passed the resolution in the administrative offence proceedings out of court or the institution whose official carried out the administrative offence investigation, as well as by the victim (or their representatives) to the regional court under the appeal procedure (Article 644 of the CAO). When hearing the appeal, the regional court shall verify the lawfulness and justification of the order (ruling) rendered in the administrative offence proceedings (Article 652(1) of the CAO).

The administrative offence proceedings completed by an enforceable order or ruling or by an administrative order may be renewed under the grounds and procedure set out by the CAO (Article 657 of the CAO). Following Article 660(1) of the CAO, an application to renew administrative offence proceedings because of newly transpired circumstances (sub-paragraphs 1, 2, 3 and 4 of paragraph 1 of Article 658 of the CAO) shall be referred to the institution the official whereof commenced the administrative offence proceedings not later than within six months from the day when such circumstances came to light or were supposed to come to light. In accordance with paragraph 2 of that same Article, the application to renew administrative offence proceedings under the grounds referred to in Article 658(1)(5) of the CAO (major breach of substantive or procedural law, which was likely to lead to an unlawful order or ruling) shall be submitted to the Supreme Court of Lithuania within three months after the day the order or the ruling became enforceable in the administrative proceedings.

IV. Cooperation and coordination

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

As mentioned in the response to Question 11, the administrative offence cases referred to in Article 614(1) of the CAO are heard by the court, while other administrative offence cases are heard out of court. Article 615 of the CAO states that administrative offence cases shall be heard out of court by the institutions referred to in Article 589 of the Code, the officers whereof carried out an administrative offence investigation and drew up an administrative offence protocol. If it is stated in Article 589 of the CAO that officers of several institutions have the right to investigate and draw up an administrative offence protocol for the same administrative offence provided for in an article and part of an article of the Special Part of this Code, the case may be referred for hearing after the investigation to the institution which is delegated by laws or other legal acts of the Republic of Lithuania to carry out supervision of the laws or other legal acts.

In criminal proceedings, punishments for criminal offences are imposed only by the court.

The safeguards of independence of judges and the status of judges are established by the Constitution of the Republic of Lithuania, by the Law on Courts, other laws and legal acts of the Republic of Lithuania. It should be noted that judges are impartial and abide only by laws in the administration of justice. In the administration of justice, judges are independent from participants in the proceedings, from the administration of courts, other judges, public authorities, officials and other persons.

22. At the European level, do respective authorities coordinate / cooperate when administrative procedures / sanctions are applicable in one State and criminal law provisions in the other? Please refer here also to situations where only administrative sanctions may be imposed against a legal person in one State whereas the law of the other State provides for criminal liability of legal persons.

Yes, at the European level the designated authorities cooperate in the field of administrative procedures to the extent prescribed by the European Union legal acts or international treaties.

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

As regards cooperation between EU member states, such instruments as Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties or Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union could be named. To some extent international conventions on mutual legal assistance or bilateral treaties on judicial cooperation could be used for the execution of requests issued in administrative procedures, however, execution of such requests (depending on the type of the request) might be limited to a condition of double criminality.

22. 2. Have problems occurred? Which ones?

The situations where administrative sanctions are applicable in one State and criminal ones in another mostly often refer to the conduct which infringes road traffic regulations (e.g. drunk driving). The liability for committing such offences often differs even in the same state depending on severity of consequences of such offence/conduct. Therefore, international cooperation naturally faces to difficulties, especially when the decision imposing a criminal sanction in one state is required to be recognized and enforced in another, where an administrative sanction is established for the same

offence. On the other hand, such difficulties depends on the instrument under which such cooperation is requested. E.g. under the European Convention on the International Validity of Criminal Judgments the condition of lack of double criminality could be used as a ground for refusal. As regards recognition of the financial penalties within the EU (under Framework Decision 2005/214/JHA), the rules are more flexible and the possibility to enforce a sanction no matter it is of criminal or administrative nature exists and reflects in practice.

LUXEMBOURG

I. Questions générales

Votre droit interne prévoit-il des infractions administratives, permettant d'imposer des sanctions administratives à des personnes physiques, qui sont comparables à des sanctions pénales?

86. Si tel est le cas, quelles catégories/types de sanctions administratives comparables aux sanctions pénales existent dans votre système légal (par exemple mesures punitives et/ou préventives, telles que des amendes, déchéances etc.) ?

Le droit luxembourgeois prévoit des sanctions administratives dans plusieurs matières, dont notamment la discipline des fonctionnaires et autres agents publics, la discipline de certaines professions dites réglementées, les autorisations de faire commerce, la sécurité sociale et le droit du travail, la fiscalité directe et indirecte, la réglementation sur le permis de conduire, la protection de l'environnement et du consommateur, les nouvelles technologies.

Le contenu de ces sanctions est varié :

- Peine disciplinaire allant du simple avertissement jusqu'à la révocation.
- Interdiction temporaire ou définitive d'exercer une profession réglementée (notariat, assurance, etc.).
- Retrait d'une permission de voirie, de port d'armes, d'un permis de conduire, d'une autorisation d'exercer une profession ou d'accomplir certaines opérations.
- Fermeture d'un établissement dangereux, insalubre ou incommode.
- Exclusion du droit de participer à des adjudications publiques.
- Amendes administratives ou fiscales.

87. Comment définissez-vous une sanction administrative et une sanction/infraction pénale ?

Des membres du Conseil d'Etat luxembourgeois ont avancé la définition suivante : « *La sanction administrative est une mesure dépourvue de caractère pénal prise en vertu de la loi par l'autorité administrative compétente à l'encontre d'une personne physique ou morale et destinée à punir celle-ci pour un manquement à une obligation établie dans un intérêt public.* »

87.1. Comment faites-vous la distinction entre les deux?

La sanction administrative, contrairement à la sanction pénale, n'est pas le fait du juge, mais d'une autorité administrative. D'autre part, des différences notables subsistent entre les deux ordres de pénalités, même si leur contenu apparaît identique. En ce qui concerne notamment les amendes, celles prononcées par un tribunal répressif se distinguent de celles infligées par un organe administratif sous plusieurs rapports. L'amende pénale est en principe inscrite au casier judiciaire, alors que l'amende administrative ne l'est pas. Dans le domaine de l'amende pénale, l'élément subjectif et moral (imputabilité - bonne foi) est généralement pris en considération, alors qu'il en est fait en principe abstraction pour l'amende administrative. C'est ainsi que seule l'amende administrative peut être directement

infligée à une société, sans qu'il soit besoin de rechercher l'organe ou le préposé responsable. Enfin, la contrainte par corps n'est pas applicable en matière d'amende administrative. L'envergure de la sanction est encore considérée pour en qualifier la nature.

87.2. La jurisprudence *Engel* a-t-elle influencé la catégorisation des sanctions dans votre système national ? 2.3 Si oui, dans quelle mesure ?

Les juridictions administratives ont repris les critères utilisés par la Cour européenne des droits de l'homme (critères Engel).

88. Dans quels cas votre système national recourrait-il à des sanctions administratives (infraction moins grave, infractions intentionnelles/négligence, importance de l'intérêt protégé, procédures plus rapide, etc.) ? Quelle est la valeur ajoutée respective des sanctions administratives et pénales? Merci de fournir des exemples représentatifs.

Un catalogue non exhaustif de sanctions administratives¹⁵⁰

- la loi fixant le statut des fonctionnaires¹⁵¹ de l'Etat prévoit une série de sanctions disciplinaires, allant de l'avertissement à la révocation, à infliger par le Conseil de discipline de la fonction publique, composé par des magistrats et des fonctionnaires ; un régime identique est prévu pour les fonctionnaires communaux¹⁵² ;

- plusieurs professions libérales ont un régime disciplinaire organisé par la loi. Ainsi, le Collège médical, composé du président du tribunal d'arrondissement de Luxembourg et de deux assesseurs médecins, exerce le droit disciplinaire à l'égard des médecins ; le droit disciplinaire à l'égard des notaires est exercé par un conseil de discipline composé du président du tribunal d'arrondissement de Luxembourg et de quatre notaires ; la discipline des avocats relève du conseil disciplinaire et administratif des barreaux¹⁵³ ;

- le retrait du permis de conduire ou la suspension temporaire du droit de conduire¹⁵⁴ ;

- la Commission de surveillance du secteur financier a le pouvoir de prononcer la suspension des personnes soumises à sa surveillance qui ne respectent pas les dispositions légales, réglementaires ou statutaires les concernant, ou dont la gestion ou la situation financière n'offre pas de garantie suffisante pour la bonne fin de leurs engagements ou de leur imposer des amendes d'ordre au cas où elles refusent de fournir les documents comptables ou autres renseignements demandés ou lorsque ceux-ci se révèlent être incomplets, inexacts ou faux ; au cas où elles empêchent ou entravent les inspections de la Commission ; au cas où elles contreviennent aux règles régissant les publications des bilans et situations comptables et au cas où elles ne donnent pas suite aux injonctions de la Commission¹⁵⁵ ;

- le Commissariat aux assurances est autorisé à infliger des amendes d'ordre, ainsi que d'autres mesures allant jusqu'à la suspension temporaire des dirigeants en cas d'infractions à la loi et aux règlements ainsi qu'aux instructions du Commissariat¹⁵⁶ ;

- le gouvernement ou la Commission indépendante de la radiodiffusion peuvent, après avertissement et en cas de récidive, retirer la concession ou la permission à un opérateur ou de faire usage de la fréquence faisant l'objet de la concession ou de la capacité de satellite ou de la liaison montante luxembourgeoise¹⁵⁷ ;

¹⁵⁰ Les sanctions administratives en Belgique, au Luxembourg et aux Pays-Bas – Analyse comparée ; Colloque Réunion des Conseils d'Etat du Benelux et de la Cour administrative du Luxembourg ; 21 octobre 2011

¹⁵¹ Art. 44 et s. de la loi modifiée du 16 avril 1979 fixant le statut général des fonctionnaires de l'Etat

¹⁵² Art. 55 et s. de la loi modifiée du 24 décembre 1985 fixant le statut général des fonctionnaires communaux

¹⁵³ Art. 17 et s. de la loi modifiée du 8 juin 1999 relative au Collège médical

Art. 84 et s. loi modifiée du 9 décembre 1976 relative à l'organisation du notariat

Art. 24 et s. de la loi modifiée du 10 août 1991 sur la profession d'avocat

¹⁵⁴ Art. 2bis de la loi du 14 février 1955 concernant la réglementation de la circulation sur toutes les voies publiques

¹⁵⁵ Loi modifiée du 5 avril 1993 relative au secteur financier

¹⁵⁶ Loi du 6 décembre 1991 sur le secteur des assurances

¹⁵⁷ Loi modifiée du 27 juillet 1991 sur les médias électroniques

- en matière fiscale, le directeur de l'administration des Contributions directes peut imposer des amendes substantielles aux contribuables qui ne remettent pas ou tardivement leurs déclarations d'impôt¹⁵⁸.

89. En matière de sanctions pénales/administratives, comment avez-vous appliqué les dispositions ci-dessous du Conseil de l'Europe :

La directive 2008/99/CE du Parlement européen et du Conseil, du 19 novembre 2008, relative à la protection de l'environnement par le droit pénal a été transposée en droit luxembourgeois par le Paquet législatif dit « REACH ».

La loi du 27 avril 2009 prévoit en son article 4 : « Les infractions à la présente loi et à ses règlements d'exécution sont constatées et recherchées par les agents de l'administration des douanes et accises à partir du grade de brigadier principal, le directeur, les directeurs adjoints et les fonctionnaires de la carrière des ingénieurs et des ingénieurs-techniciens de l'administration de l'environnement, le directeur, le directeur adjoint et le personnel supérieur d'inspection et les ingénieurs-techniciens de l'Inspection du travail et des mines, le directeur, le directeur adjoint, les médecins, pharmaciens et ingénieurs de la Direction de la santé et du Laboratoire national de santé et le directeur, le directeur adjoint et le personnel de la carrière supérieure et les ingénieurs-techniciens de l'administration de la gestion de l'eau.

Dans l'exercice de leurs fonctions relatives à la présente loi, les fonctionnaires ainsi désignés de l'administration des douanes et accises, de l'administration de l'environnement, de l'Inspection du travail et des mines, de la Direction de la santé, du Laboratoire national de santé et de l'administration de la gestion de l'eau ont la qualité d'officiers de police judiciaire. Ils constatent les infractions par des procès-verbaux faisant foi jusqu'à preuve du contraire. Leur compétence s'étend à tout le territoire du Grand-Duché. Avant d'entrer en fonction, ils prêtent devant le tribunal d'arrondissement de leur domicile, siégeant en matière civile, le serment suivant: « Je jure de remplir mes fonctions avec intégrité, exactitude et impartialité ».

L'article 458 du Code pénal leur est applicable.

89.1. Art. 4 de la Convention sur la protection de l'environnement par le droit pénal (STE 172)¹⁵⁹,

cf. réponse question n°4.

89.2. Art. 78 (3) de la Convention sur la prévention et la lutte contre la violence à l'égard des femmes et la violence domestique (STE 210).¹⁶⁰

Les infractions auxquelles se réfère l'article 78 (3) de la Convention sur la prévention et la lutte contre la violence à l'égard des femmes et la violence domestique n'ont pas encore été transposées.

89.3. Si vous n'avez ratifié aucune de ces conventions, merci de donner un autre exemple de mise en œuvre de Conventions du CdE permettant l'adoption de sanctions administratives à l'encontre de personnes physiques. /

II. Voies de sanctions distinctes ou combinées

90. Existe-t-il des types d'infractions établies dans votre législation nationale qui prévoient des sanctions administratives uniquement ?

Oui.

¹⁵⁸ Loi générale des impôts (dite *Abgabenordnung*)

¹⁵⁹ <https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168007f3f4>

¹⁶⁰ <https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168008482e>

91. Votre droit interne permet-il une combinaison de sanctions pénales et administratives ? Existe-t-il des domaines où ces deux types de sanction coexistent ?

En matière disciplinaire, les fonctionnaires et agents de l'Etat peuvent se voir infliger une sanction disciplinaire et une sanction pénale cumulativement (cf. réponse 7).

92. Selon vous: le principe *ne bis in idem* est-il applicable lorsque les deux moyens de sanctions s'appliquent ? Pouvez-vous donner des exemples de jurisprudence pertinente à cet égard dans votre droit interne ?

Selon le Conseil d'Etat¹⁶¹, le principe « non bis in idem » « *veut que pour une même infraction, il ne soit prononcé qu'une seule peine* ». En d'autres termes, les mêmes dispositions d'une loi ne peuvent être sanctionnées au titre du droit pénal et du droit administratif.

Le Conseil d'Etat a tendance à centrer l'interdiction sur le cumul des sanctions, même si dans certains avis il met également en cause le cumul de la procédure administrative et pénale pouvant aboutir à un cumul de condamnations.

Dans une série d'avis, le Conseil d'Etat a essayé de développer une doctrine sur les limites d'un possible cumul de sanctions. A cet effet, il s'est inspiré, citations à l'appui, de la jurisprudence de la Cour européenne des droits de l'homme ou encore de critères développés par le Conseil d'Etat français.

Dans des avis de 2002¹⁶², le Conseil d'Etat a considéré que le cumul entre une amende d'ordre et une amende pénale est légitime dans trois cas :

« Il est possible d'admettre des sanctions administratives ayant un caractère provisoire, en attendant l'intervention d'une sanction pénale ...

Le cumul d'une sanction administrative et d'une sanction pénale se justifie également lorsque les deux sanctions n'ont pas la même nature ...

Le cumul peut se justifier lorsque la sanction pénale est regardée comme une arme d'emploi exceptionnel. »

Le Conseil d'Etat luxembourgeois reprend ici les conditions dégagées par le Conseil d'Etat français.

Le cumul d'amendes d'ordre avec des amendes pénales est inadmissible si les sanctions ont toutes les deux une finalité répressive. Par contre, le Conseil d'Etat n'exclut pas le cumul si « *la finalité des mesures n'est pas la même* ». Tel est le cas si « *les peines prévues ont un objectif de sanctionner le contrevenant, alors que les mesures administratives visent, non pas à imposer une amende administrative, mais, dans un premier temps, à amener l'opérateur économique à respecter la loi, et, dans un deuxième temps, à suspendre l'activité non conforme à la loi* »¹ ou encore « *lorsqu'il s'agit de sanctions de nature distincte, notamment en cas de mesures ne présentant pas le caractère de sanction, comme les mesures de prévention* »¹¹². En effet, toujours selon le Conseil d'Etat, « *aux instances administratives incombe ainsi un rôle régulateur et correcteur, alors que le volet répressif doit être réservé aux autorités pénales* ».

¹⁶¹ Les sanctions administratives en Belgique, au Luxembourg et aux Pays-Bas – Analyse comparée ; Colloque Réunion des Conseils d'Etat du Benelux et de la Cour administrative du Luxembourg ; 21 octobre 2011

¹⁶² Avis du 29 janvier 2002 sur le projet de loi portant 1. transposition de la directive 96/71/CE du Parlement européen et du Conseil du 16 décembre 1996 concernant le détachement de travailleurs effectué dans le cadre d'une prestation de services; 2. réglementation du contrôle de l'application du droit du travail (doc. parl. n° 4694/07)

III. Identification des grandes différences entre la voie administrative et la voie pénale

Veillez identifier les principales conséquences découlant de l'application de la voie administrative :

Droit matériel

93. La complicité est-elle sanctionnée si un comportement est seulement constitutif d'une infraction administrative ?

En principe, la complicité n'est pas sanctionnée dans le cadre d'une infraction administrative.

Il existe cependant une exception à ce principe, notamment en ce qui concerne le domaine des sanctions administratives en matière fiscale, et plus particulièrement dans le domaine des droits d'enregistrement.

Ainsi, la loi du 28 janvier 1948 tendant à assurer la juste et exacte perception des droits d'enregistrement et de succession dispose en son article 3 que « *Quiconque aura été convaincu de s'être, d'une façon quelconque, rendu complice de manœuvres destinées à éluder le paiement de l'impôt sera personnellement passible, indépendamment de sanctions disciplinaires s'il est officier public ou ministériel, et d'interdiction du droit de faire le commerce et de tenir agence s'il est intermédiaire professionnel pour l'achat et la vente des immeubles d'une amende égale au double de la somme dont le Trésor aura été frustré, sans que cette amende puisse être inférieure à dix mille francs.* »

Principes généraux

94. Les sanctions administratives relèvent-elles des principaux généraux du droit administratif ou des principes généraux du droit pénal ? (comme la proportionnalité, nullum crimen sine lege, la légalité, la lex mitior, la non-rétroactivité, etc.)?

Dans plusieurs arrêts¹⁶³, la Cour constitutionnelle luxembourgeoise a affirmé qu'en droit disciplinaire, la légalité des peines inscrite dans l'article 14 de la Constitution suit les principes généraux du droit pénal et elle a formulé l'exigence que le droit disciplinaire observe les mêmes exigences constitutionnelles de base. L'article 14 de la Constitution luxembourgeoise dispose que nulle peine ne peut être établie ni appliquée qu'en vertu de la loi.

Sans énumérer ces principes généraux, elle a, sous la qualification de cette notion, contrôlé la constitutionnalité des dispositions légales soumises à son contrôle au vu de la spécification de l'incrimination, d'une part, et du principe de la rétroactivité de la loi la plus douce, d'autre part.

Concernant l'obligation de spécification, elle a souligné, à propos de l'incrimination d'une sanction disciplinaire, « *la nécessité de définir les infractions en termes suffisamment clairs et précis pour en exclure l'arbitraire et permettre aux intéressés de mesurer exactement la nature et le type des agissements sanctionnables.* »¹⁶⁴

Concernant la proportionnalité, force est de constater que si l'administration elle-même dispose d'un certain pouvoir d'appréciation pour fixer la hauteur de la sanction, le juge chargé d'un contrôle de pleine juridiction doit contrôler ce choix, notamment à l'aune du principe de proportionnalité. Selon la formule de la Cour constitutionnelle, « *rien de ce qui relève de l'appréciation de l'administration ne doit pouvoir échapper au contrôle du juge* ». Il n'est donc en tous cas pas satisfait à l'exigence de pleine juridiction lorsque le juge ne dispose pas du même pouvoir que l'administration de remettre ou de réduire le montant d'une amende administrative.

La Cour constitutionnelle estime, par exemple, – à propos des amendes fiscales en matière de T.V.A. – que « *lorsqu'il est saisi d'un recours contre une décision prise [...] par le ministre des*

¹⁶³ Cour const. 22 mars 2002 et 30 janvier 2004

¹⁶⁴ Cour const. 22 mars 2002, précité; 3 décembre 2004, n° 24/04, Mém. 2004, A, p. 2962 et s.

Finances ou son délégué, le juge doit pouvoir remettre ou réduire l'amende au même titre que le ministre des Finances ou son délégué ».

Concernant la non-rétroactivité, il y a lieu de mentionner que la sanction administrative, comme la sanction pénale proprement dite, est soumise au principe de la non-rétroactivité de la loi.

Le Conseil d'Etat luxembourgeois « a toujours soumis le recours aux sanctions administratives à des conditions strictes de légalité, les unes de fond, les autres de forme. Quatre conditions ou groupes de conditions peuvent être retenus: la légalité de l'incrimination, la légalité de la sanction, le respect des droits de la défense et le recours de pleine juridiction.

La première condition de fond a trait au principe constitutionnel de légalité des délits. Rappelant que la Cour européenne des droits de l'homme retient une interprétation autonome de la notion d'accusation en matière pénale sans s'attacher à la qualité de l'auteur de la sanction, le Conseil d'Etat exige que l'infraction en matière administrative soit soumise aux mêmes critères de précision que le délit pénal. Ainsi, dans une série d'avis, le Conseil d'Etat demande « une définition suffisamment précise et claire de l'incrimination, pour exclure tout arbitraire » ou pour « assurer la prévisibilité des sanctions attachées à un comportement précis ». Dans certains avis, il a annoncé un refus de la dispense du second vote constitutionnel dans la mesure où la disposition légale prévoyant la sanction administrative « manque de précision quant aux infractions à appréhender »¹⁶⁵.

A noter que la Cour constitutionnelle du Luxembourg admet qu'une certaine indétermination des incriminations en matière disciplinaire ne méconnaît pas le principe de la légalité. Le Conseil d'Etat a toujours retenu une lecture restrictive de cette jurisprudence. Ainsi, dans un avis de 2009¹⁶⁶, le Conseil d'Etat, après avoir rappelé que « la Cour constitutionnelle a certes admis

¹⁶⁵ Avis du 7 mars 2006 sur le projet de loi portant transposition de la directive 2004/25/CE du Parlement européen et du Conseil du 21 avril 2004 concernant les offres publiques d'acquisition (doc. parl. n° 5540/01).

Avis du 7 mars 2007 sur le projet de loi

1) relative à l'organisation du marché de l'électricité;

2) instaurant un poste de Commissaire du Gouvernement à l'Energie;

3) abrogeant

- la loi modifiée du 14 décembre 1967 portant institution d'un poste de commissaire du Gouvernement, portant création d'un service de l'énergie de l'Etat et concernant l'exploitation des centrales hydro-électriques d'Esch-sur-Sûre et de Rosport;

- la loi du 4 janvier 1928 concernant l'établissement et l'exploitation des réseaux de distribution d'énergie électrique dans le Grand-Duché de Luxembourg approuvant la convention de concession du 11 novembre 1927 ainsi que ses annexes;

- la loi du 30 juin 1927 approuvant le contrat de fourniture de courant du 11 avril 1927 pour l'électrification du Grand-Duché de Luxembourg;

- la loi du 2 février 1924 concernant les distributions d'énergie électrique dans le Grand-Duché de Luxembourg;

- la loi modifiée du 24 juillet 2000 relative à l'organisation du marché de l'électricité; et

4) modifiant

- la loi du 30 mai 2005 portant 1) organisation de l'Institut Luxembourgeois de Régulation; 2) modification de la loi modifiée du 22 juin 1963 fixant le régime des traitements des fonctionnaires de l'Etat;

- la loi modifiée du 22 juin 1963 fixant le régime des traitements des fonctionnaires de l'Etat (doc. parl. n° 5415/09).

Avis du 8 avril 2008 sur le projet de loi portant transposition de la directive 2004/108/CE du Parlement européen et du Conseil relative à la compatibilité électromagnétique et abrogeant le règlement grand-ducal du 21 avril 1993 transposant la directive 89/336/CEE (doc. parl. n° 5684/02).

Avis du 20 mai 2008 sur le projet de loi portant sur la libre circulation des personnes et l'immigration (doc. parl. n° 5802/10).

Avis du 6 octobre 2009 sur le projet de loi: 1. portant transposition de la directive 2006/42/CE relative aux machines; 2. modifiant l'article 14 de la loi du 20 mai 2008 relative à la création d'un Institut luxembourgeois de la normalisation, de l'accréditation, de la sécurité et qualité des produits et services; 3. concernant la mise à disposition de machines; 4. concernant les machines d'occasion (doc. parl. n° 6048/01).

¹⁶⁶ Avis du 14 juillet 2009 sur le projet de loi portant réforme de l'assurance accident et modifiant: 1. le Code de la Sécurité sociale, 2. la loi modifiée du 3 août 1998 instituant des régimes de pension spéciaux pour les fonctionnaires de l'Etat et des communes ainsi que pour les agents de la Société nationale des chemins de fer luxembourgeois, 3. la loi modifiée du 26 mai 1954 réglant les pensions des fonctionnaires de l'Etat, 4. le Code du Travail, 5. la loi du 18 avril 2008 concernant le renouvellement au soutien au développement rural, 6. la loi modifiée du 4 décembre 1967 concernant l'impôt sur le revenu (doc. parl. n° 5899/06).

qu'en matière disciplinaire, et donc a fortiori en matière administrative, une marge d'indétermination est possible (...), estime toutefois, sous peine d'opposition formelle, que le simple renvoi à l'inobservation des règlements de prévention n'est pas suffisant au regard de la jurisprudence de la Cour constitutionnelle ».

La deuxième condition porte sur la légalité des sanctions. Aux yeux du Conseil d'Etat, le principe « nulla poena sine lege » est respecté, dès lors que les sanctions sont prévues dans la loi. Il est vrai que le législateur fait preuve d'une grande imagination dans l'éventail des sanctions qui vont, selon les matières concernées, de l'avertissement et du blâme, en passant par l'amende d'ordre, à l'interdiction temporaire d'une activité, au retrait d'une autorisation, voire à la fermeture d'établissement. Dans un avis de 2009, où il s'est opposé à des mesures transactionnelles, le Conseil d'Etat a formulé l'exigence d'un « régime des peines neutre et clair ».

Dans certains avis, le Conseil d'Etat a mis en cause le caractère disproportionné de la sanction par rapport à la gravité de l'infraction. Le problème a été évoqué en relation avec les amendes d'ordre dont la nature est similaire aux amendes pénales. Les critiques du Conseil d'Etat ont été de deux ordres. Dans certains avis¹⁶⁷, le Conseil d'Etat a contesté le montant de l'amende d'ordre qui serait disproportionné par rapport à l'infraction commise. Le problème portait sur des amendes d'ordre élevées frappant l'opérateur qui n'a pas fourni à une autorité administrative indépendante certaines informations. Dans d'autres avis¹⁶⁸, le Conseil d'Etat a considéré que les amendes d'ordre « sont largement disproportionnées par rapport aux peines pénales par ailleurs inscrites au projet de loi », ceci sans préjudice de la question du cumul des peines. Le Conseil d'Etat a encore refusé d'admettre que l'administration puisse prononcer une sanction qui « de par son envergure (...) ne peut plus guère être taxée d'administrative, mais prend plutôt le caractère d'une sanction pénale » sous-entendue réservée au juge pénal.

L'étude des avis ne permet pas de dégager une ligne claire du Conseil d'Etat quant au contrôle qu'il exerce sur la manière dont l'autorité administrative exécute son pouvoir de poursuite et de sanction. Logiquement, l'administration devrait bénéficier, à l'instar du ministère public, de l'opportunité des poursuites.

Le respect du principe de personnalité de la sanction est régulièrement invoqué dans les avis en relation avec les sanctions pénales, plus rarement quand il s'agit d'apprécier des sanctions administratives. Il est vrai que, jusqu'à la consécration en 2010 de la responsabilité pénale de la personne morale¹⁶⁹, la sanction administrative présentait l'avantage indéniable de s'appliquer à l'opérateur économique en tant que tel alors que la sanction pénale frappait uniquement la ou les personnes physiques qui représentent la personne morale.

La troisième condition porte sur les droits de la défense. Toujours dans la logique que la sanction administrative relève de la matière pénale, le Conseil d'Etat, se référant à la jurisprudence de la Cour européenne des droits de l'homme, exige le respect des garanties inhérentes à un procès équitable. Ainsi, le Conseil d'Etat a insisté sur l'exigence d'une « décision motivée », sur l'« impossibilité de sanctionner une personne sans que celle-ci ait été mise à même de connaître les charges qui existent contre elle et sans qu'elle ait pu faire valoir ses moyens de défense »¹⁷⁰.

Les conditions de la motivation de la décision et du respect des droits de l'administré ne présentent pas une particularité de la sanction administrative, mais renvoient au droit commun de la procédure administrative non contentieuse. Il n'empêche que le Conseil d'Etat a mis en

¹⁶⁷ Avis du 8 avril 2008 sur le projet de loi portant transposition de la directive 2004/108/CE du Parlement européen et du Conseil relative à la compatibilité électromagnétique et abrogeant le règlement grand-ducal du 21 avril 1993 transposant la directive 89/336/CEE (doc. parl. n° 5684/02).

¹⁶⁸ Avis du 29 janvier 2002 sur le projet de loi relatif à la protection des personnes à l'égard du traitement des données à caractère personnel (doc. parl. n° 4735/06).

¹⁶⁹ Loi du 3 mars 2010 1 introduisant la responsabilité pénale des personnes morales dans le Code pénal et dans le Code d'instruction criminelle 2.modifiant le Code pénal, le Code d'instruction criminelle et certaines autres dispositions législatives.

¹⁷⁰ Avis du 22 novembre 1994, précité, sur le projet de loi portant modification de la loi modifiée du 28 mars 1972 concernant: 1) l'entrée et le séjour des étrangers 2) le contrôle médical des étrangers 3) l'emploi de la main-d'œuvre étrangère (doc. parl. n° 4013).

évidence ces exigences. Ainsi, dans un avis de 2004¹⁷¹, le Conseil d'Etat souligne le nécessaire respect des droits de la défense dans la procédure aboutissant à l'imposition d'une sanction administrative et prenant comme termes de comparaison la procédure pénale. Selon le Conseil, « les conditions du procès équitable du paragraphe 1er de l'article 6 de la Convention européenne des Droits de l'Homme devront par conséquent être respectées tout comme la présomption d'innocence et les garanties de la défense. Il faudra donc bien séparer les fonctions de jugement de celles de recherche et d'instruction des infractions ». Ces exigences renvoient au problème de la séparation des pouvoirs, alors que dans la procédure pénale l'action publique, l'instruction et le jugement relèvent de trois autorités différentes, parquet, juge d'instruction et juridiction de jugement.

La quatrième condition formulée par le Conseil d'Etat porte sur l'exigence du recours de pleine juridiction, par opposition au contrôle normal de légalité. Certes, cette condition est intimement liée à la condition précédente du respect des droits de la défense; elle revêt toutefois une portée propre en matière de sanctions administratives alors que la sanction est prononcée par un organe qui ne revêt pas la qualité d'un juge au sens de la Constitution. Dans nombre d'avis, le Conseil d'Etat, se référant à la jurisprudence de la Cour européenne des droits de l'homme, a exigé, sous peine de refus de dispense du second vote constitutionnel, de remplacer le recours de légalité par un recours de pleine juridiction. Ainsi, dans un avis de 2011¹⁷², il rappelle que « si la Cour européenne des droits de l'Homme admet en effet que des amendes administratives, assimilables à des sanctions pénales, peuvent être prononcées par des autorités ne réunissant pas toutes les caractéristiques du tribunal visé par l'article 6, paragraphe 1er de la Convention européenne des droits de l'homme, elle exige toutefois que le justiciable dispose contre ces sanctions d'un recours en réformation ». »¹⁷³

Droit procédural

16. Est-ce que les droits procéduraux caractéristiques en matière pénale s'appliquent-ils en cas de sanctions/infractions administratives (comme la présomption d'innocence, le droit d'être entendu, le droit d'accès au dossier, le droit de garder silence)?

La proximité des sanctions administratives avec le droit pénal implique également que le régime de ces sanctions ne doive pas s'écarter des garanties dont bénéficie le justiciable dans le cadre de la procédure pénale, sous peine de violer la règle constitutionnelle de la légalité des peines.

Comme précité, le respect des garanties inhérentes à un procès équitable est en principe exigé dans le cadre des sanctions administratives. Ainsi, l'exigence d'une « *décision motivée* » et l'« *impossibilité de sanctionner une personne sans que celle-ci ait été mise à même de connaître les charges qui existent contre elle et sans qu'elle ait pu faire valoir ses moyens de défense* » constituent des principes en la matière.

La Convention européenne des droits de l'homme ne s'applique aux sanctions administratives que si celles-ci peuvent être qualifiées, conformément à l'article 6, paragraphe 1er, de la Convention, de « *droits et obligations de caractère civil* » ou comme relevant d'une accusation pénale.

¹⁷¹ Avis du 16 mars 2004 sur le projet de loi relative à la concurrence (doc. parl. n° 5229/05).

¹⁷² Avis du 17 mai 2011 sur le projet de loi portant modification 1) de la loi modifiée du 30 mai 2005 concernant la protection de la vie privée dans le secteur des communications électroniques; 2) de la loi modifiée du 2 août 2002 relative à la protection des personnes à l'égard du traitement des données à caractère personnel; 3) de la loi modifiée du 22 juin 1963 fixant le régime des traitements des fonctionnaires de l'Etat; 4) du Code de la consommation (doc. parl. n° 6243/04).

Voir aussi, dans le même sens, l'avis du 4 mai 2010 sur le projet de loi relative aux licences des contrôleurs de la circulation aérienne et transposant la directive 2006/23/CE du 5 avril 2006 du Parlement européen et du Conseil concernant une licence communautaire de contrôleur de la circulation aérienne (doc. parl. n° 6056/09).

¹⁷³ Les sanctions administratives en Belgique, au Luxembourg et aux Pays-Bas, Analyse comparée, Réunion des Conseils d'Etat du Benelux et de la Cour administrative du Luxembourg, en collaboration avec le Secrétariat général du Benelux, Bruxelles, 21 octobre 2011

Les juridictions administratives ont « repris les critères utilisés par la Cour européenne des droits de l'homme pour délimiter le domaine du pénal, consistant à se demander si le texte définissant la sanction disciplinaire incriminé appartient, d'après la technique juridique nationale, au droit pénal, au droit disciplinaire ou aux deux à la fois. Ces critères considèrent également la nature même de l'infraction¹⁷⁴ et le degré de sévérité de la sanction que risque de subir l'intéressé. »¹⁷⁵

Comme précité, le Conseil d'Etat, en se référant à la jurisprudence de la Cour européenne des droits de l'homme, exige le respect des garanties inhérentes à un procès équitable.

Le tribunal administratif a par ailleurs affirmé, en se référant non pas à la Convention, mais au Traité de l'Union européenne, le droit de ne pas s'auto-incriminer en matière de la sanction d'agissements anticoncurrentiels et de procédures d'enquête engagées par l'Inspection de la concurrence.¹⁷⁶

Un autre élément distingue très fortement le régime des sanctions administratives de celui des sanctions relevant du droit pénal. En droit pénal, la présomption d'innocence est essentielle et une condamnation n'est mise à exécution que lorsque le jugement qui l'a prononcée est coulé en force de chose jugée. Toute différente est la situation en droit administratif où le privilège du préalable dont jouit l'administration confère aux décisions administratives un caractère immédiatement exécutoire, alors même que l'administré exercerait un recours gracieux ou contentieux contre la décision qui lui fait grief.

Un tel système s'accommode mal avec l'exigence de l'article 6, paragraphe 2, de la Convention, en vertu duquel toute personne accusée d'une infraction est présumée innocente jusqu'à ce que sa culpabilité ait été légalement établie. On peut se demander si une décision administrative annulée – rétroactivement – ou réformée, constate « légalement » la culpabilité du destinataire de la sanction.¹⁷⁷

Il faut cependant concéder que la Cour européenne des droits de l'homme elle-même n'adopte pas, en la matière, une attitude pure et dure. Elle a, ainsi, considéré que l'exécution forcée d'une sanction fiscale prononcée par l'administration avant qu'elle ne soit devenue définitive, ne porte pas atteinte à la présomption d'innocence, dès lors que l'intéressé peut obtenir par voie judiciaire le remboursement de tout montant versé.¹⁷⁸

17. Quels types d'autorités sont impliqués dans la décision d'imposer des sanctions administratives ?

La sanction administrative, contrairement à la sanction pénale, n'est pas le fait du juge, mais d'une autorité dite administrative désignée par la loi. Le cas classique est celui où l'auteur de la sanction est un membre du Gouvernement, le directeur ou un fonctionnaire d'une administration placée sous le contrôle d'un ministre. A l'instar des autres ordres juridiques des Etats de l'Union européenne, le droit luxembourgeois connaît un nombre croissant d'autorités plus ou moins indépendantes par rapport au Gouvernement qui sont investies d'une mission de régulation de certains secteurs d'activités. On peut citer, sans prétention d'exhaustivité, la Commission de surveillance en matière d'assurance maladie, la Commission de contrôle du secteur financier, le Commissariat aux assurances, la Commission nationale pour la protection des données, l'Inspection du travail et des mines, le Conseil de la concurrence, l'Institut luxembourgeois de

¹⁷⁴ Les critères afférents sont, d'une part, le caractère punitif et préventif de la mesure et non exclusivement ce dernier et, de l'autre, l'étendue de l'incrimination dans ce sens que si la norme impose une obligation au public en général, la sanction dont elle est assortie relève du droit pénal, tandis que si elle n'est applicable qu'à un groupe déterminé ayant un statut particulier, elle n'en relève pas forcément, v. Th. BOMBOIS et D. DÉOM, op. cit., nos. 101 et s., p. 109 et s.

¹⁷⁵ Les sanctions administratives en Belgique, au Luxembourg et aux Pays-Bas, Analyse comparée, Réunion des Conseils d'Etat du Benelux et de la Cour administrative du Luxembourg, en collaboration avec le Secrétariat général du Benelux, Bruxelles, 21 octobre 2011

¹⁷⁶ Trib. adm. 15 novembre 2007, n° 22405 du rôle, confirmé par arrêt du 20 mars 2008, n° 23772C du rôle

¹⁷⁷ V. dans ce sens S. VAN DROOGHENBROECK, op. cit., n° 12, p. 267

¹⁷⁸ Cour européenne des droits de l'homme 23 juillet 2002, JANOSEVIC / SUÈDE, n° 34619/97

régulation, la Commission indépendante de la radiodiffusion ou le Conseil national des programmes.

La particularité de ces entités, souvent très puissantes, réside dans leur statut d'indépendance fonctionnelle par rapport au Gouvernement, statut d'ailleurs imposé dans certains cas par le droit européen. Le caractère de l'indépendance fonctionnelle est expressément souligné par la loi en ce qui concerne la Commission nationale pour la protection des données ou encore l'Institut luxembourgeois de régulation. La loi qualifie le Conseil de la concurrence comme « autorité administrative indépendante ». Contrairement à l'autorité administrative traditionnelle exercée par le ministre ou des fonctionnaires dépendant de lui, ces autorités ne sont pas soumises à un contrôle hiérarchique du Gouvernement ni politiquement responsables, par le biais du ministre de tutelle, devant la Chambre des députés. Ce qui plus est, elles cumulent souvent les fonctions de créer la règle de droit, de contrôler son application et d'en sanctionner la violation, ce qui cause, à l'évidence, des problèmes en matière de séparation des pouvoirs.

D'une manière générale, l'organe juridictionnel compétent pour connaître des sanctions administratives est la juridiction administrative.

La justice administrative n'est pas une juridiction d'exception mais les juridictions administratives tirent leur existence et leur compétence directement de la Constitution. En effet, à côté des articles 84 et 85 de la Constitution, l'article 95bis de la Constitution luxembourgeoise institue des juridictions administratives et leur confie la connaissance du « contentieux administratif ».¹⁷⁹

Les juridictions administratives ont déclaré applicables aux sanctions administratives, en de multiples circonstances, les règles découlant des loi et règlement grand-ducal relatifs à la procédure administrative non contentieuse.¹⁸⁰ Il s'agit d'un corps de règles très protectrices de l'administré dans ses relations avec toute administration étatique ou communale.

D'autre part, les juridictions civiles sont compétentes pour connaître des recours dirigés contre certaines sanctions infligées par l'administration, notamment en matière de TVA.

Les contestations relatives à d'autres sanctions administratives relèvent encore des juridictions civiles, sinon exclusivement, du moins partiellement composées de magistrats judiciaires. Il en est ainsi des sanctions prononcées en matière de discipline des professions libérales qui sont toutes susceptibles d'un appel devant, soit une juridiction judiciaire ordinaire (en matière de notariat), soit devant une juridiction composée de magistrats professionnels et de membres de la profession concernée (en matière de discipline des médecins, un magistrat et deux assesseurs médecins; en matière de discipline des avocats, deux magistrats et un avocat). La composition de ces juridictions pose quelquefois problème, surtout si elles sont composées majoritairement de pairs de la personne à juger, risquant de ne pas avoir la « juste distance », ou plus prosaïquement, l'impartialité nécessaire.¹⁸¹

18. Les autorités administratives ayant pouvoir de sanction respectent-elles les principes d'indépendance et d'impartialité ? la décision relative à la sanction est-elle susceptible de faire l'objet d'une revue judiciaire complet (sur le fond et les faits)? Quelles autorités judiciaires/tribunaux sont chargées de contrôler les sanctions administratives?

¹⁷⁹ Il y a lieu de souligner qu'avant la création des juridictions administratives en 1996, la situation était identique en ce qui concerne les questions de compétence. En effet, le Conseil d'Etat luxembourgeois se voit à son tour ancré dans la Constitution et l'article 83bis ancien de la Constitution lui confiait la connaissance du contentieux administratif.

¹⁸⁰ Loi du 1er décembre 1978 réglant la procédure administrative non contentieuse et règlement grand-ducal du 8 juin 1979 relatif à la procédure à suivre par les administrations relevant de l'Etat et des communes

¹⁸¹ Initialement, le conseil disciplinaire et administratif d'appel des barreaux était composé de deux magistrats et de trois avocats. Dans son arrêt WILSON du 19 décembre 2006, rendu en grande chambre (n° C-506/04), la Cour de justice des Communautés européennes a estimé qu'une telle juridiction, composée en majorité de pairs, n'offre pas assez de gages d'impartialité (n° 58) et que le pourvoi en cassation dont une décision de cet organe peut être frappée ne saurait pallier à cette insuffisance, étant donné que la Cour de cassation voit sa compétence limitée aux questions de droit, si bien qu'elle ne dispose pas de la plénitude de juridiction.

Concernant le respect du principe d'indépendance et d'impartialité des autorités administratives, il y a lieu de se référer à la réponse à la question n°11.

Comme précité, l'organe juridictionnel compétent pour connaître des sanctions administratives est en principe la juridiction administrative. Ces juridictions ont été créées à travers une réforme constitutionnelle du 12 juillet 1996 et une loi organique du 7 novembre 1996 pour reprendre la fonction juridictionnelle du Conseil d'Etat dont la compétence fut réduite à sa fonction consultative. Cette réforme importante du contentieux administratif a ainsi instauré des juridictions administratives indépendantes et distinctes de l'ordre judiciaire et introduit le double degré de juridiction en la matière.

Les juridictions administratives se composent de la Cour administrative et du Tribunal administratif. Les membres des juridictions administratives sont exclusivement des juges professionnels indépendants et inamovibles.

Au Luxembourg, depuis l'institution des juridictions administratives, les décisions administratives individuelles sont toutes susceptibles d'un recours devant le tribunal administratif et que tous les jugements de celui-ci peuvent être portés, en seconde instance, devant la Cour administrative qui ne siège pas comme juge de cassation, mais comme juge d'appel au fond (art. 6, paragraphe 2, de la loi modifiée du 7 novembre 1996 portant organisation des juridictions de l'ordre administratif).

Il existe des discussions autour de l'étendue du contrôle que le juge est autorisé à exercer, en la matière, sur la décision administrative. Son contrôle se limite-t-il, selon la formule classique utilisée en matière de recours en annulation, à vérifier le caractère légal et réel des motifs invoqués à l'appui de l'acte administratif attaqué, la mission du juge de la légalité excluant le contrôle des considérations d'opportunité à la base de l'acte administratif attaqué, le juge ne pouvant que vérifier, d'après les pièces et éléments du dossier administratif, si les faits sur lesquels s'est fondée l'administration sont matériellement établis à l'exclusion de tout doute, étant encore précisé que d'autres décisions ajoutent que la vérification des faits matériels inclut le contrôle de la proportion entre la situation de fait telle qu'elle se présente et la décision prise?¹⁸² Il est par ailleurs vrai, que dans le recours en annulation, le juge sanctionne traditionnellement l'erreur manifeste d'appréciation. La justice administrative luxembourgeoise fonctionnant désormais à deux degrés, il a semblé que le concept d'« erreur manifeste d'appréciation » est particulièrement mal approprié lorsque la Cour est amenée à réformer un jugement ayant rejeté un recours en annulation dirigé contre une décision administrative.

La Cour utilise désormais la formule de « l'erreur d'appréciation » se résolvant en dépassement de la marge d'appréciation de l'auteur de la décision querellée.¹⁸³

Il est vrai que même arrivée à ce stade, la jurisprudence reconnaît à l'administration une marge d'appréciation dans ce sens que lorsque l'administration reste à l'intérieur de cette marge, sa décision ne sera pas annulée alors même que si le juge était appelé à refaire la décision, il aurait choisi une autre solution. Mais il faut concéder que les recours en annulation, d'une part, et en réformation, d'autre part, ont tendance à se rapprocher singulièrement, en tout cas en ce qui concerne la démarche à laquelle se livre le juge.

Au Luxembourg, dans les matières sensibles qui s'apparentent, de manière évidente, au droit pénal et dans lesquelles l'administration jouit d'un large pouvoir d'appréciation, à savoir, avant tout, en matière disciplinaire, les lois applicables prévoient toutes un recours en réformation (la

¹⁸² V. Cour adm. 3 février 2004, n° 17124C du rôle; 16 octobre 2008, n° 24414C du rôle. – Cette formule est l'aboutissement d'une longue évolution. En 1996, P. PESCATORE écrivait encore que "l'expérience nous dit que (le) contentieux de l'annulation (...) se décide en droit, non en fait. Les juges sont là pour contrôler la légalité des décisions administratives, ils ne sont pas là pour refaire l'instruction, moins encore, pour décider de l'opportunité à la place de l'administration" (Luxemburger Wort 3 janvier 1996, Tribune libre)

¹⁸³ Cour adm. 9 novembre 2010, n° 26886C du rôle. – Il faut mesurer le chemin parcouru par la jurisprudence en la matière. Par un arrêt du 14 décembre 1989, n° 8181 du rôle, le comité du contentieux du Conseil d'Etat avait encore estimé que "le moyen invoqué de la disproportionnalité de la peine du retrait du permis de conduire par rapport aux faits reprochés au requérant est étranger aux causes d'annulation."

loi parle de « recours au fond »¹⁸⁴) qui permet au juge de se livrer à une propre appréciation, sans limites, de la légalité de la décision, ainsi que de l'opportunité de la mesure prise, y compris en ce qui concerne le quantum de la sanction infligée et de substituer sa propre décision à celle de l'administration.

C'est ainsi qu'en matière de discipline dans la fonction publique, le juge administratif, saisi d'un recours contre une décision de la commission de discipline prononçant une sanction disciplinaire, peut y substituer une peine inférieure – mais pas supérieure (respectivement art. 79, alinéa 2 de la loi modifiée du 16 avril 1979 fixant le statut général des fonctionnaires de l'Etat et 93 de la loi modifiée du 24 décembre 1985 fixant le statut général des fonctionnaires communaux). Les réformations de décisions administratives avec application de peines plus douces sont très fréquentes.

En matière de fiscalité directe par exemple, qui relève de la compétence des juridictions administratives, les juridictions se voient législativement habilitées de réformer les décisions de l'administration infligeant des sanctions pécuniaires.

En droit administratif, dans certaines matières, le juge se voit privé du droit de refaire la décision de l'administration. Il en est ainsi en matière de retrait administratif du permis de conduire et des amendes que la Commission de surveillance du secteur financier peut prononcer contre des établissements financiers qui ne se conforment pas à certaines exigences.

IV. Coopération et coordination

21. Au niveau national, les autorités respectives se coordonnent-elles/coopèrent-elles lorsqu'elles infligent des sanctions pénales et administratives ?

La coordination/coopération entre les autorités respectives est limitée en vertu de l'application du principe de la séparation des pouvoirs.

22. Au niveau européen, les autorités respectives se coordonnent-elles/coopèrent-elles lorsque des procédures/sanctions administratives sont applicables dans un Etat et des dispositions pénales dans l'autre ? Veuillez également mentionner ici les situations dans lesquelles seules les sanctions administratives peuvent être imposées à une personne morale dans un Etat alors que le droit de l'autre Etat prévoit la responsabilité pénale des personnes morales.

Concernant la coordination/coopération au niveau européen, il y a lieu de relever que le Luxembourg met en œuvre le droit de l'Union européenne prévoyant de telles mécanismes/procédures et ne dispose pas d'un régime national spécifique en la matière.

22.1. Si oui, au moyen de quel(s) mécanisme(s) / instruments juridiques? /

22. 2. Des problèmes se sont-ils produits ? Lesquels ? /

Sources principales :

- *Les sanctions administratives en Belgique, au Luxembourg et aux Pays-Bas, Analyse comparée*, Réunion des Conseils d'Etat du Benelux et de la Cour administrative du Luxembourg, en collaboration avec le Secrétariat général du Benelux, Bruxelles, 21 octobre 2011

- *La sanction en matière administrative en droit luxembourgeois*, Rapport présenté par MM. R. MAUL et J. KAUFFMAN, Conseillers d'Etat du Grand-Duché du Luxembourg, 1972

¹⁸⁴ Sur les différentes conceptions de la notion de recours «de pleine juridiction», v. D. RENDERS et alii, op. cit., n° 77, p. 232

MOLDOVA

I. General questions

97. Does your national law provide for administrative offences, allowing to impose administrative sanctions against natural persons, which are comparable to criminal sanctions? If so, what categories/types of administrative sanctions comparable to criminal sanctions exist in your legal system (e.g. punitive and/or preventive measures, such as fines, disqualifications, etc.)?

Answer: Article 32 paragraph (2) of the Code of Contraventions states express and exhausted the administrative sanctions:

- a) warning;
- b) fine;
- c) deprivation of the right to carry out certain activity;
- d) deprivation of the right to hold certain positions;
- e) penalty points;
- f) deprivation of the special right (the right to drive (in accordance with the Criminal Code-means of conveyance), the right to hold a weapon and a port gun);
- g) unpaid community work;
- h) administrative/contraventional arrest.

In the same time, art. 62 of the Criminal Code expressly and exhaustively states the types of criminal penalties that shall be applied to individuals:

- a) fine;
- b) deprivation of the right to occupy a certain positions or to carry out a certain activity;
- b¹) deprivation of the right to drive means of conveyance or the repeal of this right;
- c) withdrawal of the military or of the special degree, of a special title, a qualification degree (classification), or government distinctions;
- d) unpaid work for the benefit of community;
- e) imprisonment;
- f) life imprisonment.

Their punitive feature characterizes both criminal and administrative sanctions. As a rule, they vary by degree of "severity". Thus, the fine applied for administrative offences shall be smaller than for the criminal ones (the amount of the fee in administrative case might vary from 1 to 500 conventional units, a conventional unit being equal to 50 MDL – i.e. Moldovan Lei – domestic currency, subsequently, for criminal offences - from 500 to 3000 conventional units, a conventional unit being equal to 50 MDL).

Deprivation of the right to drive as an administrative sanction usually last up to 1 year, but in some cases up to 3 years. The term of deprivation of the right to drive as criminal punishment varies from one to five years, and only as a complementary punishment. Unpaid community work for committing the administrative offense may not exceed 60 hours, while the criminal penalty for unpaid community work is set within the range of 60 hours to 240 hours. The length of the administrative arrest may not exceed 30 days for the plurality of offences; 15 days for a singular offense. In these cases, the imprisonment shall be applying for a period of at least 3 months.

98. How do you define an administrative and a criminal offence/sanction?

Answer: Both administrative and criminal offences are harmful actions, punished by law. The degree of social danger differs, and the laws under which they are punished differ as well.

Art. 10 of the Code of Contraventions defines **administrative offence** as "illegal action or lack of action, which has a lower social danger degree than criminal offence, committed by guilt, which violates the social values protected by law, is provided by the above code and shall be punished with administrative sanction";

Article 14 paragraph (l) of the Criminal Code defines **the criminal offense** as "a detrimental act (action or inaction), regulated by the Criminal law, committed with guilt and punishable with criminal penalty".

The **administrative sanction**, according to article 32 paragraph (1) of the Code of Contraventions, represents "a measure of state constraint and a means of correction and re-

education which is applied, in the name of the law, to the person who committed a contravention/administrative offence";

Criminal punishment under Article 61 paragraph (1) of the Criminal Code is "a measure of state constraint and a means of correction and re-education of the convicted person, in the name of the law, of persons who have committed crimes, causing certain privations and limitations of their rights";

Consequently, the **administrative sanction** is a measure of state constraint and a means of correction and re-education applied, in the name of the law, to the person who committed an administrative offence.

The **criminal sanction** is defined as a measure of state constraint and a means of correcting and re-educating a convicted person, which is applied by the courts in the name of the law, to persons who have committed crimes, causing certain shortcomings and restrictions of their rights.

98.1. How do you distinguish the two?

Answer: Both administrative and criminal law are codified. Subsequently, the Administrative Code provides the administrative offences and the Criminal Code the criminal ones.

98.2. Has the Engel jurisprudence influenced the categorisation of sanctions in your national system?

98.3. If so, to what extent?

Answer: The *Engel* case and the criteria established by the ECHR for difference sanctions have affected not only the classification of sanctions on domestic level, but also their practical perception with regard to *non bis in idem* principle.

99. **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 the respective added value of administrative and criminal sanctions? Please provide representative examples.**

Answer: The administrative sanctions shall be applied for committing administrative offences. Criminal sanctions shall be applied for committing criminal offences.

At the same time, article 55 and 53 of the Criminal Code regulates the case of release an individual from criminal liability with administrative liability when: a minor or less serious offense has been committed for the first time, the guilt has been confessed, the damage caused by the offense has been compensated and his correction is possible without being a subject to criminal liability.

Individuals released from criminal liability under Article 55 of the Criminal Code shall be subjects to the following sanctions:

- a) a fine of up to 150 conventional units (7500 lei);
- b) deprivation of the right to carry out certain activity for a period of 3 months to one year;
- c) deprivation of the right to hold certain positions for a period of 3 months to one year;
- d) deprivation of the special right to drive for a period of 6 months to 3 years;
- e) deprivation of the special right to hold a gun and a harness for a period of 3 months to one year;
- f) unpaid community work over a period of 10 to 60 hours;
- g) administrative arrest for up to 30 days.

The deprivation of the right to perform a particular activity, the deprivation of the right to hold certain position, the deprivation of a special right may also be applying as complementary sanctions.

This rule shall not be applied to individuals who have committed the offenses provided by art. 181 (corruption of electores), art. 256 (receipt of an illegal remuneration for the performance of public service), art.264 paragraph (3) (violation of transport traffic or operational safety rules by person operating the means of transport rules for the safety of the traffic or the operation of the means of transport by the person in charge of the means of transport that caused severe bodily injury or damage to health or the death of a person), art.264¹ (operating a means of transport in a state of acute alcoholic intoxication or in a state of intoxication caused by other substances), art.303 (interference with the dispense of justice and with criminal investigations),

art.314 (Determination oto make false statements, false expert conclusions, or wrong translations), art. 326 para. (1) and (I 1) (influence pedding), art.327 para. (I) (abuse of power or abuse of official position), Article 328, paragraph (I) (excess of power or excess of official authority), Article 332 paragraph (I) (forgery of public documents), Article 333 paragraph (I) (b)), Article 333 (1) and (2) (taking bribes), Article 335 paragraph (1) (abuse of official position).

It is relevant that the maximum of applied sanctions applied within the art. 55 of the Criminal Code represents 150 conventional units (7,500 MDL). The maximum limit of the sanction for administrative cases, according to the provisions of the Contraventional Code, which can be applied to the individual, is 500 conventional units (25,000 MDL) and to the official - 1,500 conventional units (75,000 MDL). Thus, an administrative sanction, applied under the provisions of the Code of Contravention, might exceed the one applied under the Criminal Code.

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

100.1. Art. 4 of the Convention on the protection of the environment through criminal law (ETS 172).¹⁸⁵

Answer: On 19 November 2009, the European Parliament and the Council of the European Union approved the Directive 2008/99/EC on the protection of the environment through criminal law, which sets out criminal measures to ensure more effective environmental protection.

Article 4 of the Directive states that Member States shall ensure that inciting, aiding and abetting the international conduct referred to in Article 3 is punishable as a criminal offence. Thus, not all the acts provided for in Article 3 of Directive 2008/99 / EC (offenses) are punishable by domestic criminal law. According to the Criminal Code of the Republic of Moldova (Chapter IX, environment offenses), the following conduct constitutes a criminal offence, only when a serious environmental pollution has been caused.

When a less serious consequence has been caused, an administrative sanction shall be applied. Thus, the criminal liability shall be applied when a serious and extremely serious damage has been caused.

According to Article 3 of the above-mentioned Directive, it is considered an offence when the discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants.

Persons can be held liable for criminal offence referred to art. 227 (soil pollution), art. 229 (water pollution), art.230 (air pollution) of the Criminal Code of the Republic of Moldova, when such offence has caused damage to: (a) population's health; (b) environment; (c) agricultural production, or the death of the person.

Therefore, most of the criminal components of environmental offences are material and require injurious consequences, unlike EU legislation where it is enough for illegal pollution to cause or is likely to cause serious consequences.

We would like to remind that the infringement of the ecological legislation is the most common in the Republic of Moldova, and the Criminal Code is applicable only in cases where damage occurred.

In order to achieve the principle of the inevitability of legal liability for any violation of environmental legislation and in the context of starting the procedure for drafting new amendments to the criminal legislation, the Prosecutor's Office on 04.07.2018 submitted to the Government a "*de lege ferenda*" proposal on amendment of the Chapter IX of the Criminal Code (ecological offenses), which has not been accepted.

100.2. Art. 78 (3) of the Council of Europe Convention on preventing and combating violence against women and domestic violence (ETS 210).¹⁸⁶

Answer: On 11 May 2011, the Council of Europe adopted the Convention on the preventing and combating the violence against women and domestic violence (Istanbul Convention), an interstate treaty, which requires Member States to exercise due diligence to prevent, investigate

¹⁸⁵ <https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168007f3f4>

¹⁸⁶ <https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168008482e>

violence against women and domestic violence, punishing the aggressors and compensating victims of violence.

The Republic of Moldova signed the Convention on 06.02.2017 in Strasbourg, committing itself to take multiple actions to reduce this phenomenon. The provisions of the Convention shall become binding upon its ratification and entry into force.

In order to eradicate the phenomenon of domestic violence, on March 1st, 2007, the Parliament of the Republic of Moldova adopted the Law no.45-XVI on the Prevention and combating domestic violence (Law no. 45), into force starting with 18.09.2008.

Law no.167 from 09.07.2010 adopted by the Parliament has improved the implementation mechanism of Law no.45 and amended the Criminal Code with a new pre-regulation - Article 201¹ whereby domestic violence has been classified as a crime. Criminal and civil procedural law also has been amended.

By Law no. 196 on amending and completing certain legislative acts from 28.07.2016, in force since 16.09.2016, the domestic legal framework has been harmonized with international standards and CoE Convention on preventing and combating domestic violence.

Please note that Law no. 167 includes amendments to 11 normative acts: Law on the Prevention and combating domestic violence, Law on Police Activity and the Status of the Police Officer, Law on State Guaranteed Legal Assistance, Law on Local Public Administration, Law on foreigners in the Republic of Moldova, Law on weapons and ammunition for civilian use, Law on State Tax, Criminal Code, Contravention Code, Criminal Procedure Code, Civil Procedure Code.

The offense of "**domestic violence**" according to the provisions of art. 201¹ of the Criminal Code, is understood as - "any intentionally conduct committed by a family member towards another member of the family, expressed by:

lit. a) maltreatment, other violent act, resulting in minor injury to bodily integrity or health (attributable to physical violence);

lit. b) isolation, intimidation for the purpose of imposing will or personal control over the victim (attributable to psychological violence) and

lit. c) deprivation of economic means, including primary means of subsistence, neglect, if they have caused the victim slight harm to bodily integrity or health (economic violence).

The aggravation of the offense is regulated by paragraphs (2), (3) and (4) of the article.

Art. 2 of the Law no. 45 defines the "**psychological violence**" as: any conduct that seriously impairs another person's psychological integrity through coercion or threats, imposing his own will or personal control, causing tension and mental suffering by insulting, derision, swearing, nicknaming, blackmailing, demonstrative goods destruction, oral threats, ostentatious display of weapons or by hitting domestic animals; neglect; mixture in private life; being jealous; neglect; mixture in personal life; acts of jealousy; imposing isolation by detention, including family housing; isolation from family, community, friends; prohibition of professional performance, prohibition of attending classes; dispossession of identity documents; intentional ban of access to information; other conduct having similar effect.

Also, a new article was introduced on the failure to comply with the measures stated by the protection order of the victim of domestic violence - art. 320¹ of the Criminal Code.

By the said law, other important provisions were amended and / or completed, such as:

- Art. 77 paragraph (l) let. g), art. 145 paragraph (2) with lit. e) of the Criminal Code;
- Art. 69 paragraph (1), art. 71, paragraph (2), art. 118 paragraph (2), art. 2151 and art. 276 paragraph (5) of the Criminal Procedure Code;

100.3. 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.

Answer: The Law no. 45 amended also the Code of Contravention: Art. 16, art. 37, art. 41, art. 78 of the Contravention Code and introduced some new articles - art. 781 domestic violence, art. 782 persecution conduct (a new administrative offence regulated according the Istanbul Convention as a form of violence against women) and Art. 318¹ Failure to execute the emergency restraint order.

We mention that, by assigning primary character to the security of the person, the General Prosecutor's Office in 2017 elaborated new Methodological Recommendations for the Implementation of legal framework on combating domestic violence (no. 25-13d / 2017-258 of June 16, 2017). The recommendations have been disseminated to prosecutors from territorial prosecutor's offices and Police General Inspectorate for implementing.

II. Separate or combined tracks of sanctions

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

Answer: The conduct regulated by the special part of the Code of Contravention is only liable for contravention.

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

Answer: Criminal and administrative sanctions shall not be mixed or opposed. As an example in this regard might be a road accident case that caused several victims, one having slight body injuries and two others with average injuries. Under these circumstances, the perpetrator is liable both for administrative and criminal liability. Thus, the administrative sanction shall be combined with criminal sanction, but in separate proceedings

103. In your view: is the *ne bis in idem* applicable in case both tracks apply? Can you give examples of relevant national case law in this respect?

Answer: The principle of *non bis in idem* would have been breached if the same offense was penalized both in criminal and contraventional terms. The domestic courts comply with this principle without exception, especially after the decision of ECHR in the case of *Ziliberberg v. Republic of Moldova* (1 February 2005).

However, when the person commits an unlawful act, the liability shall be established only for the criminal offense, or only for the administrative offense. When an individual has been convicted for committing an unlawful act, it is no longer possible for him to be held responsible for the same deed according to the administrative law.

And vice versa, when an individual has been punished for committing an administrative offence, being prosecuted for the same illegal conduct according to the criminal law, the criminal proceedings shall be ceased by the prosecutor (pretrial stage) or, judge (judiciary/trial stage), based on the fact that there is already a final decision issued on the same person on the same accusation.

At the same time, according to Article 380 of the Code of Contravention, no one shall be prosecuted or sanctioned several times for the same deed. When new circumstances occur, or a fundamental defect affecting the decision is found, the administrative investigations might be renewed.

III. Identification of main differences between administrative and criminal tracks

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

Substantive law

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

Answer: The Administrative Code does not regulate administrative sanctioning for complicity or helping/supporting the commitment of the administrative offences. However, if two or more persons have committed the same offense, they are all liable to be held responsible for this act.

According to the Criminal Code, participating (art.41) and the supporting (art. 49), as well as supporting of the serious, exceptionally grave or exceptionally serious crimes, shall be sanctioned (art.323).

General principles

105. Are administrative sanctions governed by general principles of administrative law or general principles of criminal law (such as proportionality, nullum crimen sine lege, legality, lex mitior, non-retroactivity etc)?

Answer: Art.3-9 of the Code of Contravention establishes the general principles of the Administrative Law.

According to art. 1 paragraph (1) of the Code of Administrative Contraventions, the law on contravention consist of rules of law establishing the administrative general and particular principles and provisions, determining the administrative offenses and stipulating the administrative proceeding and sanctions. Thus, the administrative sanctions are regulated by the general principles of the Administrative law, expressly regulated bu the Code of Administrative Offences as follows: the principle of legality (art.5), the principle of equality before the law (art.6), the principle of justice (art.7) the principle of the personal character of administrative liability (Article 8) and the principle of individualisation of administrative offence and sanctions (Article 9).

In the context, it is relevant that, in accordance with the provisions of Article 3 paragraph (2) of the Code of Contravention, "the law of contravention, which sanctions the worsening or worsens the situation, the person guilty of committing a contravention does not have retroactive effe Răspuns: Art.3-9 din Codul contravențional stabilesc principiile generale ale dreptului contravențional.

Procedural law

106. Do typical criminal procedural rights apply in case of administrative offences/sanctions (such as presumption of innocence, right to be heard, right of access to the case-file, right to remain silent)?

Answer: The particular procedural-criminal rights shall be applied for the administrative cases. In particular, those expressly provided by the Code: the presumption of innocence (art. 375), the inviolability of the person (art. 376), the freedom of confession against him self (art.377), the right not be prosecuted or sanctioned several times (art.380) and free access to justice (art.381).

107. What kind of authorities are involved in the decision to impose administrative sanctions?

Answer: Art. 393 of the Code regulates the competent authorities in the decision to impose administrative sanctions: the official examiner, the administrative commission, the prosecutor, as the case may be, the court.

108. Do administrative authorities vested with a sanctioning power comply with the principles of independence and impartiality? Is the decision on the sanction subject to a full judicial review (in law and in facts)? Which judicial authorities/courts are in charge of reviewing administrative sanctions?

Answer: The official examiner shall act according to principles of independence and impartiality. An appeal against the decision on administrative sanction may be appealed issued in the court. Subsequently, the courts decision might be object of appeal in case of disagreement. Reviewing sanctions is within the jurisdiction of the courts, which issued the respective decisions.

Official examiner shall act within the principles of independence and impartiality, based on the provisions of art. 374 of the Code of Contravention, stipulating that the administrative process is carried out on general principles of administrative law, based on the Constitution, the present above Code and the Code of criminal proceedings, the latter expressly laying down the principles.

According to article 448 of the Administrative Code, when disagree, the offender, the victim or their representative, the prosecutor, when he is a party to the administrative case, have the right to appeal the decision of administrative officer.

The article also regulates the terms and procedure for appeal.

Art. 451/3 of the Administrative Code, states the term of appeal is 15 days since the official examiner has applied the administrative sanction.

At the same time, Chapter VIII of the Code of Contravention (art. 465-474) states the appeal court has the jurisdiction to examine the appeals issued against the courts decisions of first level. Theirs decisions are beyond recall.

Art. 475-477 of the Code of Contravention regulates the procedure of reviewing the administrative decisions. The reviewing request shall be submitted within the terms of 6 months since one of the specific reasons has occurred

The administrative cases might be reviewed exclusively when there is a pending case issued against Republic of Moldova by an International Court or has been initiated a free settlement agreement of the case, by the perpetrator or the Prosecutor General or his deputies, in the court decision or decision has become final.

IV. Cooperation and coordination

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

Answer: The procedures are clearly regulated if, during the finding of the administrative offense, it is found that this is actually a criminal violation and vice versa, when a criminal investigation leads to the conclusion that it is an administrative offence. Authorities collaborate in this regard.

The competent authorities to establish and examine administrative offences are regulated by the Code of Administrative offences, namely the Court's jurisdiction (art. 395), the prosecutor's jurisdiction (art.396), the jurisdiction of the administrative commission (art.398) and the competence of the official examiner (399).

It is relevant that only the court can apply administrative sanctions in the form of: deprivation of the right to carry out certain activities, deprivation of the right to hold certain positions, deprivation of a special right (right to drive, right of ownership or harbor and use of a weapon), unpaid community work, and administrative arrest.

Accordingly, the official examiner and the prosecutor shall apply the other sanctions regulated by law. When there is court's jurisdiction, both the official examiner and the prosecutor shall make appropriate proposals to the court to examine and establish the punishment.

All these represent coordination/cooperation aspects at domestic level concerning the application of administrative sanctions.

With regard to criminal sanctions, at national level, exclusively the Court shall settle them.

Finally, the legislator stated in the Criminal Code (Article 55) the possibility, under given conditions, to apply administrative liability instead of criminal one. In this case, the prosecutor shall settle a fine as sanction.

22. At the European level, do respective authorities coordinate/cooperate when administrative procedures/sanctions are applicable in one State and criminal law provisions in the other? Please refer here also to situations where only administrative sanctions may be imposed against a legal person in one State whereas the law of the other State provides for criminal liability of legal persons.

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

Answer: According to domestic legal framework there is no legal instrument in these regard.

22. 2. Have problems occurred? Which ones?

Answer: Finally, it has to be mentioned that the EHCR findings stated in Ziliberberg v. Moldova (application no.61821/00) are still valid in case of Republic of Moldova.

The Court stated in the judgment of 01.02.2005, that: for Article 6 to apply, it suffices that the offence in question should by its nature be "criminal" from the point of view of the Convention, or should have made the person concerned liable to a sanction which, by its nature and degree of severity, belongs in general to the "criminal" sphere (see, inter alia, the Lutz v. Germany judgment of 25 August 1987, Series A no. 123, p. 23, § 55).

This does not exclude that a cumulative approach may be adopted where the separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a "criminal charge" (see, Janosevic v. Sweden, no. 34619/97, § 67, ECHR 2002-VII).

As regards the nature of the offence committed by the applicant, the Court notes that he was convicted under Article 174/1 § 4 of the Code of Administrative Offences ("CAO") of

participating in an unauthorised demonstration. That provision regulates offences against public order and is designed to regulate the manner in which demonstrations are to be held. Accordingly, the legal rule infringed by the applicant is directed towards all citizens and not towards a given group possessing a special status. The general character of the legal rule in question is further confirmed by Article 1 and Article 12 of the CAO which refer to the fact that administrative responsibility comes into operation at the age of sixteen and all citizens must show respect for legal rules and the rights of other citizens and legal persons (see *Öztürk v. Germany*, judgment of 21 February 1984, Series A no. 73, § 53).

Moreover, Mr Ziliberberg was sentenced by the courts to a fine. The fine was not intended as pecuniary compensation for damage but was punitive and deterrent in nature (see, *mutatis mutandis*, the *Bendenoun v France* judgment of 24 February 1994, Series A no. 284, § 47). Article 22 of the CAO is relevant to that effect. The Court reiterates that a punitive character is the customary distinguishing feature of criminal penalties (see the above-mentioned *Öztürk* judgment, § 53).

The Court reiterates that in principle, the general character of the CAO and the purpose of the penalties, which are both deterrent and punitive, suffice to show that for the purposes of Article 6 of the Convention the applicant was charged with a criminal offence (see, *Lauko v. Slovakia*, judgment of 2 September 1998, Reports 1998-VI, § 58).

The criminal character of the offence is further evidenced by the fact that the applicant was taken to the police where he was held for a few hours and interrogated by criminal investigators. Moreover, the CAO contains provisions relating to such matters as mitigating and aggravating circumstances, responsibility for attempt to commit an offence and legitimate defence (see paragraph 22 above) which are indicative of the criminal nature of the administrative offences. It is also important to note that the CAO cases are heard by criminal chambers of the courts

The Court reiterates that the lack of seriousness of the penalty at stake cannot deprive an offence of its inherently criminal character (see the above mentioned *Öztürk* judgment, § 54). In the present case, however, the severity of the actual and potential penalty could in principle be considered as another argument in favour of the applicability of Article 6. In this respect it is to be noted that the applicant was fined MDL 36 (the equivalent of EUR 3.17 at the time), which constituted over 60% of his monthly income and that he faced a maximum penalty of MDL 90 (the equivalent of EUR 7.94 at the time).

Moreover, if he failed to pay the fine in the circumstances provided for in Article 26/4 of the CAO he was liable to be imprisoned for twenty days (see paragraph 22 above). It is important to note in this respect that under the Code of Civil Procedure in force at the material time, the failure to comply with civil judgments could not lead to imprisonment.

Given the state of the Moldovan legislation and the practice, which transpires from the judgments presented by the parties, the Court is unable to conclude whether in the particular circumstances of his case the applicant ran the risk of being imprisoned in accordance with Article 26/4 of the CAO. However, even if the fine could not have been converted into imprisonment in his case, that would not have been decisive for the classification of an offence as “criminal” under Article 6 (see, *Janosevic v. Sweden*, cited above, § 69).

Having weighed the various aspects of the case, the Court notes the predominance of those which suggest that a criminal charge was involved. Although none of them is decisive on its own, taken together and cumulatively they bring the “charge” within the criminal sphere for purposes of Article 6 § 1.

MONTENEGRO

I. General questions

1. Does your national law provide for administrative offences, allowing to impose administrative sanctions against natural persons, which are comparable to criminal sanctions? If so, what categories/types of administrative sanctions comparable to criminal sanctions exist in your legal system (e.g. punitive and/or preventive measures, such as fines, disqualifications, etc.)?

First of all, please note that for the purpose of this Questionnaire, administrative sanctions will be considered as what is known in Montenegrin legislation as misdemeanor sanctions.

The Law on Misdemeanors of Montenegro prescribes that misdemeanour sanctions are: penalties, warning measures, protective measures and corrective measures.

The types of penalties are: sentence of imprisonment; fine and a fine or a sentence of imprisonment. Instead of a term of imprisonment or a fine, the offender, provided he consents, may be sentenced to a penalty of community service.

The warning measures that may be imposed in accordance with the Law on misdemeanors are an Admonition and a Suspended Sentence.

Protection measures are: Seizure of items; Prohibition to practice a profession, business activity or duty; Suspension of driver's license; Mandatory alcohol addiction treatment; Mandatory drug addiction treatment; Mandatory psychiatric treatment and internment in a health care institution; Mandatory psychiatric outpatient treatment; Public announcement of decision; and Deportation of foreign nationals from Montenegro.

The following corrective measures may be imposed on juvenile offenders: Warning and guidance measures - reprimand and special obligations; Measures of intensive supervision: intensive supervision by parents, adoptive parents, or guardians, intensive supervision carried out by the social welfare authority and intensive supervision with daily stay in an appropriate juvenile correctional and educational facility and Referral to a non-institutional correctional facility.

2. How do you define an administrative and a criminal offence/sanction?

Misdemeanor has defined as an act that constitutes a violation of a public order, and which is defined as a misdemeanour under the law or other piece of legislation and for which a sanctions are provided. The general purpose of prescribing, pronouncing and applying misdemeanor sanctions is that citizens respect the legal system, express the social reproach to the perpetrator for the committed violation and affect him and all other persons in the future to not commit a violation.

Criminal offense is an offense defined by law as a criminal offense, which is unlawful and for which guilt was determined. Criminal sanctions are: punishments, warning measures, security measures and correctional measures. The general purpose of prescribing and pronouncing criminal sanctions is the suppression of offenses that violate or endanger the values protected by criminal legislation.

The Criminal Code of Montenegro prescribes that criminal sanctions shall include the following: punishments, warning measures, security measures, and correctional measures.

According to the law, perpetrators may receive the following punishments: forty-year prison term; prison term; fine and community work.

Warning measures are: suspended sentence and judicial admonition.

Security measures are: mandatory psychiatric treatment and placement in a medical institution; mandatory psychiatric outpatient treatment; mandatory medical treatment of drug addiction; mandatory medical treatment of alcoholism; disqualification from a profession, activity or duty; driving prohibition; confiscation of objects; expulsion of a foreign national from the country and publication of the judgment.

2.1. How do you distinguish the two?

Definitions of misdemeanor sanctions and criminal sanctions are precisely regulated at the national level by the Law on Misdemeanors and Criminal Code of Montenegro.

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

2.3. If so, to what extent?

3. 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 the respective added value of administrative and criminal sanctions? Please provide representative examples.
4. In terms of criminal/administrative sanctions, how did you implement the following provisions of Council of Europe Conventions:
 - 4.1. Art. 4 of the Convention on the protection of the environment through criminal law (ETS 172).¹⁰
 - 4.2. Art. 78 (3) of the Council of Europe Convention on preventing and combating violence against women and domestic violence (ETS 210).¹¹
 - 4.3. 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

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

Misdemeanour sanctions may be prescribed only according to the Law on Misdemeanors.

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

It is possible that a person is convicted of a misdemeanor for a particular event, and against that person the criminal proceeding is subsequently conducted for the same event. In this situation, the Criminal Code stipulates that a prison or a fine imposed on a convicted person, or paid for a misdemeanor, shall be counted in the sentence imposed on a criminal offense whose characteristics include the characteristics of the offense.

7. In your view: is the *ne bis in idem* appl Misdemeanour sanctions may be prescribed only in accordance with the Law on misdemeanors. licable in case both tracks apply? Can you give examples of relevant national case law in this respect?

The Law on misdemeanors has defined misdemeanor as an act that constitutes a violation of a public order, and which is defined as a misdemeanour under the law or other piece of legislation and for which a sanction is provided. It is characterized by a lower degree of social danger from a criminal offense, which, according to the Criminal Code of Montenegro, is an act determined by law as a criminal offense, which is unlawful and concealed.

In order to prevent the use of both sanctioning channels in practice, The Law on Misdemeanors prescribes the banning of a retrial, i.e. prescribes that a person who has been found guilty in criminal proceedings for an offense having a characteristic of a misdemeanor shall not be punished for a misdemeanor. Also, if against offender of the misdemeanor a criminal proceedings for a criminal offense having the character of a misdemeanor is began, a misdemeanor procedure can not be initiated for this offense, and if the misdemeanor procedure is initiated it will be suspended.

This is important, since there are acts that are sanctioned under both the Law on Misdemeanors and the Criminal Code. Such an example exists in the crime of Domestic Violence and in the case of Violence in the Family.

The basic form of the criminal offense Domestic Violence will exist in the case of a violation of the physical or mental integrity of a member of his / her family or family community, using gross violence.

In practice there was a situation of initiation of both criminal and misdemeanor proceedings, but then the abovementioned provisions of the Law on Misdemeanors apply. For example, in one case, the misdemeanor procedure was suspended because the Basic State Prosecutor's Office informed the Misdemeanor Court that regarding the same event for which the misdemeanor procedure was initiated, the procedure was initiated in that prosecutor's office for the criminal offense of Domestic Violence. As the prosecutor assessed the evidence collected, found that there was a reasonable suspicion that a criminal offense prosecuted ex officio was committed, the misdemeanor procedure was suspended.

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>

III. Identification of main differences between administrative and criminal tracks

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

Substantive law

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

The provisions of the Criminal Code regulating culpability, mental capacity, wrongful intent, negligence, error of fact, error of law, co-principal, instigation and aiding, shall apply accordingly to the misdemeanor offender. Also, the provisions of the Criminal Code on the manner, time and place of commission of offence, legitimate self-defense, extreme necessity, force and threat shall apply accordingly to the misdemeanor offender.

General principles

9. Are administrative sanctions governed by general principles of administrative law or general principles of criminal law (such as proportionality, nullum crimen sine lege, legality, lex mitior, non-retroactivity etc)?

General principles of criminal law.

Procedural law

10. Do typical criminal procedural rights apply in case of administrative offences/sanctions (such as presumption of innocence, right to be heard, right of access to the case-file, right to remain silent)?

If The Law on misdemeanors does not regulate certain issues of misdemeanor proceedings, the provisions of the Criminal Procedure Code are applied accordingly.

11. What kind of authorities are involved in the decision to impose administrative sanctions?

The Law on Courts establishes misdemeanour courts and High Misdemeanour Court.

The Law on Misdemeanours prescribes that the authorised body that issued the Misdemeanour Order is responsible for enforcement and monitoring the enforcement of fines and other measures imposed in the Misdemeanour Order. In addition, courts shall enforce and monitor enforcement of fines, costs of procedure and other measures which they imposed in their decisions

12. Do administrative authorities vested with a sanctioning power comply with the principles of independence and impartiality? Is the decision on the sanction subject to a full judicial review (in law and in facts)? Which judicial authorities/courts are in charge of reviewing administrative sanctions?

Misdemeanor courts are part of the regular judicial system, and they are also subject to the basic constitutional and legal principles of independence and autonomy.

The Misdemeanor Courts are competent to decide on request for the initiation of the misdemeanor procedure and on request for judicial decision. The High Misdemeanour Court shall decide on appeals lodged against decisions of misdemeanour courts, shall decide on the conflict of jurisdiction between misdemeanour courts and shall perform other duties

prescribed by law..

A judicial decision may be contested by appeal on the grounds of: a serious violation of the provisions governing misdemeanour proceedings; incorrect application of the substantive law prescribing the misdemeanour in question; the factual situation being erroneously or incompletely established; a decision on the sanction, confiscation of material gain, award of costs of the misdemeanour proceedings and the property claim.

At the session of the Panel, the second instance court may: dismiss an appeal as belated or as inadmissible; dismiss an appeal as unfounded and reaffirm the decision of the first instance court; vacate the first instance decision and remand the case to the first instance court for de novo adjudication; modify the first instance decision.

In addition to appeal, there are also extraordinary legal remedies: Reopening Misdemeanour Proceedings and Petition for Protection of Legality.

IV. Cooperation and coordination

13. At the national level, do respective authorities coordinate / cooperate when imposing criminal and administrative sanctions?

In order to avoid the use of both channels of sanction and to properly apply the provisions of the Law on Misdemeanors aimed at banning the retrial, cooperation between the criminal and misdemeanor courts and the prosecution authorities is of the utmost importance. Within response to the question No. 7, an example of cooperation between these authorities was given.

14. At the European level, do respective authorities coordinate / cooperate when administrative procedures / sanctions are applicable in one State and criminal law provisions in the other? Please refer here also to situations where only administrative sanctions may be imposed against a legal person in one State whereas the law of the other State provides for criminal liability of legal persons.

14.1. If so, under which mechanism(s) / legal instruments?

14.2. Have problems occurred? Which ones?

NORTH MACEDONIA

I. General questions

1. Does your national law provide for administrative offences, allowing to impose administrative sanctions against natural persons, which are comparable to criminal sanctions? If so, what categories/types of administrative sanctions comparable to criminal sanctions exist in your legal system (e.g. punitive and/or preventive measures, such as fines, disqualifications, etc.)?

According to the Macedonian legislation the sanctions for natural persons are prescribed in the Law on misdemeanors and Criminal Code are comparable.

According to the Macedonian Law on misdemeanours the following sanctions can be imposed to adult perpetrators for committed misdemeanors:

1. fine;
2. warning;
3. termination of the validity of a driver's license;
4. prohibition to operate a motor vehicle;
5. prohibition to perform a profession, activity or duty;
6. eviction of a foreign person from the country;
7. mandatory treatment of alcoholics and drug addicts (persons with addiction diseases) and
8. prohibition to enter and attending sports competitions.

Article 33 from the Criminal Code prescribes the types of criminal sanctions in the Criminal Code.

The criminally liable offenders can be imposed the following sentences for the crimes they have committed:

- 1) imprisonment;
- 2) fine;
- 3) prohibition on practicing profession, performing an activity or duty;
- 4) prohibition on operating a motor vehicle;
- 5) expulsion of a foreigner from the country; and
- 6) prohibition on attending sports competitions.

2. How do you define an administrative and a criminal offence/sanction?

In the article 5 of the Law on misdemeanors, the misdemeanor is defined as an unlawful act determined by law, with attributes determined by Law and for which misdemeanor sanction is provided.

According to the Criminal Code, as criminal offence shall be considered an unlawful act which is determined by law to be a crime, and whose characteristics are determined by law.

a. How do you distinguish the two?

In the Republic of Macedonia the system of punishable acts is divided in two categories: criminal acts and misdemeanors.

The misdemeanors are separate category of punishable act, prescribed with separate laws and less serious type of offence, which is different from the criminal offence.

The criminal acts are more serious offences and are prescribed in the Criminal Code.

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

No, our system was in line with the international standards and we did not have problems in this matter.

c. If so, to what extent?

3. 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 the respective added value of administrative and criminal sanctions? Please provide representative examples.

The misdemeanors as mention before are less serious type of offences, different from the criminal offence. The prescribed procedure is simpler, faster and less expensive in comparison to the criminal procedure.

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

a. Art. 4 of the Convention on the protection of the environment through criminal law (ETS 172).¹⁸⁷

Republic of Macedonia did not ratify this convention.

b. Art. 78 (3) of the Council of Europe Convention on preventing and combating violence against women and domestic violence (ETS 210).¹⁸⁸

The article 33 – Psychological violence of the Convention is prescribed as criminal act in the Criminal Code, as a part of the family violence.

In article 122 of the Criminal Code family violence is defined as abuse, rude insults, threatening of the safety, inflicting physical injuries, sexual or other physical and psychological violence which causes a feeling of insecurity, being threatened, or fear towards a spouse, parents or children or other persons which live in a marital or other community or joint household, as well as towards a former spouse or persons which have a common child or are have close personal relations.

Family violence is qualified form of couple of criminal acts prescribed in the Criminal Code.

¹⁸⁷<https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168007f3f4>

¹⁸⁸<https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168008482e>

For example:

Bodily injury

Article 130

(1) Whosoever causes bodily injury or health deterioration to another, shall be fined or sentenced to imprisonment of up to three years.

(2) Whosoever commits the crime referred to in paragraph 1 while committing family violence shall be sentenced to imprisonment of six months to three years.

(3) The court may impose the offender of the crime referred to in paragraph 1 a court admonition if, he was provoked with especially insulting or rude behavior by the damaged person.

(4) The prosecution for the crime referred to in paragraph 1 shall be undertaken upon a private complaint, and for the one referred to in paragraph 2 upon a proposal.

Regarding article 34 of the Convention, stalking is defined in the Law on prevention and protection from family violence in accordance with the convention. It is also prescribed as a criminal act in the Criminal code in article 144 - Threatening the safety. There is need for further implementation of this article in accordance with the Convention.

- c. 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

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

Yes, misdemeanors are separate offences and are prescribed in separate laws, in competences of different ministries. For example, there are misdemeanours in the area of public traffic, pollution of environment, public finances e.c.t. Also the procedure is different than the criminal one, although some of the main institutes can be used, as it is prescribed in the Law on misdemeanors.

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

No, this kind of combination between these two is not allowed. One offence can be either criminal or misdemeanor offence.

7. In your view: is the *nebis in idem* applicable in case both tracks apply? Can you give examples of relevant national case law in this respect?

In the article 14 of the Constitution of the Republic of Macedonia is prescribed that no person may be tried in a court of law for an offence for which he/she has already been tried and for which a legally valid court verdict has already been brought. This is constitutional provision which is also prescribed in the criminal law.

In the article 7 of the Law on criminal procedure is stipulated that no person shall be tried again and sentenced for a criminal offense for which he or she has already stood trial and a final and valid judicial verdict exists.

III. Identification of main differences between administrative and criminal tracks

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

Substantive law

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

According to article 12 of the Macedonian Law on misdemeanours there is no misdemeanours responsibility for aiding and abetting, except if it is prescribed by the law.

General principles

9. Are administrative sanctions governed by general principles of administrative law or general principles of criminal law (such as proportionality, nullumcrimen sine lege, legality, lexmitior, non-retroactivity etc)?

According to the article 2 of the Law on misdemeanors, for the misdemeanor and the misdemeanor responsibility, the provisions of the General part of the Criminal Code shall apply.

Procedural law

10. Do typical criminal procedural rights apply in case of administrative offences/sanctions (such as presumption of innocence, right to be heard, right of access to the case-file, right to remain silent)?

Yes, its prescribed that If the Law does not provide otherwise, the courts shall apply the following provisions of the Law on Criminal Procedure to the misdemeanor procedure: the basic principles; language, competence, competence consequences and conflict of competences; exemption; defendant; attorney; writs; minutes; deadlines; reinstatement; costs; property request; enacting and announcing the decisions; service of writs; summoning, arrest, detention of persons, guarantee and taking foreigner's passports; hearing of witnesses; review; expertise; search of premises and persons; regular and extraordinary legal remedies.

11. What kind of authorities are involved in the decision to impose administrative sanctions?

The misdemeanor procedure can be conducted, and a misdemeanor sanction can be imposed only by a competent court. For certain types of misdemeanors, specified by law, the misdemeanor procedure can be conducted, and the misdemeanor sanction can be imposed by a state administrative body. The decision who will be competent for the misdemeanors procedure, state body or court is made by the competent authorities in their substantive laws when prescribing the misdemeanors.

12. Do administrative authorities vested with a sanctioning power comply with the principles of independence and impartiality? Is the decision on the sanction subject

to a full judicial review (in law and in facts)? Which judicial authorities/courts are in charge of reviewing administrative sanctions?

Yes, the administrative authorities are independent and impartial.

If the administrative body is competent for the misdemeanour procedure and imposing the sanction, in that case the concerned party has a right to appeal to the State commission of second instance in inspection surveillance and misdemeanour procedure. The decision of the State Commission is final and can be executed. The concerned party who is not satisfied of this decision has a right to file for instigation of an administrative dispute to the Administrative court.

If the court of first instance is competent for the misdemeanour procedure, in that case the concerned party who is not satisfied with the first instance decision has a right to appeal to the court of second instance (Appellant court).

IV. Cooperation and coordination

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

In criminal law the public prosecutor has no right to propose or influence when imposing criminal sanction by the court, its judge decision only to decide on the type and severity of the sanction. This is not case in plea bargaining procedure.

Its the same in misdemeanour procedure, the Commission or the court is competent for imposing the sanction.

22. At the European level, do respective authorities coordinate / cooperate when administrative procedures / sanctions are applicable in one State and criminal law provisions in the other? Please refer here also to situations where only administrative sanctions may be imposed against a legal person in one State whereas the law of the other State provides for criminal liability of legal persons.

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

22. 2. Have problems occurred? Which ones?

NORWAY

I: General questions

1. Yes, our national law provides for several administrative sanctions against natural persons that are comparable to criminal sanctions, both with respect to their purpose and the nature of the penalty.

The main types of administrative sanctions that our legislation provides for are:

- (administrative) fines
- withdrawal or restriction of a permit for a time-limited period
- exclusion from a public aid scheme
- confiscation of assets
- formal warnings

By far most the prevalent kind of administrative sanction in our legislation is (administrative) fines.

2.

2.1 Administrative sanctions are defined in the Public Administration Act section 43 as a "...negative reaction that may be applied by an administrative agency in response to a breach of a statute, regulation or individual decision, and which is deemed to be a criminal sanction pursuant to the European Convention on Human Rights." The definition of a criminal sanction is based on the classification in the legislation of the sanction as a criminal sanction.

Administrative sanctions do not entail deprivation of liberty except for some disciplinary sanctions within the military and prisons.

2.2 Yes, our definition of administrative sanctions in the public administration act is based on the Engel jurisprudence concerning when negative reactions by an administrative agency in response to offences is considered a criminal charge within the meaning of the European Convention on Human Rights Article 6; see 2.1 above.

2.3 To a considerable extent; see definition in 2.1 above (where there is a direct link to the concept of "criminal sanction" within the meaning of the European Convention on Human Rights).

3. The most prevalent administrative sanction provided for in our legislation are administrative fines for breaches of the regulation of business activities, like competition law, environmental law and tax law. The most serious breaches of the regulation of business activities will lead to criminal sanctions although the legislation often also provides for administrative sanctions. Other offences typically lead to administrative sanctions although the legislation often also provides for criminal sanctions. Administrative sanctions can also apply to less serious and less complicated offences conducted outside the scope of business activities, like parking violations. The most serious offences against the rights and freedoms of others by natural persons, for example bodily assault, belong exclusively to criminal law.

Added value of administrative sanctions (compared to criminal sanctions):

- The procedure is generally faster and less costly. This is in part due to less extensive procedural guarantees compared to criminal sanctions, notwithstanding the possibility for the addressee to challenge the sanction before a court. Furthermore, it is in part due to the expert knowledge and experience of administrative agencies in their specific area compared to the Norwegian Prosecuting Authority. Increased efficiency in turn enables the authorities to pursue more infringements, thereby enhancing compliance.
- Administrative sanctions may be more flexible. In some cases concerning less serious first time offences, criminal sanctions may be disproportionate, especially taken into consideration the stigmatizing effect of criminal sanctions. However, no sanctions at all may send the wrong message and undermine compliance. Administrative sanctions that can be adapted to the seriousness of the offence then provides a sensible alternative.

Added value of criminal sanctions (compared to administrative sanctions):

- There are enhanced procedural guarantees when criminal sanctions are imposed. The main difference is that without a consent of the addressee, criminal sanctions may, as a main rule, only be imposed pursuant to a decision by a court.
- In terms of both effectiveness and efficiency, both criminal and administrative sanctions represent advantages and disadvantages. While the procedure in cases concerning administrative sanctions is generally faster and less costly, the enhanced procedural guarantees in criminal cases are both necessary and appropriate when imposing more serious punishments, like imprisonment. Such serious punishments may enhance compliance. The enhanced procedural guarantees also enable the authorities to pursue more offences committed by natural persons outside the scope of business activities, where guarantees in criminal cases are appropriate.

4.

4.1 Norway has not ratified nor signed the Convention on the protection of the environment through criminal law (ETS 172).

4.2 The offences covered by Article 33 and 34 of the Council of European Convention on preventing and combating violence against women and domestic violence are in Norwegian legislation exclusively covered by criminal sanctions.

II. Separate or combined tracks of sanctions

5. Yes, there are some offences where our national law provides only for administrative sanctions, although this is not typical.
6. Yes. Under the Norwegian Criminal Code a final administrative sanction does not constitute a bar for imposing a criminal sanction. However, the administrative sanction will generally be taken into account in sentencing in criminal proceedings. Neither does a final criminal sanction constitute a bar for

imposing administrative sanctions. In any case, the ne bis in idem principle pursuant Article 4 of Protocol No. 7 to the European Convention on Human Rights applies in those cases where both tracks apply.

7. The ne bis in idem principle pursuant Article 4 of Protocol No. 7 to the European Convention on Human Rights applies in those cases where both tracks apply. The decision of the Norwegian Supreme Court in case no. 2012/361, provides an example. The case concerned a 16-year old boy that was committed to a child care institution under section 4-24 subsection 2 cf. subsection 1 of the Child Welfare Act due to serious behavioural difficulties and repeated criminal activities. After the child care measure criminal charges were filed for essentially the same offences. The Supreme Court, which stated that the penal concept is the same in ECHR Protocol 7, article 4 (P 7-4) as in ECHR Articles 6 and 7, concluded that there were no grounds for deviating from Rt-2003-1827, according to which committal under the criminality alternative in section 4-24 subsection 1 of the Child Welfare Act entailed punishment in the sense of P 7-4. The Supreme Court further concluded that it was the same facts that formed the basis of the committal and the criminal case, which meant that the requirement as to identity between the child welfare case and the criminal case was met, cf. EMD-2003-14939, but that there was such connection in terms of time and facts between the cases that this constituted legal parallel prosecution. The appeal against the Court of Appeal's conviction in the criminal case was dismissed.
8. We do not know of any statutes or regulations where aiding and abetting have been sanctioned as such if a behaviour is only constitutive of an administrative offence.

III: Identification of main differences between administrative and criminal tracks

9. General principles of administrative law apply. However, the European Convention of Human Rights including Articles 6 and 7, as well as Protocol 7, article 4, will apply in such cases. In addition general administrative law principles as applicable in cases of administrative sanctions will be influenced, according to the circumstances, by general principles of criminal law.
10. Yes, but with respect to some rights, especially the right to remain silent, to a lesser extent than in criminal cases.
11. That varies somewhat. Typically an administrative agency that deals with matters concerning a specific area, like for example fisheries, will also have the power to impose administrative sanctions for offences within its purview. Individual decisions may be appealed to the administrative agency (the appellate instance) which is the immediate superior of the administrative agency that made the administrative decision (the subordinate instance). The decisions of some administrative agencies may in some fields be appealed to an independent administrative tribunal, for instance The Norwegian Competition Authority's decisions may be appealed to the Norwegian Competition Tribunal.

12. Yes, administrative authorities vested with a sanctioning power are obliged to do so independently and with impartiality. Aspects of the legislation on administrative sanctions contribute to their impartiality, for example the rule that the administrative fine shall accrue to the treasury, and not the particular administrative agency imposing the sanction. However, those administrative authorities will not in general be regarded as a “an independent and impartial tribunal” within the meaning of ECHR Article 6.

The decision on the sanction is subject to a full judicial review (in law and in facts) in the ordinary courts. Some statutes and regulations provide that the administrative sanction has to be tried by the immediate superior of the administrative agency that made the administrative decision or an administrative tribunal before the case can be brought before the ordinary courts.

IV Cooperation and coordination

21. Pursuant to the Public Administration Act, if an administrative agency has reason to believe that both a criminal penalty and an administrative sanction may be an appropriate reaction for the same breach, the administrative agency shall consult with the prosecution authority to clarify whether the breach shall be pursued criminally, administratively, or both criminally and administratively. Furthermore, if an administrative agency has reason to believe that another agency may have grounds to impose an administrative sanction for the same breach, the administrative agency shall ensure that the question of imposing sanctions is dealt with in a coordinated manner. In any case, the principle of ne bis in idem principle must be respected.

Some administrative agencies have made guidelines in cooperation with the Norwegian Prosecuting Authority on which offences shall be pursued administratively and which shall be subject to criminal prosecution.

22. Not answered.

I. General questions

109. Does your national law provide for administrative offences, allowing to impose administrative sanctions against natural persons, which are comparable to criminal sanctions? If so, what categories/types of administrative sanctions comparable to criminal sanctions exist in your legal system (e.g. punitive and/or preventive measures, such as fines, disqualifications, etc.)?

Polish law provides for administrative sanctions in case of administrative torts, which are not treated as offences. The administrative sanctions such as for example financial penalty or decision to suspend certain activities (similar to a fine or a ban on performing profession or business activities that can be imposed based on criminal law) have preventive nature. The aim of administrative sanctions is to prevent further harmful effects of the breach of law.

110. How do you define an administrative and a criminal offence/sanction?

110.1. How do you distinguish the two?

Administrative tort usually takes place in case of a breach of requirements provided for by the law while the offence is committed when the action is forbidden and as a rule brings serious results.

In general the nature of the sanction is the factor which is taken into account while establishing whether the sanction is criminal or administrative. Administrative sanctions have in general preventive character while both the punitive and preventive nature as well as the gravity of a sanction characterise criminal sanctions.

In the judgment of 18 April 2000, file no. K. 23/99, the Constitutional Tribunal held that a provision imposing on natural or legal persons a certain obligation should be connected with a provision specifying the consequence of its non-fulfillment, because as a result of the lack of the following sanctions is a deadlock of the rule and a widespread disregard for the obligation imposed. The distinguishing feature of "punishment" within the meaning of criminal law from "punishment" - an administrative sanction - is that the former must have individualised nature - it can be measured only if the natural person by his or her culpable act fulfils the characteristics of an offence and the latter may be imposed on both a natural person as well as a legal person, it is applied automatically, by virtue of objective liability and, above all, has a preventive effect.

The Constitutional Tribunal in its judgement of 22 September 2009, file no SK 3/08 pointed out that a petty offence (unlawful, socially dangerous, culpable and prohibited act) is a violation of legal obligations, similar in nature to a crime rather than to a violation of legal and administrative directives, and the fine imposed by the judgment is similar to the penalties imposed for crimes and its essence is to cause personal ailment to the perpetrator of an act prohibited by reducing his property.

As concerns administrative financial sanction, it is imposed on various entities (not only on natural persons) by an administrative decision. The decision on imposing the financial sanction is subject to appeal to the administrative court. This sanction is connected with violations of standards, which are often of a technical nature, and is a mean for the administration to carry out its statutory tasks. In this context, the sanction should be regarded as a repressive measure less harmful to an entity infringing a sanctioned standard than penalty imposed by the court in criminal proceedings (especially as regards the legal consequences of the conviction). The admissibility of using administrative

pecuniary penalties as a reaction to a breach of statutory obligations does not raise constitutional doubts. It is not only the criminal courts that can decide on repressive measures. The boundary between administrative tort (and, as a consequence, administrative punishment) and an offence is fluid, and its definition falls within the discretion of the legislature. A complaint to an administrative court is the appropriate legal means to guarantee the plaintiff's right to a court. Although the standards stemming from Article 42 of the Constitution (criminal liability) do not apply to administrative penalties, other constitutional standards of a democratic state governed by the rule of law remain in force.

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

Yes.

110.3. If so, to what extent?

Polish law takes into account all the Engel criteria (legal qualification, nature of breach of law, character and the gravity of a sanction).

111. 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 the respective added value of administrative and criminal sanctions? Please provide representative examples.

The administrative sanctions are envisaged for less serious breaches of law connected with the breach of certain requirements (for example in cases where it is necessary to have certain permits). These breaches are not the offences. Administrative sanctions can be adjudicated in different fields of law, for example: law on environment protection, gambling, aviation law, pharmaceutical law.

The division between administrative and penal sanctions responds to the rule of ultima ratio of penal responsibility and sanctioning system.

The added value of administrative sanctioning system is to take immediate action against a person who breaches the law. In case of administrative liability there is no need to establish guilt/negligence. The sole fact of a breach of law is sufficient to impose administrative sanction. The aim of the administrative liability is, among others, to deprive certain rights, to stop harmful activities, to pay financial penalties.

The added value of criminal sanctioning system is to punish a perpetrator, to prevent the committal of further offences, to educate and rehabilitate the perpetrator as well as to protect the victim.

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

111.1. Art. 4 of the Convention on the protection of the environment through criminal law (ETS 172).¹⁸⁹

The acts envisaged in article 4 of the Convention can be treated either as an administrative tort or a petty offence. The legal qualification depends on particular elements of the behaviour of a person. They are described by the law and can be

¹⁸⁹ <https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168007f3f4>

penalized for example either with a fine (petty offence) or a decision to suspend the activities or fulfil certain obligations, financial sanction (administrative tort).

- 111.2. Art. 78 (3) of the Council of Europe Convention on preventing and combating violence against women and domestic violence (ETS 210).¹⁹⁰

The acts mentioned in art. 78 (3) of the convention are criminalised as the offences under Penal Code.

- 111.3. 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

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

Yes, for example only administrative sanctions are provided for in the Law on the renewable sources of energy.

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

Yes, for example environmental law, law on financial market, geological and mining law.

114. In your view: is the *ne bis in idem* applicable in case both tracks apply? Can you give examples of relevant national case law in this respect?

Ne bis in idem principle shall be applied when two types of sanctions (administrative and penal) do not meet the Engel criteria. Thus, if the criteria are met it is possible to apply both tracks without ne bis in idem implications.

In the judgment of 16 October 2007 Voivodship Administrative Court in Warsaw, case file no VI SA/Wa 1029/07, explained that mandatory withdrawal the arms permit is an administrative sanction consisting in the deprivation of a special right, i.e. the arms permit, imposed in administrative proceedings initiated on the basis of a final decision - a conviction of for an offence against health, life or limb, or property or binding information on the initiation of criminal proceedings for the commission of such crimes. For these reasons this sanction, among others, (different nature of penalties, proceedings of a different nature) cannot be treated as the compulsory withdrawal of the weapons licence, that is as an additional penalty to that imposed by a criminal court for offences against health, life or property; nor can its imposition be regarded as a second punishment for the same act, leading to a breach of the ne bis in idem principle.

III. Identification of main differences between administrative and criminal tracks

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

Substantive law

¹⁹⁰ <https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168008482e>

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

No.

General principles

116. Are administrative sanctions governed by general principles of administrative law or general principles of criminal law (such as proportionality, nullum crimen sine lege, legality, lex mitior, non-retroactivity etc)?

There are specific rules governing administrative sanctions included in relevant administrative laws and code of administrative procedure. According to the latter the imposition of financial sanction is governed by certain rules such as proportionality, the rule to impose the sanction which is lenient for the party, force majeure, rules concerning financial sanction's concession, withdrawal of the sanction.

Procedural law

117. Do typical criminal procedural rights apply in case of administrative offences/sanctions (such as presumption of innocence, right to be heard, right of access to the case-file, right to remain silent)?

During administrative proceedings specific administrative rules are applied. However, procedural rights are also applied during these proceedings (the right to be heard, the right of access to the case files, right to remain silent, right to have an attorney).

118. What kind of authorities are involved in the decision to impose administrative sanctions?

Administrative authorities as a first instance and administrative courts as a second instance.

119. Do administrative authorities vested with a sanctioning power comply with the principles of independence and impartiality? Is the decision on the sanction subject to a full judicial review (in law and in facts)? Which judicial authorities/courts are in charge of reviewing administrative sanctions?

According to the principle of deepening the trust envisaged in the code of administrative procedure, the administrative authorities conduct the proceedings in the way that strengthens the parties trust towards public authorities, guided by the rules of proportionality, impartiality and equal treatment. The decision on the sanction is subject to a full judicial review both for the facts and the law. There are administrative courts which deal with administrative sanctions.

IV. Cooperation and coordination

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

No. However, the administrative authority has to take into account the judgement issued by the criminal court.

22. At the European level, do respective authorities coordinate / cooperate when administrative procedures / sanctions are applicable in one State and criminal law provisions in the other? Please refer here also to situations where only administrative sanctions may be

imposed against a legal person in one State whereas the law of the other State provides for criminal liability of legal persons.

No

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

22. 2. Have problems occurred? Which ones?

PORTUGAL

I. General questions

1. Does your national law provide for administrative offences, allowing to impose administrative sanctions against natural persons, which are comparable to criminal sanctions? If so, what categories/types of administrative sanctions comparable to criminal sanctions exist in your legal system (e.g. punitive and/or preventive measures, such as fines, disqualifications, etc.)?

As introductory remark it should be stated that the major interventionism characteristic of the welfare State and the advent of the State as regulator have led to an expansion of the administrative activity. This reality, together with the need for reform of the Criminal Law led to the development of the Sanctioning Administrative Law, under which administrative sanctions appears as an instrument for the effectiveness of the regulatory action of the Administration.

An administrative sanction should be understood as a punitive measure imposed by the Administration in the case of violation of a legal-administrative provision. Through it, the Administration aims to punish the citizen for the commission of an administrative illicit, intentionally committed.

Allied to this idea of the existence of a sanctioning power outside the judicial sphere that conflicts with the principle of the division of powers, is the recognition, in comparative law and by a certain doctrine, of the unity of this administrative sanctioning power with the judicial power, representing two sides of the same *ius puniendi* of the State, which is thus unitary. Alongside the State *ius puniendi* of administrative nature exists the judiciary power, which is responsible for the application of justice, in accordance with the Constitution of the Portuguese Republic.

Therefore, the answer is YES. The Portuguese law foresees administrative sanctions for administrative offences of criminal nature. This regime is applicable to natural and legal persons. The general regime is foreseen in Decree-Law no. 433/82, of 27 October.

As stated before, an administrative offence (*contraordenação*) is any illegal act that is subject to a fine and appeals against it must be made to a court of Law. When the administrative offence has criminal nature, the appeal must be filed to a criminal court.

To these administrative offences are applicable as punitive measures fines, which are also be one of the consequences of the commission of a crime. These fines have the nature of monetary sanctions intended to punish administrative offences, designed in the same terms as the ones intended to punish a crime.

To administrative offences are also applicable accessory sanctions, such as:

- a) Confiscation of objects;
- b) Interdiction of the exercise of professions or activities whose exercise depends on public title or authorization or homologation of public authority;
- c) Deprivation of the right to a subsidy or benefit granted by public entities or services;
- d) Deprivation of the right to participate in fairs or markets;
- e) Deprivation of the right to participate in public tenders or tenders for the execution of works or the concession of public works, the supply of goods and services, the concession of public services and the attribution of licenses or permits;
- f) Closure of an establishment whose operation is subject to authorization or license of administrative authority;
- g) Suspension of authorizations licenses and permits.

As preventive measure, during the administrative procedure can be applicable caution measures such as the seizure of objects or assets.

2. How do you define an administrative and a criminal offence/sanction?

An Administrative offence is, accordingly to Article 1 of Decree-Law no. 433/82, of 27 October, any unlawful and censurable act that fulfils a legal type to which a fine deemed therefore.

Criminal offence is the behaviour that violates the law and as such is punished with a penalty. For the purposes of the Code of Criminal Procedure (article 1), crime is the set of assumptions on which the application to the offender of a criminal penalty or security measure depends.

a. How do you distinguish the two?

The Law specifically classifies the behaviours over which it produces a censure judgement.

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

The Engel jurisprudence is reflected in the Portuguese legal framework considering the relationship between criminal and administrative sanctions. The Portuguese legal system uses administrative sanctions for less serious offences, considering that criminal law should only be used as the *ultima ratio* of criminal policy, designed to punish intolerable offenses against values or interests fundamental to human coexistence. Therefore, criminal law is not a solution to sanction infractions of unproven criminal dignity.

Administrative offences are designed mainly to respond to those cases where the conducts are socially intolerable, but do not attain criminal dignity.

c. If so, to what extent?

Please see the previous answer.

3. 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 the respective added value of administrative and criminal sanctions? Please provide representative examples.

As stressed above, the Portuguese legal system uses administrative sanctions for less serious offences, considering that criminal law should only be used as the *ultima ratio* of criminal policy, designed to punish intolerable offenses against values or interests fundamental to human coexistence.

Therefore, criminal law is not a solution to sanction conducts of unproven criminal dignity. Administrative offences are designed mainly to respond to those cases where the

conducts are socially intolerable, but do not attain criminal dignity. On the other hand, the legal framework set out by Decree-Law no. 433/82, of 27 October, densifies the need for a reaction (that not a criminal one) in the face of increasing State intervention in certain sectors (as provider or as a regulator), representing the administrative offence a clear added value once it grants speed, efficiency and effectiveness.

As an example, the administrative sanctions for traffic offences set out in Decree-Law no. 114/94, of 3 May, represent a less serious grade offences than the road traffic crimes.

The administrative offences set out in the mentioned legal instrument include the violation of a set of social living rules. They reflect rules of organization and security essential to road safety. When the conducts are harmful to the human being or appropriate to produce a greater risk, the Criminal Law comes into action. For example, driving under the effect of alcohol is strictly forbidden. If the amount detected in the blood is equal to or greater than 0,5 g/l it represents an administrative offence. Whenever the amount of alcohol detected is over 1.2 g/l, it becomes a crime foreseen in the Criminal Code, considering the incorporated grade of the risk.

Other examples of areas where administrative offences prevail are environmental law, construction or markets.

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

- a. Art. 4 of the Convention on the protection of the environment through criminal law (ETS 172).¹⁹¹

Portugal has not signed this Convention.

- b. Art. 78 (3) of the Council of Europe Convention on preventing and combating violence against women and domestic violence (ETS 210).¹⁹²

Article 78 (3) states that any State or the European Union may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right to provide for non-criminal sanctions, instead of criminal sanctions for the behaviours referred to in Articles 33 and 34.

Referring to both of the behaviours set forth in Article 33 – Psychological violence – and Article 34 – Stalking -, criminal sanctions are foreseen in the Portuguese legal framework.

- c. 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.

Administrative offences are widely used envisaging environmental protection.

II. Separate or combined tracks of sanctions

¹⁹¹ <https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168007f3f4>

¹⁹² <https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168008482e>

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

YES.

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

YES. For instance in the field of environment protection.

7. In your view: is the *ne bis in idem* applicable in case both tracks apply? Can you give examples of relevant national case law in this respect

YES. This principle is applicable as a general principle of law. The following case law addresses this issue, considering that no double sanction for the same conduct and the same effect is admitted:

<http://www.dgsi.pt/jtrc.nsf/-/BF364813F72116ED80258213003E8BD3>

III. Identification of main differences between administrative and criminal tracks

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

Substantive law

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

NO. However, Article 16 of Decree-Law no. 433/82, of 27 October, establishes that if several offenders participate in the commission of the offence, any of them is liable for the administrative offence even if the level of participation or of the guilt depend upon certain characteristics of the offender and those only exist in one of them. The fine fixed for the offender, especially mitigated, shall apply to the accomplice.

General principles

9. Are administrative sanctions governed by general principles of administrative law or general principles of criminal law (such as proportionality, nullum crimen sine lege, legality, lex mitior, non-retroactivity etc)?

To administrative offences are applicable specific laws that subsidiary apply criminal procedure law.

Procedural law

10. Do typical criminal procedural rights apply in case of administrative offences/sanctions (such as presumption of innocence, right to be heard, right of access to the case-file, right to remain silent)?

YES. General framework Law on administrative offences (Decree-Law no. 433/82, of 27 October), determines that whenever the contrary does not result from the law, the rules regulating criminal proceedings are applicable, duly adapted. It also determines that the imposition of a fine or accessory penalties is not allowed without first ensuring that the accused has the possibility to pronounce, within a reasonable time, on the offence against him/her and on the sanction or penalties applicable. The defendant has the right to be accompanied by a lawyer, chosen at any stage of the proceedings.

11. What kind of authorities are involved in the decision to impose administrative sanctions?

Administrative authorities, defined by law in each case or intervention area. If an appeal is submitted, judicial authorities assume the competence.

12. Do administrative authorities vested with a sanctioning power comply with the principles of independence and impartiality? Is the decision on the sanction subject to a full judicial review (in law and in facts)? Which judicial authorities/courts are in charge of reviewing administrative sanctions?

YES, administrative authorities vested with a sanctioning power comply with the principles of independence and impartiality.

The decision on the sanction is subject to a full official review by courts, upon appeal.

IV. Cooperation and coordination

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

YES.

22. At the European level, do respective authorities coordinate / cooperate when administrative procedures / sanctions are applicable in one State and criminal law provisions in the other? Please refer here also to situations where only administrative sanctions may be imposed against a legal person in one State whereas the law of the other State provides for criminal liability of legal persons.

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

Under international cooperation instruments or under international assumed commitments. As an example, consider the mechanism established under Directive (EU) 2015/413, of the European Parliament and of the Council, of 11 March 2015, facilitating cross-border exchange of information on road-safety-related traffic offences Text with EEA relevance, transposed by law no. 49/2017, of 10 July.

22. 2. Have problems occurred? Which ones?

The European Car and Driving Licence Information System (EUCARIS) is relatively recent in order to allow for an evaluation.

RUSSIA

1. General questions

1. The legislation of the Russian Federation provides for criminal liability exclusively for natural persons. Article 19 of the Criminal Code of the Russian Federation No. 63-F3 of June 13, 1996 with amendments of November 12, 2018 (hereinafter referred to as "the Criminal Code") says that "only a sane natural person who has reached the statutory age envisaged by this Code shall be subject to criminal liability."

Liability of both legal entities and natural persons who have committed an administrative offense is regulated by the Code of Administrative Offenses of the Russian Federation No. 195-FZ of December 30, 2001 with amendments of November 28, 2018 (hereinafter referred to as "the Administrative Code").

As for the assessment of the comparability of administrative and criminal liability of natural persons, it should be assumed that the types of criminal punishments are as follows:

- a fine, deprivation of the right to hold specified offices or to engage in specified activities, deprivation of a special or military rank or honorary title, class rank or government decoration, compulsory works, corrective labor, restriction of military service, restricted liberty, compulsory labor, arrest, service in a disciplinary military unit, deprivation of liberty for a fixed period, deprivation of liberty for life, and capital punishment (Article 44 of the Criminal Code).

In the light of our accession to the Council of Europe Russia undertook obligations to gradually abolish the capital punishment. Decree of the President of the Russian Federation No. 724 of May 16, 1996 established a moratorium on the execution of capital punishment. Currently, this type of punishments is not applied.

Such types of criminal punishment as compulsory work, corrective labor, restriction of military service, compulsory labor, arrest, service in a disciplinary military unit, deprivation of liberty for a fixed term, and deprivation of liberty for life shall be applicable as basic penalties alone.

Fines, deprivation of the right to hold specific offices or to engage in specific activity and restriction of liberty may be applicable both as basic and additional penalties.

Deprivation of a special or military rank, honorary title, class rank or government decorations shall be applicable as additional penalties alone.

Restriction in military service or service in a disciplinary military unit shall be applied for military crimes, that is the crimes against the established order of military service committed by servicemen.

Article 3.2 of the Administrative Code establishes the following types of administrative sanctions imposed for committing administrative offenses: warning, administrative fine, confiscation of the instrument or the object of an administrative offense, deprivation of a special right granted to a natural person, administrative arrest, administrative deportation from

the Russian Federation of a foreign citizen or a stateless person, disqualification, administrative suspension of the activity, compulsory works, and administrative ban on visiting venues of official sports competitions in the corresponding days.

However, a warning, an administrative fine, deprivation of a special right granted to a natural person, with the exception of the right to drive vehicle of a corresponding type, administrative arrest, disqualification, administrative suspension of the activity, and compulsory works may be established and imposed as principal administrative penalties only (Article 3.3. of the Administrative Code).

Confiscation of the instrument or the object of an administrative offense, deprivation of a special right in the form of the right to drive vehicle of a corresponding type, administrative deportation from the Russian Federation of a foreign citizen or a stateless person, and administrative ban on visiting venues of official sports competitions in the corresponding days may be established and imposed both as principal and additional administrative penalties.

2. In accordance with Article 14 of the Criminal Code, a socially dangerous act, committed with guilt and prohibited by this Criminal Code under threat of punishment, shall be deemed to be a crime.

The commission of an act, or inaction, although formally containing the *indicia* of any act provided for by the Code, but which, by reason of its insignificance, does not represent a social danger, shall not be deemed a crime.

According to the definition contained in Article 43 of the Criminal Code, punishment is a measure of State compulsion assigned by a court's judgment. Punishment shall be applied to a person who has been found guilty of the commission of a crime. It consists of the deprivation or restriction of the rights and freedoms of this person, as provided for by the Code. Punishment shall be applied for the purpose of restoring social justice, and also for the purpose of reforming a convicted person and of preventing the commission of further crimes.

Article 2.1 of the Administrative Code contains the following definition of an administrative offense: a wrongful, guilty action (omission) of a natural person or legal entity which is administratively punishable under this Code or the laws on administrative offenses of constituent entities of the Russian Federation shall be regarded as an administrative offense.

According to Article 3.1 of the Administrative Code, an administrative penalty is a punitive measure for committing an administrative offense, established by the State, and it shall be administered for the purpose of preventing the commitment of new offenses either by the offender himself, or by other persons.

2.1. As can be seen from the above mentioned legal norms, both crime and administrative offense are wrongful, guilty and punishable actions: crime – under the Criminal Code; and administrative offense – under the Administrative Code.

Moreover, definition of crime also contains an *indicium* of an act representing a social danger. This material *indicium* reveals the social essence of a crime. It manifests itself as a

socially dangerous act that causes harm or creates a threat of damage to a person, society, or the State. In compliance with the Constitution of the Russian Federation, the tasks of the Code are explicitly indicated in Article 2 of the Criminal Code of the Russian Federation and are the following: the protection of the rights and freedoms of a person and citizen, property, public order and public security, the environment, and the constitutional system of the Russian Federation, the maintenance of peace and security of mankind, as well as the prevention of crimes.

To accomplish these tasks, the Criminal Code establishes the basis and principles of criminal liability, defines which deeds are recognized as offenses dangerous to persons, society, or the State, and establishes the types of punishment and other penal measures for the commission of offenses (Article 2).

In compliance with Article 1.2 of the Administrative Code, the aims of the legislation on administrative offenses shall be the protection of a person, of human and civil rights and freedoms, of citizens' health, of the sanitary-andepidemiological well-being of the population, the defense of public morals, protection of the environment, of the established procedure for exercising State powers, of public order and security, of property, the protection of the lawful interests of natural persons and legal entities, society and the State from administrative offenses, as well as the prevention of administrative offenses.

Both criminal and administrative legislation prioritize the protection of an individual.

Differences include the degree of the social danger, which depends on the significance of the object of the guilty offense, the nature and extent of the damage caused, the method of its perpetration and other circumstances. Having assessed the degree of social danger of an act, the legislator criminalizes the certain act. Thus, the act is dangerous since it is actually contrary to the interests of an individual, society and the State. Meanwhile, the range of socially dangerous acts may vary due to changes in the economy and politics: some socially dangerous acts are recognized as criminal acts (became criminalized), while others, on the contrary, cease to be such, and are decriminalized.

Criminal punishment is assigned by a court's judgment, only, and to a natural person, only.

A judgment with conviction for a crime is always delivered on behalf of the State and entails a criminal record which a person maintains for a certain period of time determined by law and after serving the sentence and which may have negative affect for him/her established by law.

The offender shall bear administrative liability by definition or resolution of the authorized bodies or officials (judges, commissions on juvenile affairs, federal executive authorities and executive authorities of constituent entities of the Russian Federation, the Bank of Russia, etc.) within their competence on the grounds and in accordance with the procedure established by law.

Moreover, administrative penalties may also apply to a legal entity (Article 3.2 of the CAO).

The Criminal Code as well as the Administrative Code imposes liability both for intentional and careless acts (Articles 24 of the Criminal Code and 2.2 of the Administrative Code).

2.2-2.3. There are three criteria known as Engel criteria (Judgment of the European Court of Human Rights of June 8, 1976 in the case of *Engel and Others V The Netherlands*) under the case law of the European Court of Human Rights (hereinafter – the European Court, ECHR), by which an administrative offence could be distinguished from a criminal act. Russian national legislation is in general conformity with these criteria.

3. The grounds and procedures for criminal and administrative prosecution are completely different in the Russian Federation and are governed by different laws. The legislation of the Russian Federation does not provide for an administrative penalty for a committed crime. The possible form of liability is determined at the stage of legal classification of committed acts while distinguishing administrative offences from crimes.

4.1-4.2. The Russian Federation is not a party to the Council of Europe Convention on the Protection of the Environment through Criminal Law of November 4, 1998 and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence of May 11, 2011.

4.3. The elaboration of the Council of Europe Convention on the Counterfeiting of Medical Products and Similar Crimes Involving Threats to Public Health (*MEDICRIME* Convention) has given a new impetus to attempts to criminalize socially dangerous manifestations of illicit trafficking in health products in the form of special compositions. This Convention was signed on October 28, 2011 in Moscow (ratified by Russia on March 22, 2018, and entered into force in Russia on July 1, 2018).

After signing of this Convention the Federal law No. 532-FZ on Amendments to a Number of Legislative Acts of the Russian Federation on Countering Trafficking in Fraudulent, Counterfeit, Inferior and Unregistered Medicinal Products, Medical Goods and Fraudulent Nutritional Supplements of December 31, 2014 introduced criminal and administrative liability for trafficking in counterfeit medicines.

In particular, illegal production of medicinal products and medical goods (Article 235.1 of the Criminal Code), handling of fraudulent, inferior and unregistered medicinal products, medical goods and trafficking of fraudulent nutritional supplements (Article 238.1 of the Criminal Code), as well as forgery of falsified documents for medicinal products or medical goods, or of packaging of medicinal products or medical goods (Article 327.2 of the Criminal Code) are criminalized.

At the same time, this Federal law provides for administrative liability of citizens, officials, individual entrepreneurs, legal entities for handling of fraudulent, counterfeit, inferior

and unregistered medicinal products, medical goods and fraudulent nutritional supplements (Article 6.33 of the Administrative Code).

Before supplementing the Administrative Code by Article 6.33, administrative liability for violation of legislation on handling of medicinal products was established in Article 14.4.2 of the Administrative Code.

II. Separate and combined tracks of sanctions.

5. Yes, there are types of offences that provide for administrative sanctions only under the national law of the Russian Federation.

6. Russian national legislation does not allow a combination of criminal and administrative sanctions and does not provide for administrative penalty for an act legally classified as crime, and vice versa.

Certainly, there are areas of public relations where the two types of sanctions co-exist. Criminal acts and administrative offences are present in the spheres of health protection of citizens, property protection, public security, environment and others. Acts are distinguished, as previously indicated, according to the degree of risk they pose to society, to the extent of the damage to individuals, society or the State caused or which could be caused by an act.

7. Russian criminal legal doctrine upholds the principle *ne bis in idem*. Under Article 27 of the Criminal-procedural code of the Russian Federation the criminal prosecution with respect to the suspect and to the accused shall be stopped also because of the existing sentence on the same accusation or of the ruling of the court or the resolution of the judge on the termination of the criminal case on the same accusation with respect to such persons, which has come into legal force, or existing cancelled resolution of the body of inquiry, of the investigator or of the prosecutor with respect to the suspect and to the accused on the termination of the criminal case on the same accusation, or on the refusal to institute a criminal case.

Under Article 24.5 paragraph 1 subparagraph 7 of the Administrative Code proceedings in a case concerning an administrative offence may not be started, and such proceedings, if they have been started, are subject to termination if there is a decision to impose an administrative penalty, or a decision to terminate proceedings in a case concerning an administrative offence, which is set out in the same paragraph of the article of these Code or in a law of the constituent entities of the Russian Federation, or of a decision to initiate criminal proceedings against a person in respect of one and the same fact of committing unlawful actions (omissions) by a person, who is put on trial in connection with an administrative offence.

This legal norm is reflected in the stance set out in paragraph 12.1 of the ruling of the Plenary Session of the Russian Supreme Court No.25 on Jurisprudence on Criminal Cases Related to Traffic Violations and Non-Compliance with Rules of Vehicles Operation, and to

their Unlawful Taking without Intent to Steal of December 9, 2008: if in legal proceedings in criminal case concerning crime provided for in Article 264 paragraph 2, 4 or 6, or in Article 264.1 of the Criminal Code it is established that a person had incurred administrative liability in relation to this offence under Article 12.8 paragraph 1 or 3, or Article 12.26 of the Administrative Code, the court should refer the criminal case to a prosecutor under Article 237 of the Criminal-procedural code of the Russian Federation, since the decision to subject such a person to administrative liability, which entered into force and was not cancelled, for the same acts, incriminated to this person by preliminary investigation bodies (driving of an automobile in a state of intoxication or refusing to comply with the legitimate demand of an authorized official to submit to a medical test for intoxication) prevents sentencing.

Therefore, the *ne bis in idem* exists, is applied and even enshrined at the constitutional level. The Constitution of the Russian Federation declared: "No one may be convicted twice for one and the same crime" (Article 50 paragraph 1).

III. Identification of main differences between administrative and criminal tracks

8. Russian national law provides for liability for aiding, which could be defined purely as administrative offence, in only one case: Article 18.12 paragraph 2 of the Administrative Code establishes the imposition of an administrative fine in the amount of one thousand to two thousand roubles for "failure of a person, crossing the State Borders of the Russian Federation on private business, to take measures aimed at preventing the use of the transport vehicle, which he drives, by another person for illegal crossing of the State Borders of the Russian Federation, which has entailed an illegal crossing or an attempted illegal crossing of the State Border of the Russian Federation by one or several violators thereof, where said action is not complicity in the crime".

Russian legislation does not provide for liability for abetting administrative offences.

9. Implementation of administrative penalties is regulated by general principles of law, such as proportionality, legality, legitimacy, non-retroactivity in the case the situation of an offender deteriorates.

In particular, a person held administratively responsible may not be subject to an administrative penalty and to measures for ensuring proceedings in respect of a case concerning an administrative offence otherwise than for the reasons and in the procedure established by law under Article 1.6 of the Administrative Code.

The same legal norm prohibits decisions or actions (failure to act) abasing human dignity when taking administrative coercive measures (paragraph 3).

Under Article 1.7, paragraph 2 of the Administrative Code, any law mitigating or terminating administrative responsibility for an administrative offense, or otherwise improving

the position of a person who has committed an administrative offense shall be retroactive, that is, it shall also extend to persons who committed administrative offenses prior to the entry of such law into force and who have not been punished pursuant to a decision to impose an administrative sanction.

A law establishing or aggravating administrative responsibility for an administrative offense or otherwise worsening the position of the person shall not be retroactive.

10. The rights of participants in administrative offense proceedings are broadly similar to the rights of participants in criminal proceedings and include among other things the presumption of innocence, the right to be heard, the right of access to the case file, and the right to remain silent.

11. The courts consider and adjudicate administrative cases within their competence on violated or disputed rights, freedoms, and legitimate interests of citizens, rights and legitimate interests of organizations that arise from administrative and other public legal relations, in the manner stipulated in the Code of Administrative Judicial Proceedings of the Russian Federation.

Apart from the courts, administrative offense cases can be tried (within their competence) in commissions on minors and the protection of their rights; internal affairs bodies (the police); bodies and agencies within the penal system; tax and customs agencies; border control agencies; the federal executive body authorized to perform fiscal control and supervision, as well as several other bodies indicated in chapter 23 of the Administrative Code.

12. Judgments of a court of first instance that have not become enforceable can be appealed against in line with the rules set forward in chapter 34 of the Code of Administrative Proceedings of the Russian Federation.

Appeal against a judgment made by the court may be filed by individuals who have participated in the case, as well as persons who were not summoned to participate in the administrative case and whose rights and obligations should be determined by the court. A prosecutor who has taken part in the administrative case may lodge a prosecutor's appeal.

Apart from that, a judgment on an administrative offense case may be appealed:

made by a collegiate body - to the district court at its location;

made by an official - to a superior body, a superior official, or a district court at the place of trying the case;

made by an official indicated in Article 23.79, paragraph 2; Article 23.79.1, paragraph 2; or Article 23.79.2, paragraph 2 of the Administrative Code - to a superior body, a superior official, a federal executive body authorized by a corresponding order by the President of the Russian Federation or the Government of the Russian Federation, or an agreement on the partial transfer of authority, or to a district court at the place of trying the case.

IV. Cooperation and coordination

21. Matters related to the imposition of criminal and administrative sanctions are often discussed at the Plenary Session of the Supreme Court of the Russian Federation.

See Ruling by the Plenary Session of the Supreme Court of the Russian Federation of December 9, 2008 No. 25 (version of May 24, 2016) on Jurisprudence on Criminal Cases Related to Traffic Violations and Non-Compliance with Rules of Vehicle Operation, as well as Their Unlawful Taking without Intent to Steal.

22. It is worth noting that many agreements on legal assistance concluded by the Russian Federation include provisions allowing to provide legal assistance if the offense in question is not criminalized under its legislation.

22.1-22.2. The concept of international cooperation on administrative offense cases was incorporated into Russian legislation by Federal Law No. 97-FZ on Amendments to the Criminal Code of the Russian Federation and the Code of Administrative Offenses of the Russian Federation in furtherance of the Improvement of Public Administration in the Area of Anti-Corruption of May 4, 2011.

Analysis of the current practice showed that cooperation with Russian and foreign competent authorities that provide legal assistance on administrative offense cases is not effective enough.

Article 29.1.1 of the Administrative Code of the Russian Federation contains a list of law enforcement bodies authorized to request legal assistance on administrative offense cases.

Under the provisions of Chapter 29.1 of the Administrative Code of the Russian Federation, legal grounds for international cooperation on administrative offense cases are international agreements of the Russian Federation and the principle of reciprocity.

The Russian Federation is a party to international treaties in specific areas of administrative legal relations: customs and tax matters, compliance with traffic rules, etc. Competent authorities are determined by their function and interact directly.

For example, Armenia, Belarus, Kazakhstan, Tajikistan, Kyrgyzstan, and Russia are parties to the Convention on Mutual Recognition and Enforcement of Judgments on Cases Concerning Administrative Violations of Traffic Rules of March 28, 1997. The Russian Federation ratified the convention by Federal Law No. 134-FZ of July 22, 2008 stating that the body responsible for referring and receiving requests related to the implementation of provisions of the convention shall be the federal executive body in charge of internal affairs.

The Agreement on Legal Assistance and Cooperation of Customs Authorities of Member States of the Customs Union on Criminal Cases and Administrative Offense Cases of July 5, 2010 regulates procedural and other actions on administrative offense cases by customs authorities of Member States of the Eurasian Customs Union. Apart from this customs law agreement, the Russian Federation has concluded intergovernmental

agreements on cooperation on customs matters with the Federal Republic of Germany, the Hellenic Republic, the Republic of Korea, and other countries.

Cooperation on administrative cases is based on an appropriate international legal framework, including the principle of reciprocity.

Another area of international cooperation on administrative offense cases is administrative prosecution. According to Articles 29.1.6 and 29.1.7 of the Administrative Code of the Russian Federation, the General Prosecutor's Office of the Russian Federation shall be authorized to refer administrative offense cases for administrative prosecution and respond to requests for administrative prosecution. In this area, the legislative authority vested the Prosecutor's Office with exceptional powers, appointing it as the sole body for inter-State cooperation.

Only a small amount of administrative offense cases are submitted in order to be referred to foreign authorities.

In 2018, 3 cases were sent to competent authorities of foreign countries (Poland, Ukraine, Azerbaijan) for administrative prosecution of offenders.

Administrative offense case against P. Sagan who had committed an administrative offense under Article 12.26, paragraph 1 of the Administrative Code (Non-fulfilment by the Driver of the Demand to Undergo an Alcohol Intoxication Test) was sent to the Ministry of Justice of the Republic of Poland in line with Article 21 of the European Convention on Mutual Assistance in Criminal Matters of April 20, 1959 and commentary on Article 1 of its Explanatory Report of March 2, 2018.

The Polish side refused to initiate an administrative prosecution of P. Sagan due to the lack of legal grounds for the requested assistance.

Ukrainian competent authorities refused to initiate an administrative prosecution of *Avtoekspres-Dnepr* private company for an administrative offense introduced in Article 20.25, paragraph 1 (Failure to Undergo an Administrative Sanction) of the Code of Administrative Offenses of the Russian Federation.

The refusal was justified by the fact that Ukrainian procuratorial authorities had no powers to enforce judgments on administrative cases or supervise their enforcement. Supervision over compulsory enforcement of decisions to fine offenders is exercised by the public executive service within the structure of the Ministry of Justice of Ukraine.

SERBIA

I. General questions

1. Does your national law provide for administrative offences, allowing to impose administrative sanctions against natural persons, which are comparable to criminal sanctions? If so, what categories/types of administrative sanctions comparable to criminal sanctions exist in your legal system (e.g. punitive and/or preventive measures, such as fines, disqualifications, etc.)?

No, national legislation of the Republic of Serbia doesn't provide administrative offences which could be comparable to criminal sanctions.

2. How do you define an administrative and a criminal offence/sanction?

Article 1 of Criminal Code stipulates the following: No one may be punished or other criminal sanction imposed for an offence that did not constitute a criminal offence at the time it was committed, nor may punishment or other criminal sanction be imposed that was not applicable at the time the criminal offence was committed.

According to Article 4 of Criminal Code which provides criminal sanctions and their general purpose, criminal sanctions are punishment, caution, security measures and rehabilitation measures. The general purpose of prescription and imposing of criminal sanctions is to suppress acts that violate or endanger the values protected by criminal legislation.

There is no definition of administrative sanctions in the Criminal Code or any other law.

- 2.1. How do you distinguish the two?

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- 2.2. Has the *Engel* jurisprudence influenced the categorisation of sanctions in your national system?

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- 2.3. If so, to what extent?

-/

3. 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 the respective added value of administrative and criminal sanctions? Please provide representative examples.
4. In terms of criminal/administrative sanctions, how did you implement the following provisions of Council of Europe Conventions:

Art. 4 of the Convention on the protection of the environment through criminal law (ETS 172).¹⁹³ **-/**

- 4.1. Art. 78 (3) of the Council of Europe Convention on preventing and combating violence against women and domestic violence (ETS 210).¹⁹⁴

Implementation of the mentioned provisions are contained just in the Criminal code. There is no administrative sanctions.

- 4.2. 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

¹⁹³ <https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168007f3f4>

¹⁹⁴ <https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168008482e>

5. Are there types of offences set out in your national law that provide for administrative sanctions only? -/
6. Does your national law allow a combination of criminal and administrative sanctions? Are there areas where the two types of sanctions co-exist? -/
7. In your view: 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 track:

Substantive law

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

General principles

9. Are administrative sanctions governed by general principles of administrative law or general principles of criminal law (such as proportionality, nullum crimen sine lege, legality, lex mitior, non-retroactivity etc)? -/

Procedural law

10. Do typical criminal procedural rights apply in case of administrative offences/sanctions (such as presumption of innocence, right to be heard, right of access to the case-file, right to remain silent)? -/
11. What kind of authorities are involved in the decision to impose administrative sanctions? -/
12. Do administrative authorities vested with a sanctioning power comply with the principles of independence and impartiality? Is the decision on the sanction subject to a full judicial review (in law and in facts)? Which judicial authorities/courts are in charge of reviewing administrative sanctions? -/

IV. Cooperation and coordination

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

22. At the European level, do respective authorities coordinate / cooperate when administrative procedures / sanctions are applicable in one State and criminal law provisions in the other? Please refer here also to situations where only administrative sanctions may be imposed against a legal person in one State whereas the law of the other State provides for criminal liability of legal persons.

22.1. If so, under which mechanism(s) / legal instruments? -/

22.2. Have problems occurred? Which ones? -/

SLOVENIA

I. General questions

1. Does your national law provide for administrative offences, allowing to impose administrative sanctions against natural persons, which are comparable to criminal sanctions? If so, what categories/types of administrative sanctions comparable to criminal sanctions exist in your legal system (e.g. punitive and/or preventive measures, such as fines, disqualifications, etc.)?

MINISTRY OF JUSTICE RS: Yes. Thorough perspective of legal system of the Republic of Slovenia administrative offences are almost exclusively considered as minor offences. That area of punitive law is governed by Minor Offences Act (Zakon o prekrških, ZP-1) – Official Gazette of the Republic of Slovenia, nos. 29/11 – officially consolidated text, 21/13, 111/13, 74/14 – rul. CC, 92/14 – rul. CC, 32/16 and 15/17 – rul. CC).

Article 4 of Minor Offences Act stipulates these sanctions for minor offences:

(1) Subject to the conditions stipulated in this Act, either a sanction or a warning shall be imposed for the commission of an offence.

(2) The sanctions for minor offences are as follows:

- a fine;
- an admonition;
- penalty points for driving offences, including revocation of and prohibition from using a driving license;
- a driving ban;
- deportation of an alien;
- the seizure of items;
- loss or limitation of the right to funds from the budget of the Republic of Slovenia and budgets of self-governing local communities;
- exclusion from public procurement procedures;
- educational measures.

(3) A fine shall be prescribed and imposed as the main sanction, with an admonition imposed as an alternative; penalty points for driving offences, a driving ban, deportation of an alien and the seizure of items, loss or limitation of the right to funds from the budget of the Republic of Slovenia and budgets of self-governing local communities and exclusion from public procurement procedures shall be prescribed and imposed as secondary sanctions.

(4) Penalty points for driving offences and a driving ban, loss or limitation of the right to funds from the budget of the Republic of Slovenia and budgets of self-governing local communities and exclusion from public procurement procedures shall be imposed subject to the conditions stipulated in this Act only when they are prescribed by an Act for such offences.

(5) The deportation of an alien and the seizure of his items shall be imposed subject to the conditions stipulated in this Act or if so determined by other Act.

(6) One or more secondary sanctions may be imposed in addition to a fine or admonition.

(7) Subject to the conditions and in the manner stipulated by this Act, a warning may be imposed on the perpetrator of an offence instead of initiating an offence procedure or issuing a decision on the offence.

(8) Subject to the conditions stipulated in this Act, any proceeds arising from a minor offence shall be seized.

(9) The educational measures and other sanctions stipulated in this Act shall be imposed on juvenile offenders.

In the future there may be third kind of offence – administrative offences/sanctions exclusively for legal persons in accordance with the regulations governing the protection of competition, insurance supervision, the securities market, the prevention of money laundering and regulations implemented by the Bank of Slovenia. Only in that cases strict liability for offences committed by legal persons could be used (strict liability in the Republic of Slovenia is prohibited for natural persons in criminal matters – Article 27 of the Constitution of the Republic of Slovenia).

2. How do you define an administrative and a criminal offence/sanction?

MINISTRY OF JUSTICE RS: Definition of minor offence is set in Article 6 of the Minor Offences Act:

“A minor offence is any act which represents a violation of an Act, a decree adopted by the Government, or an ordinance adopted by a self-governing local community which has been stipulated as a minor offence and for which a sanction has been prescribed.”

Definition of criminal offence is set in Article 16 of The Criminal Code (Official Gazette of the Republic of Slovenia, nos. 50/12 – officially consolidated text, 6/16 – corr., 54/15, 38/16 and 27/17):

“A criminal offence shall mean unlawful conduct that the statute due to urgent protection of legal values determines as a criminal offence, while defining the elements thereof and the sentence for the guilty perpetrator.”

Regarding sanctions for minor offences see previous question.

System of Criminal Sanctions is governed by Article 3 of the Criminal Code as follows:

(1) Criminal sanctions shall include: sentences, admonitory sanctions and safety measures.

(2) The imposition of a sentence shall be prescribed for the perpetration of any criminal offence, which shall be imposed on the perpetrator (hereinafter, the perpetrator) in proportion to the weight of the committed act and his guilt. Admonitory sanctions instead of a sentence and, in addition to a sentence or admonitory sanction, safety measures may be imposed on the perpetrator under the conditions determined in the general part of this Code.

(3) If the perpetrator has been convicted of a criminal offence, he may be subject to the confiscation of property and to the publication of the judgement under the conditions determined by the present Code.

(4) When rules determine that because of the conviction for the criminal offence the offender's (hereinafter, the offender) rights or certain rights shall be revoked or limited

in addition to the imposed criminal sanctions, the prohibition referred to in the previous Article shall apply for such legal consequences as well.

(5) Under the conditions determined in this Code, a perpetrator may be subjected to safety measures, confiscated proceeds of crime, and may be issued with a judgment if he was not found guilty on the grounds of his insanity at the time of committing a criminal offence. Provisions regarding the legal consequences of the sentence shall also apply to such perpetrators.

2.1. How do you distinguish the two?

MINISTRY OF JUSTICE RS: Criminal sanctions are found exclusively in The Criminal Code and sanctions for minor offences are found in Acts governing different legal areas – minor offences for breaking road traffic rules are found in Road Traffic Rules Act, minor offences regarding nature conservation are found in Nature Conservation Act,...

Minor offences can also be part of a Decree adopted by the Government of the Republic of Slovenia and a part of an Ordinance adopted by a self-governing local community.

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

MINISTRY OF JUSTICE RS: No, it has not.

2.3. If so, to what extent?

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3. 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 the respective added value of administrative and criminal sanctions? Please provide representative examples.

MINISTRY OF JUSTICE RS: Administrative sanctions – minor offences in the Republic of Slovenia are, as Article 6 of Minor Offences Act state, a violation of an Act, a decree adopted by the Government, or an ordinance adopted by a self-governing local community which has been stipulated as a minor offence and for which a sanction has been prescribed.

Minor offences are usually less serious offences, main type of liability for minor offences is negligence, a regulation governing minor offences may stipulate that a perpetrator be held liable only for offences which have been committed intentionally (in criminal offence law (the Criminal Code) main type of liability is intent, so the perpetrator shall be punished for the criminal offence committed through negligence only if the law so determines). On the other hand, there are also some serious minor offences, for instance in Prevention of Restriction of Competition Act Code (Official Gazette of the Republic of Slovenia, nos. 36/08, 40/09, 26/11, 87/11, 57/12, 39/13 – rul. CC, 63/13 – ZS-K, 33/14, 76/15 and 23/17) regarding restriction of competition, in Banking Act (Official Gazette of the Republic of Slovenia, nos. 25/15, 44/16 – ZRPPB, 77/16 – ZCKR, 41/17, 77/18 – ZTFI-1, 22/19 – ZIUDSOL in 44/19 – rul. CC),...

Minor offences shall be adjudicated by minor offence authorities (administrative and other state authorities and bearers of public authority which supervise the implementation of Acts and decrees on minor offences, and - self-governing local

community bodies vested with authority to adjudicate on offences pursuant to special regulations) and courts.

Focus of minor offences procedures is on so called “expedited proceedings” that are carried out by minor offence authorities, so these procedures are normally speedier. Minor offences are adjudicated by courts only when expedited proceedings are not admissible (in the following cases stipulated in Paragraph 2, Article 52 of Minor offences Act).

When prescribing minor offences, competent authority must not duplicate minor offence (the same minor offence cannot be prescribed for instance in two different Acts) or even duplicate minor offence with criminal offence. Constitutional court of the Republic of Slovenia for instance adjudicated that the Criminal Code was in breach of Article 28 of Constitution (Principle of Legality in Criminal Law), because unlawful storage of firearms or ammunition whose circulation is restricted to individuals was at the same time criminal offence and minor offence – see decision of CC, no. U-I-88/07):¹⁹⁵

“Because the legal signs of the criminal offense according to the first paragraph of Article 310 of the Criminal Code, in so far as they pertain to the commission of an offense committed with the "unlawful storage of firearms or ammunition whose circulation is restricted to individuals", may be completely covered by the legal signs of an minor offense under point 4 of the first paragraph of Article 81 of the Weapons Act in relation to Article 10 of the same law, the Constitutional Court found that Article 310 of the Criminal Code in this part is not in compliance with Article 2 Of the Constitution and Article 28 of the Constitution.”

Minor offences in the Republic of Slovenia are sometimes very simple (speeding, not reporting something to the date,...), but on the other hand minor offences are sometimes very complicated, for instance minor offences prescribed in Prevention of Restriction of Competition Act, although “Unlawful restriction of competition” is also criminal offence as set in Article 225 of the Criminal Code:

“(1) Whoever, in pursuing an economic activity contrary to regulations governing the protection of competition, violates the prohibition of restricting agreements between companies, abuses the dominant position of one or more companies, or creates a forbidden concentration of companies and thus prevents or significantly impedes or distorts competition in the Republic of Slovenia, or on the European Union market, or its significant part, or significantly influences trade between Member States, which results in a large property benefit for such a company or companies, or a large property damage for another company shall be sentenced to imprisonment for not less than six months and not more than five years.

(2) The perpetrator who violated the prohibition of restricting agreements referred to in the preceding paragraph and had declared such an offence before it was detected or he knew it had been detected and took part in its investigation and the elimination of consequences and neither compelled others to take part in the restriction of competition nor forced them to continue taking part in the restriction, may be granted a remission of the sentence.”.

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

¹⁹⁵ <http://odlocitve.us-rs.si/sl/odlocitev/US28479?q=kaznivo+dejanje%2C+prekr%C5%A1ek>

4.1. Art. 4 of the Convention on the protection of the environment through criminal law (ETS 172).¹⁹⁶

MINISTRY OF JUSTICE RS: The Republic of Slovenia did not sign that Convention on the protection of the environment through criminal law (ETS 172).

4.2. Art. 78 (3) of the Council of Europe Convention on preventing and combating violence against women and domestic violence (ETS 210).¹⁹⁷

MINISTRY OF JUSTICE RS: Council of Europe Convention on preventing and combating violence against women and domestic violence has been (partly) implemented in legal system with Act Amending the Criminal Code (Official Gazette of the Republic of Slovenia, no. 54/15) with new criminal offences such as “Entering into a forced marriage or setting up similar communities” (Article 132.a of the Criminal Code), “Stalking”(Article 134.a of the Criminal Code). Amended was also General part of the Criminal Code with new Article 71.a – “A restraining order against the victim of the criminal offence”. Previously the Criminal Code had criminal offences of “Domestic violence” (Article 191 of the Criminal Code), “Rape” (Article 170 of the Criminal Code), Sexual violence (Article 171 of the Criminal Code). Article 43 of so called “Istanbul Convention” states that the (criminal) offences established in accordance with this Convention shall apply irrespective of the nature of the relationship between victim and perpetrator.

4.3. 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.

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II. Separate or combined tracks of sanctions

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

MINISTRY OF JUSTICE RS: Yes, there is quite a large number of minor offences in the Republic of Slovenia and only the most serious offences are crimes (criminal offences).

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

MINISTRY OF JUSTICE RS: Yes, national law allows that, but criminal procedure has always advantage over minor offence procedure. Therefore Article 11.a of the Minor Offences Act states:

“Minor offence and criminal offence

Article 11.a

(1) Minor offence proceedings shall not be initiated against, and sanctions shall not be imposed upon a perpetrator who has been found guilty in criminal proceedings of committing a criminal act that includes the elements of a minor offence or when a

¹⁹⁶ <https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168007f3f4>

¹⁹⁷ <https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168008482e>

criminal complaint having basis on such act has been dropped on the grounds of settlement procedure or of deferred prosecution.

(2) In the event that criminal proceedings for a criminal offence that includes elements of a minor offence have been suspended on the basis of a final decision or a decision of acquittal was issued or charges were finally dropped or dismissed, or a criminal complaint was dismissed, minor offence proceedings shall be conducted against the perpetrator only when he/she may not be excluded from the reasons for such a decision.

(3) Minor offence proceedings shall not be initiated when a criminal complaint was lodged for a criminal offence that includes elements of a minor offence or when criminal proceedings are conducted against the perpetrator; if minor offence proceedings were initiated, they shall be suspended and shall continue only after the criminal offence proceedings have been completely terminated. The limitation of legal proceedings with respect to a minor offence shall not apply and shall be resumed after the final decision from the preceding paragraph has been given.

(4) The state prosecutor shall forthwith notify the competent minor offence authority and/or the court of its decision from the preceding paragraphs of this article that has influence on the conduct of the proceedings when these have been initiated, as well as of the final decision by the court.”

But nevertheless, of the Article 11.a of Minor offences Act, principle of *ne bis in idem* as set in ECHR case Sergey Zolotukhin v. Russia applies.

7. In your view: is the *ne bis in idem* applicable in case both tracks apply? Can you give examples of relevant national case law in this respect?

MINISTRY OF JUSTICE RS: Yes, *ne bis in idem* is one of basic principles in criminal law AND minor offences law (together these legal fields are called punitive law) and only description of situation matters like it was set in ECHR case Sergey Zolotukhin v. Russia.

For instance if someone was driving too close to the edge of the road and would hit cyclist: if the driver of the car would be charged with fine for committing minor offence by Police, because of the *ne bis in idem* principle he could not be charged in criminal procedure for the same situation if that cyclist would later die as a consequence of driving too close to the edge of the road.

III. Identification of main differences between administrative and criminal tracks

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

Substantive law

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

MINISTRY OF JUSTICE RS: No, participation (aiding or abetting) in committing criminal or minor offence is punishable in both types of offences. Regarding participation

committing minor offence provisions regarding these two institutes are (*mutatis mutanda*) used in minor offence procedure (Article 8 of Minor Offences Act). And there is only one special provision regarding aider and abettor – Article 11 of Minor Offences Act: “If an aider or abettor has aided or abetted in particularly mitigating circumstances or if the offence was not eventually committed, the aider or abettor may not be sanctioned.”.

9. Are administrative sanctions governed by general principles of administrative law or general principles of criminal law (such as proportionality, *nullum crimen sine lege*, legality, *lex mitior*, non-retroactivity etc.)?

MINISTRY OF JUSTICE RS: Minor offences in the Republic of Slovenia are considered part of punitive law, so general principles of criminal law, primarily set in the Constitution of the Republic of Slovenia (Constitution), also apply for minor offences:

1. **Principle of Legality – Article 28 of Constitution; Paragraph 1 of Article 2 of Minor Offences Act - a sanction for a minor offence may not be imposed if the act committed has not been previously defined as an offence in an act, decree or self-governing local community ordinance, and if no sanctions were prescribed for committing such an act - *nullum crimen sine lege*.**

Paragraph 2 and 3 of Article 1 of Minor Offences Act: (2) The regulations that define minor offences committed in the Republic of Slovenia shall be applied exclusively in compliance with this Act.

(3) The provisions of Part One of this Act (substantive law provisions) shall apply to all minor offences pursuant to the regulations referred to in the preceding paragraph.

2. ***lex mitior* – Paragraph 2 of Article 2 of Minor Offences Act - in cases where, after an offence has been committed, the substantive law provisions of this Act or the regulation which governs the offence are amended on one or more occasions, the Act or the regulation which is more lenient on the perpetrator shall apply.**
3. ***Prohibition of Double Jeopardy* – Article 31 of Constitution**
4. **Principles of proportionality non-retroactivity – general constitutional principles from Article 2 of Constitution apply: “Slovenia is a state governed by the rule of law and a social state.”**

Procedural law

10. Do typical criminal procedural rights apply in case of administrative offences/sanctions (such as presumption of innocence, right to be heard, right of access to the case-file, right to remain silent)?

MINISTRY OF JUSTICE RS: Minor offences in the Republic of Slovenia are considered part of punitive law, so general principles of criminal procedural law apply also for minor offences:

1. **Right to Judicial Protection – Article 23 of Constitution**
2. **Right to Legal Remedies – Article 25 of Constitution**

3. **Presumption of Innocence – Article 27 of Constitution, Article 7 of Minor Offences Act**
4. **Legal Guarantees in Criminal Proceedings – Article 29 of Constitution – Anyone charged with a criminal offence must, in addition to absolute equality, be guaranteed the following rights:**
 - the right to have adequate time and facilities to prepare his defense;
 - the right to be present at his trial and to conduct his own defense or to be defended by a legal representative;
 - the right to present all evidence to his benefit;
 - the right not to incriminate himself or his relatives or those close to him, or to admit guilt.
5. **Right to be heard – general principle of punitive law.**

11. What kind of authorities are involved in the decision to impose administrative sanctions?

MINISTRY OF JUSTICE RS: Paragraph 1 to 3, Article 45 of Minor Offences Act states:

(1) Minor offences shall be adjudicated by minor offence authorities and courts.

(2) Minor offence authorities are: - administrative and other state authorities and bearers of public authority which supervise the implementation of Acts and decrees on minor offences, and - self-governing local community bodies vested with authority to adjudicate on offences pursuant to special regulations.

(3) Courts are minor offence courts of the first and second instances.

Examples of administrative and other state authorities: Police, Municipal Wardens, different Inspectorate, some Ministries are minor offence authorities (for instance Ministry of Justice is regarding minor offences prescribed in Financial Operations, Insolvency Proceedings, and Compulsory Dissolution Act), minor offence authority are also be certain kinds of supervisors (nature, traffic, water, fishing, skiing,...)...

Focus of minor offences procedures is on so called “expedited proceedings” that are carried out by minor offence authorities. Minor offences are adjudicated by courts only when expedited proceedings are not admissible (in the following cases stipulated in Paragraph 2, Article 52 of Minor offences Act):

- where the initiator of ordinary court proceedings evaluates, taking the nature of the minor offence into consideration, that the conditions necessary for the imposition of a secondary sanction pursuant to this Act have been met;
- when the prescribed secondary sanction shall take the form of a driving ban;
- when exclusion from public procurement procedures is prescribed by Act;
- when the offender is a juvenile;
- for offences relating to defense duties and for offences relating to the incompatibility of holding public office with profitable activities;

- for public transport safety offences for which a secondary sanction of 18 penalty points is prescribed;

- for minor offences regarding political parties and election and referendum campaigns where supervisory body is the Court of Auditors of the Republic of Slovenia;

- if accusatory instrument pursuant to the second paragraph of Article 103 of this Act is lodged by the body which, by law, controls the work of the minor offences authority body.

12. Do administrative authorities vested with a sanctioning power comply with the principles of independence and impartiality? Is the decision on the sanction subject to a full judicial review (in law and in facts)? Which judicial authorities/courts are in charge of reviewing administrative sanctions?

Do administrative authorities vested with a sanctioning power comply with the principles of independence and impartiality?

MINISTRY OF JUSTICE RS: Yes. Paragraph 2, Article 120 of Constitution states:

“Administrative authorities perform their work independently within the framework and on the basis of the Constitution and laws.”

Is the decision on the sanction subject to a full judicial review (in law and in facts)?

MINISTRY OF JUSTICE RS: Yes. Paragraph 3, Article 120 of Constitution states:

“Judicial protection of the rights and legal interests of citizens and organisations is guaranteed against decisions and actions of administrative authorities and bearers of public authority.”

There are two types of judicial reviews stipulated in Minor offences act:

- If minor offence was sanctioned by minor offence authority (for instance Police, Inspectorate) in “expedited proceedings”, part of right to legal remedies is “Request for judicial protection” as stipulated in Article 59 to Article 66 of Minor offences Act.
- If expedited proceedings are not admissible, so minor offence is sanctioned by court, part of right to legal remedies is “Appeal” as stipulated in Article 150 to Article 168 of Minor offences Act.

Which judicial authorities/courts are in charge of reviewing administrative sanctions?

MINISTRY OF JUSTICE RS:

- If minor offence was sanctioned by minor offence authority (for instance Police, Inspectorate), decision is reviewed by County Court (there is 44 County courts in the Republic of Slovenia).
- If expedited proceedings is not admissible, appeal against a judgment issued by the County court is reviewed by Higher court (there are 4 Higher courts in the Republic of Slovenia).

IV. Cooperation and coordination

13. At the national level, do respective authorities coordinate / cooperate when imposing criminal and administrative sanctions?

MINISTRY OF JUSTICE RS: Yes, there is cooperation between minor offence authorities and State prosecutor, because criminal procedure always has advantage over minor offence procedure (see answer to question no. 6) – Paragraph 4, Article 11.a of Minor Offences Act:

“(4) The state prosecutor shall forthwith notify the competent minor offence authority and/or the court of its decision from the preceding paragraphs of this article that has influence on the conduct of the proceedings when these have been initiated, as well as of the final decision by the court.”

Also, State Prosecutor can report to the minor offence authority that he will not prosecute offence as criminal offence, so minor offence authority can adjudicate offence as minor offence in expedited proceeding.

14. At the European level, do respective authorities coordinate / cooperate when administrative procedures / sanctions are applicable in one State and criminal law provisions in the other? Please refer here also to situations where only administrative sanctions may be imposed against a legal person in one State whereas the law of the other State provides for criminal liability of legal persons.

MINISTRY OF JUSTICE RS: Judicial cooperation in criminal/ administrative matters within the European Union runs directly between competent authorities of requesting and requested states. In case the competent court establish that in requesting country the offence is criminal, but in Slovenia it is an administrative procedure, it sends the MLA request to the Slovenian Court, competent for minor offences.

Within the cooperation with third countries, where the Ministry of Justice of Republic of Slovenia is the central authority, if the Ministry receives the MLA request form foreign authorities in cases where the offence in criminal in other Country and in Slovenia it qualifies as administrative, the Ministry sends the MLA request for the execution to the Slovenian Court, competent for minor offences

If so, under which mechanism(s) / legal instruments?

MINISTRY OF JUSTICE RS: Paragraph 5, Article 45 of Minor Offences Act states: “(5) International cooperation between authorities during minor offence proceedings shall be governed, mutatis mutandis, by the provisions of the Act regulating international cooperation in criminal matters.”

The international cooperation in criminal matters is regulated with the following legal instruments:

Act regulating international cooperation in criminal matters is Cooperation in Criminal Matters with the Member States of the European Union Act (Official Gazette of the Republic of Slovenia, nos. 48/13, 37/15 and 22/18).

Article 3

Proceedings in connection with which mutual assistance is also to be afforded

1. Mutual assistance shall also be afforded in proceedings brought by the administrative authorities in respect of acts which are punishable under the national law of the requesting or the requested Member State, or both, by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters.
2. Mutual assistance shall also be afforded in connection with criminal proceedings and proceedings as referred to in paragraph 1 which relate to offences or infringements for which a legal person may be held liable in the requesting Member State.

The cooperation between EU member states is direct and the Ministry of Justice of Republic of Slovenia does not have a role of a central Authority. However, the Ministry does provide assistance to the home authorities (court and prosecutor's offices) when finding the right authority to send the MLA request to, language requirements and similar.

With the third countries the legal basis for cooperation in criminal and administrative procedure is European Convention on Mutual Assistance in Criminal Matters of 20.4.1959 and Second additional protocol to the European Convention on Mutual Assistance in Criminal Matters of 8.11.2001.

Article 1 – Scope (Second Additional Protocol)

Article 1 of the Convention shall be replaced by the following provisions:

- "1The Parties undertake promptly to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party.
- 2This Convention does not apply to arrests, the enforcement of verdicts or offences under military law which are not offences under ordinary criminal law.
- 3Mutual assistance may also be afforded in proceedings brought by the administrative authorities in respect of acts which are punishable under the national law of the requesting or the requested Party by virtue of being infringements of the rules of law, where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters.
- 4Mutual assistance shall not be refused solely on the grounds that it relates to acts for which a legal person may be held liable in the requesting Party."

Republic of Slovenia has also several bilateral treaties that give basis for the cooperation (with Republic of Croatia, Bosnia and Hercegovina, Republic of Serbia and others).

14.1. Have problems occurred? Which ones?

Problems that have occurred in administrative proceedings are mostly related to finding the competent authorities to send the MLA request to. With third countries that is not the problem, as the Ministry of Justice of Republic of Slovenia sends the MLA request to the central authority. But in cases where the direct communication is possible on the basis of the Second Additional Protocol it can also be a challenge to find the competent authority to send the MLA request to. And within the EU countries the EJM (European Judicial Network) Atlas does not include information on the competent authorities in administrative procedures. Also, in some countries the Prosecutor's Office are the one competent for the administrative procedures and it is a challenge to establish the right authority or to be familiar with foreign regulations and system.

SPAIN

I. General questions

1. Does your national law provide for administrative offences, allowing to impose administrative sanctions against natural persons, which are comparable to criminal sanctions? If so, what categories/types of administrative sanctions comparable to criminal sanctions exist in your legal system (e.g. punitive and/or preventive measures, such as fines, disqualifications, etc.)?

Yes. Article 25 of the Spanish Constitution¹⁹⁸ foresees the imposition of administrative sanctions. It also provides that Administrations cannot impose sanctions implying, directly or indirectly, deprivation of liberty. Therefore, administrative sanctions can consist of economic fines, disqualifications, punitive and preventive (precautionary) measures entailing deprivation of rights. Law 40/2015¹⁹⁹ on the legal regime of public sector classifies infractions into minor, serious and very serious infringements (Article 27.1). Rules defining infractions and sanctions cannot be analogically applied (Article 27.4).

2. How do you define an administrative and a criminal offence/sanction? How do you distinguish the two?

Spanish legal system does not expressly define administrative sanctions nor criminal offences. However, Article 27.1 of Law 40/2015 on legal regime of public sector states that only breaches of the legal system, which are foreseen as administrative infractions by a Law, are administrative infractions.

Article 1 of the Spanish Criminal Code²⁰⁰ requires an action or omission to be defined as an offence in order to be punished. The Code also points out that:

- no criminal offence shall be punishable by a punishment that is not foreseen by Law prior to it being committed (Article 2);
- criminal Law shall not apply to cases other than those specifically included therein (Article 4);
- and no punishment whatsoever shall be imposed in the absence of either mens rea or negligence (Article 5).

- a. Has the *Engel* jurisprudence influenced the categorisation of sanctions in your national system?

As already mentioned in the previous question, Spanish legal system does not expressly define administrative sanctions. The current legislation distinguishes between procedural aspects (regulated in Law 39/2015²⁰¹ on common administrative procedure of Public

¹⁹⁸ Constitución española: <https://www.boe.es/buscar/doc.php?id=BOE-A-1978-31229>

¹⁹⁹ Ley 40/2015, de 1 de octubre, de Régimen Jurídico del Sector Público:

<https://www.boe.es/buscar/pdf/2015/BOE-A-2015-10566-consolidado.pdf>

²⁰⁰ Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal: <https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444>

²⁰¹ Ley 39/2015, de 1 de octubre, del Procedimiento Administrativo Común de las Administraciones Públicas: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-10565

Administrations) and substantive aspects (regulated in Law 40/2015 on the legal regime of public sector).

If so, to what extent?

Most aspects of Engel jurisprudence are contained in the Spanish legislation. The Spanish Constitutional Court has also pointed out the "*principles inspiring Criminal Law are also applicable to administrative sanctions*" (judgements of 30th January and 8th June 1988, among others) and exposes that a same legal interest/asset is protected both by administrative and criminal techniques (judgements of 27th May and 3rd October 1988, among others)

In this regard, judgement of 26th September 2011 (STC 145/2011) specifies that "*the procedural guarantees established in article 24.2 of the Spanish Constitution (which enshrines the right to effective legal protection) are also applicable to sanctioning administrative proceedings, insofar as they are a manifestation of the punitive power of the State*. The exercise of the right of defense in an administrative sanctioning procedure presupposes that the person involved shall be able to enjoy an effective possibility of defense against the offense that is charged.

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 the respective added value of administrative and criminal sanctions? Please provide representative examples.

There is no a general rule to determine the criteria used by the legislator to determine when an administrative sanction or a criminal sanction is applied. Neither the seriousness of the infraction nor the protected legal interest are applicable. Sometimes, Criminal Law foresees some penalties – applicable to minor crimes- that are lower than those established for most administrative sanctions. Regarding the legal interest protected, lines between criminal and administrative sanctions are too diffuse to establish a distinction.

Consequently, the criterion applicable is the judicial or administrative nature of the competent authority to investigate the procedure and/or impose the sanction.

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

3.1 Art. 4 of the Convention on the protection of the environment through criminal law (ETS 172).²⁰²

In the administrative field, the protection of the environment is a shared competence between the Spanish State and the Autonomous Communities (regions), both having sanctioning powers.

The Criminal Code also includes some conducts that can harm the environment. However, it is impossible pre-determine each attack as a crime or administrative offense, as it is a legislative choice and depends on each particular matter. On the other hand, Title XVI of the Criminal Code criminalizes "*offenses related to the planning of the territory and urban planning, the protection of historical heritage and the environment* ", where different types of environmental protection are collected.

²⁰² <https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168007f3f4>

- a. 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

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

Yes. There are substantive areas where only administrative sanctions apply (e.g. some aspects of traffic regulation).

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

Yes. There are areas, such as environment protection or labour conditions, where both criminal and administrative sanctions can be applied. However, administrative sanctions cannot be applied to those facts that have already been criminally punished (Article 31 of Law 40/2015).

Should administrative authorities consider that a fact might be qualified as a criminal offence, they shall submit it to the Public Procurement. The administrative procedure will be suspended until the judicial authority passes a firm sentence, the judicial procedure is closed or the case is sent back to the administrative authorities.

3. In your view: is the *ne bis in idem* applicable in case both tracks apply? Can you give examples of relevant national case law in this respect?

Yes. This principle is contained in Law 39/2015 (Article 31). It applies to criminal penalties and administrative sanctions and also to administrative infractions where identity of the subject, fact and foundation is appreciated.

III. Identification of main differences between administrative and criminal tracks

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

Substantive law

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

Concepts that are included in the collaboration should not be extended to the administrative field. This is without prejudice to the fact that sectoral administrative laws may include assumptions analogous to collaboration.

General principles

5. Are administrative sanctions governed by general principles of administrative law or general principles of criminal law (such as proportionality, nullum crimen sine lege, legality, lex mitior, non-retroactivity etc)?

Yes. Article 25 of the Spanish Constitution enshrines principle of legality and non-retroactivity. Law 40/2015 contains principles of legality (Article 25), non-retroactivity (Article 26), nullum crimen sine lege (Article 27), responsibility (Article 28) and proportionality (Article 29).

Procedural law

6. Do typical criminal procedural rights apply in case of administrative offences/sanctions (such as presumption of innocence, right to be heard, right of access to the case-file, right to remain silent)?

Yes. Law 39/2015 on common administrative procedure regulates rights corresponding to interested parties of an administrative procedure (Article 53). They include, among others, the following rights:

- to be heard;
- to use the means of defense allowed by the legal system;
- to submit documents that shall be considered by the administrative authorities;
- to be assisted by an adviser;
- to be notified the facts with which they are being charged, the sanctions that could be imposed, the competent authority to instruct the proceedings, the competent authority to impose the sanctions, the Law which attribute them such competences;
- to be presumed innocent.

7. What kind of authorities are involved in the decision to impose administrative sanctions

The competence to instruct a sanctioning procedure and to impose a sanction shall be expressly attributed by Law to the administrative authorities determined (Article 25 of Law 40/2015).

Moreover, the authority in charge of the investigation shall be different to the one competent to impose the sanction (Article 39 of Law 39/2015).

Finally, due to the system of distribution of competences applicable in Spain, the procedure and the final sanction may involve central, regional or local administrative authorities. .

8. Do administrative authorities vested with a sanctioning power comply with the principles of independence and impartiality? Is the decision on the sanction subject to a full judicial review (in law and in facts)? Which judicial authorities/courts are in charge of reviewing administrative sanctions?

Yes. As mentioned in the previous questions, the competent authorities shall be expressly established by Law and shall comply with the principles contained in the Spanish Constitution and Law 40/2015.

On the other side, Law 39/2015 indicates that the final resolution of a sanctioning procedure shall include the administrative and judicial remedies available (Article 88).

Regarding judicial remedies, the contentious-administrative courts are competent to make a full judicial review²⁰³.

IV. Cooperation and coordination

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

Yes. In case that the competent administrative authorities consider that a fact may qualify as a criminal offence, they will submit the investigation to the Public Prosecutor. Conversely, when a fact is being judicially prosecuted and the Public Prosecutor or the competent judge consider that there are no elements to judge it as a criminal offence but, instead, it can be considered as an administrative infraction, they will submit it to the competent administrative authorities.

22. At the European level, do respective authorities coordinate / cooperate when administrative procedures / sanctions are applicable in one State and criminal law provisions in the other? Please refer here also to situations where only administrative sanctions may be imposed against a legal person in one State whereas the law of the other State provides for criminal liability of legal persons.

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

22. 2. Have problems occurred? Which ones

Law 39/2015 establishes a kind of “non bis in idem” principle applicable to infractions already sanctioned by an organ from the European Union (Article 31.2): *“When an organ of the European Union has imposed a sanction for the same facts, and provided that the identity of subject and foundation do not concur, the competent body to resolve must take it into account in order to graduate the sanction to impose, being able to reduce it, without prejudice to declare the commission of the infraction*

In any case, preference of criminal penalties is clear.

²⁰³ Ley 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-administrativa: <https://www.boe.es/buscar/act.php?id=BOE-A-1998-16718>

I. General questions

1. Does your national law provide for administrative offences, allowing to impose administrative sanctions against natural persons, which are comparable to criminal sanctions? If so, what categories/types of administrative sanctions comparable to criminal sanctions exist in your legal system (e.g. punitive and/or preventive measures, such as fines, disqualifications, etc.)?

Yes. There is no definition of administrative sanctions in Swedish legislation but we use administrative sanctions, such as non-criminal fines and the possibility to revoke a permission, in a number of areas. Administrative sanctions can be imposed on both natural persons and legal entities.

2. How do you define an administrative and a criminal offence/sanction?
 - a. How do you distinguish the two?

There is no definition of administrative offences/sanctions in Swedish legislation. However, it is sometimes described as a negative reaction imposed by a public authority laid down by law on account of conduct contrary to applicable rules and which mainly serves a punitive purpose.

According to the Swedish Criminal Code, an (criminal) offence is an act described in the Code or in another act of law or statute for which (criminal) fines or imprisonment is provided. Under criminal law, criminal sanctions mean the penalties of (criminal) fines and imprisonment as well as conditional sentences, probation and special care orders.

In preparatory work there are principles for what can be criminalized and guidelines for when administrative sanctions can be used.

- b. Has the *Engel* jurisprudence influenced the categorisation of sanctions in your national system? If so, to what extent?

The Engel jurisprudence has not influenced the categorisation of sanctions in the Swedish legal system as such. It has however influenced the reasoning on which form of sanctions (criminal or administrative) that should be prescribed for different forms of unlawful conduct. In some areas administrative sanctions have been assessed as punishments according to the Engel jurisprudence (See, for example, work environment [SOU 2011: 57, prop. 2012/13: 143], export control [SOU 2014: 83] and market abuse [SOU 2014: 46, prop. 2016/17: 22]). The legislator has then stated that rules in these areas must have to fulfill the requirements that follows from Article 6 (See, for example, prop. 2012/13:143 s. 71 f.). It has also influenced how cases where both administrative sanctions and criminal sanctions are prescribed for the same conduct are handled (*ne bis in idem*).

3. 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 the respective added value of administrative and criminal sanctions? Please provide representative examples.

There are guidelines in preparatory work for when and how administrative sanctions can be used in general. Administrative sanctions can provide an effective solution in cases where regulatory violations are particularly frequent or particular difficulties exist in calculating the amount of profit or savings achieved in the particular case. Other cases are where the economic benefit of an isolated infringement can, on average, be assessed as low, while society's need for protection in the area in question is so prominent that not only the economic benefit in the particular case but already the prospect of profit or savings should be neutralized.

In general, criminal penalties are used for more serious offenses which require more detailed investigative measures and evidence. Administrative sanctions are used for less serious offenses, which are easy to observe and do not require other than limited investigation measures and written evidence. Administrative sanctions are used both in terms of intentional offences and negligence, normally, however, in terms of strict liability.

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

- a. Art. 4 of the Convention on the protection of the environment through criminal law (ETS 172).²⁰⁴

Sweden has not ratified that convention.

- b. Art. 78 (3) of the Council of Europe Convention on preventing and combating violence against women and domestic violence (ETS 210).²⁰⁵

Sweden has not, in accordance with Article 78 (3), declared that it reserves the right to provide for non-criminal sanctions, instead of criminal sanctions, for the behaviours referred to in Articles 33 and 34. Criminal sanctions are therefore provided for the behaviours referred to in Articles 33 and 34.

- c. 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

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

Yes, within environmental law, for example, there are several such offences in the regulation (2012: 259) on environmental sanction fees. Typically, these are violations of various forms of reporting requirements (e.g. a certain form has not been filed with the supervisory authority in time) or that a product has been marked in the wrong way.

²⁰⁴<https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168007f3f4>

²⁰⁵<https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168008482e>

Another example is in the field of finance. The supervising authority (Finansinspektionen) has the power to impose administrative sanctions, for instance under the Securities Market Act (2007:528). For a majority of those offences only administrative sanctions are available. Normally they are imposed on the supervised entity, but for some offences persons with managerial responsibilities can be held responsible.

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

Yes, within environmental law, for example, in Chapter 29 and 30 of the Environmental Code there are overlaps in some cases, mostly due to the fact that some of the penal provisions in chapter 29 of The Environmental Code has a wide scope of application and therefor covers several of the violations in the environmental sanction fee system.

As regards tax law, a prosecutor may not prosecute or take other measures entailing a final judicial review of someone's responsibility or guilt, if the Tax Agency has previously taken a decision on tax surcharge in respect of the same inaccuracy or inaction of the same person. Conversely, the Tax Agency may not decide on tax surcharges if the prosecutor has brought charges or taken other measures entailing a final judicial review of someone's responsibility or guilt in respect of the same inaccuracy or inaction concerning the same person, see section 13 b § in the Tax Offences Act (1971:69) and sections 10 a and b §§ in chapter 49 in the Tax Procedures Act (2011:1244). These provisions came into force January 1, 2016.

At the same time, a new regulation also came into effect, namely the Act on the application of tax surcharge in certain cases (2015:623). The act is applicable if an inaccuracy or an inaction may constitute the basis for both a decision on tax surcharge according to the Tax Procedures Act and prosecution for tax crimes according to the Tax Offences Act for the same natural person. When commencing a prosecution under the Tax Offences Act, the prosecutor shall, in these cases and if the conditions for this are fulfilled, at the same time produce a claim for tax surcharge for the natural person in question, if the tax surcharge relates to an error or inaction that is covered by the prosecution.

7. In your view: is the *ne bis in idem* applicable in case both tracks apply? Can you give examples of relevant national case law in this respect?

Yes, relevant precedents are the following cases from the Supreme Court of Sweden: for example, NJA 2013 s. 502, NJA 2013 s. 746 and HFD 2013 ref. 71; cf. however NJA 2014 s. 377.

III. Identification of main differences between administrative and criminal tracks

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

Substantive law

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

No, there are no general provisions on aiding and abetting in relation to administrative offences so unless a person's conduct is covered by the specific provision on liability he or she cannot be subject to administrative sanctions.

General principles

9. Are administrative sanctions governed by general principles of administrative law or general principles of criminal law (such as proportionality, nullum crimen sine lege, legality, lex mitior, non-retroactivity etc)?

General principles of criminal law such as those mentioned in the question apply for administrative sanctions.

Procedural law

10. Do typical criminal procedural rights apply in case of administrative offences/sanctions (such as presumption of innocence, right to be heard, right of access to the case-file, right to remain silent)?

Typical criminal procedural rights such as those mentioned in the question apply in case of administrative offences/sanctions.

11. What kind of authorities are involved in the decision to impose administrative sanctions?

Decisions where administrative sanctions are imposed are either made by public authorities as a first instance with possibility to appeal the decision to a court or by a court as a first instance.

There are several authorities involved depending on the subject area. For example, according to Chapter 30, Section 3 of the Environmental Code it is the supervisory authority that decides on the environmental sanction fee. What authority that decides on the environmental sanction fee is stated in the Environmental Inspection Regulation (2011:13) and the regulation on environmental sanction fees.

In finance field of many administrative sanctions are imposed by the supervisory authority (Finansinspektionen) as a first instance with the possibility to appeal to a court. In some legal areas however, such as market abuse, administrative sanctions are imposed by a court as first instance, but can be imposed by the supervisory authority if a person accepts the sanction. The same is the case when persons with managerial responsibilities are held responsible for an offence committed by a supervised entity. Also, regarding market abuse, a prosecutor has the option to bring a claim of administrative sanction as a secondary charge to a criminal charge. In these cases the court may not decide on imposing both a criminal and an administrative sanction against the defendant in the same trial.

12. Do administrative authorities vested with a sanctioning power comply with the principles of independence and impartiality? Is the decision on the sanction subject to a full judicial review (in law and in facts)? Which judicial authorities/courts are in charge of reviewing administrative sanctions?

Yes, they comply with principles of independence and impartiality. They are generally subject to a full judicial review even though the liability is often strict (no mens rea required).

Usually decisions made by public authorities are appealed to administrative courts. However, it differs depending on the subject area, but a decision about an environmental sanction fee can for example be appealed to the Land and Environmental Court and the Land and Environmental Court of Appeal.

IV. Cooperation and coordination

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

Yes, for example, within the environmental area, there are collaborations between prosecutors (Rema), police, customs, county administrative boards and other supervisory authorities, especially on issues concerning illegal waste transport. Rema, environmental crime investigating police and environmental inspectors also have regular contacts in other cases.

Cooperation also exists regarding chemical cases, where the Swedish Chemicals Agency has contact with the prosecutors. Certain co-operation also exists between the Swedish Chemicals Agency, the municipalities and the county administrative boards.

In all situations where an authority is responsible for supervisory guidance, they cooperate with other authorities, e.g. applies to the Swedish Chemicals Agency's and the Swedish Environmental Protection Agency's supervisory guidance aimed at the municipalities and county administrative boards.

Customs are also involved in certain environmental cases due to seizures at the borders and cooperate with the relevant authority, e.g. cases concerning waste, artificial breaches and chemical offenses. It can also apply to radiation protection.

Yet another example is in the field of finance where – in short – the supervisory authority (Finansinspektionen) and the prosecutor collaborate on what minor market abuse offences that are to be handled by the supervisory authority with administrative sanctions and what more severe cases that is taken by the prosecutor to criminal prosecution.

22. At the European level, do respective authorities coordinate / cooperate when administrative procedures / sanctions are applicable in one State and criminal law provisions in the other? Please refer here also to situations where only administrative sanctions may be imposed against a legal person in one State whereas the law of the other State provides for criminal liability of legal persons.

There are for example cooperation with other countries regarding illegal waste shipments and cooperation between prosecutors in different areas.

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

Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on the transport of waste and Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 on the Registration, Evaluation, Authorization and Restriction of Chemicals (REACH).

22. 2. Have problems occurred? Which ones?

No problems have occurred.

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22. 2. Have problems occurred? Which ones?

No problems have occurred.

I. Questions générales

Votre droit interne prévoit-il des infractions administratives, permettant d'imposer des sanctions administratives à des personnes physiques, qui sont comparables à des sanctions pénales? Oui.

13. Si tel est le cas, quelles catégories/types de sanctions administratives comparables aux sanctions pénales existent dans votre système légal (par exemple mesures punitives et/ou préventives, telles que des amendes, déchéances etc.) ?

Ces sanctions peuvent être divisées en 3 catégories.

a) Une première catégorie est composée des sanctions dites disciplinaires. Il s'agit des sanctions dont dispose l'administration à l'égard de personnes qui sont dans un rapport de droit spécial avec l'Etat (militaires, fonctionnaires) ou qui exercent une activité d'intérêt public exigeant une surveillance particulière (avocats, médecins). Les sanctions typiques sont l'avertissement, le blâme, le retrait d'une autorisation de pratiquer, ou l'amende disciplinaire.

b) Une seconde catégorie englobe les désavantages administratifs punitifs. On peut citer par exemple le retrait du permis de conduire, le retrait de prestations d'assistance, la révocation d'une concession ou d'une autorisation.

c) Enfin, une troisième catégorie est composée des sanctions administratives pécuniaires. Ces sanctions sont prévues dans certains domaines particuliers. Elles s'adressent, à quelques exceptions près, exclusivement à des entreprises. Elles sont considérées par le législateur comme un instrument permettant de sanctionner directement les entreprises elles-mêmes, sans devoir, comme en droit pénal, rechercher des responsabilités individuelles ou établir un manquement au niveau organisationnel (v. p. ex. le message du Conseil fédéral du 1er juillet 2015 sur la modification de la loi sur les travailleurs détachés [FF 2015 5359, 5368], ou le message du Conseil fédéral relatif à la révision de la loi sur les cartels du 7 novembre 2001 [FF 2002 1911ss, 1922]). Ces sanctions sont prévues dans différents domaines²⁰⁶. Il s'agit le plus souvent de secteurs dans lesquels les entreprises exercent des activités économiques nécessitant une concession ou une autorisation, bénéficient de subventions étatiques, ou sont soumises à une forte surveillance administrative.

A noter que le droit suisse prévoit aussi des sanctions pénales pour punir certaines violations d'obligations de droit administratif:

a) La violation d'obligations de droit administratif peut être punie par le droit pénal ordinaire. Les infractions sont alors prévues par le code pénal suisse (RS 311.0), ou par des lois administratives spéciales (ou des lois administratives cantonales). La poursuite et le jugement des infractions pénales prévues par le droit fédéral incombent aux cantons, sous réserve de certaines infractions très particulières, qui sont du ressort de la juridiction fédérale (infractions en lien avec le matériel de guerre, l'énergie nucléaire, l'aviation, les prestations de sécurité fournies à l'étranger ou les marchés financiers).

b) Les violations peuvent être aussi être sanctionnées par le droit pénal administratif. Ces sanctions se distinguent des sanctions pénales ordinaires par le fait que leur poursuite et leur jugement incombent aux autorités administratives fédérales. La procédure est spécialement régie au niveau fédéral par la loi sur le droit pénal administratif (DPA; RS 313.0). Le droit pénal administratif englobe traditionnellement

²⁰⁶ Notamment : art. 49a et suivants de la loi sur les cartels (LCart; RS 251); art. 100 et 109 de la loi sur les jeux d'argent (LJA; RS 935.51); art. 60 de la loi sur les télécommunications (LTC; art. 784.10), art. 90 de la loi sur la radio-télévision (LRTV; RS 784.40), art. 160 de la loi sur l'agriculture (LAgr; RS 910.1), art. 13 de la loi sur réduction des émissions de CO₂ (LCO₂; RS 641.71), art. 9 de la loi sur les travailleurs détachés (LDét; RS 823.3).

des domaines d'activités dans lesquels des autorités spécialisées paraissent plus à même que les autorités pénales de poursuivre, d'établir et de punir les infractions.

Une catégorie particulière de sanction réside dans ce que l'on nomme "les amendes d'ordre". Ces amendes sont prononcées en cas de violation de règles mineures, ou de règles de procédure. Les amendes d'ordre les plus courantes sont les amendes prononcées en matière de circulation routière en application de la loi fédérale sur les amendes d'ordre (LAO; RS 741.03). Elles ont longtemps été considérées comme des sanctions purement administratives. Aujourd'hui, la doctrine majoritaire leur reconnaît un caractère pénal. Selon les situations, elles peuvent être considérées comme une catégorie particulière de droit pénal administratif (art. 2 et 3 DPA), ou comme une sous-catégorie des amendes disciplinaires et des sanctions administratives pécuniaires, dont elles se distinguent principalement par leur faible montant et par la procédure applicable.

14. Comment définissez-vous une sanction administrative et une sanction/infraction pénale ?

14.1. Comment faites-vous la distinction entre les deux ?

14.2. La jurisprudence Engel a-t-elle influencé la catégorisation des sanctions dans votre système national ?

14.3. Si oui, dans quelle mesure ?

La théorie voudrait que l'on considère qu'une sanction est administrative lorsqu'elle vise la bonne application du droit administratif, et qu'elle est pénale lorsqu'elle vise à punir un comportement et à éviter qu'il ne se reproduise. En pratique toutefois, les sanctions administratives visent souvent aussi les buts assignés aux sanctions pénales. La manière la plus simple de distinguer les deux types de sanctions est peut-être de considérer que les sanctions sont administratives lorsqu'elles sont rendues par une autorité administrative en application des règles de la procédure administrative fédérale (PA; RS 172.021) ou des procédures administratives cantonales et qu'elles sont pénales si elles sont prononcées par une autorité pénale en application des règles du code de procédure pénale (CPP; RS 312.0), ou par une autorité administrative en application des règles de la DPA.

La jurisprudence Engel a eu une grande influence sur les décisions des tribunaux suisses. Ces derniers s'en inspirent très largement lorsqu'ils ont à se déterminer sur le caractère pénal ou administratif d'une sanction rendue par une autorité administrative. Ainsi, par exemple, c'est sur la base des principes développés par la Cour que le Tribunal fédéral a constaté le caractère pénal :

- de l'amende infligée pour infraction aux règles de la circulation routière (ATF 115 la 183);
- de l'amende pour soustraction de l'impôt fédéral direct (ATF 140 I 68; 119 Ib 311);
- du retrait d'admonestation du permis de conduire (ATF 121 II 219);
- des sanctions administratives pécuniaires prononcées à l'encontre d'entreprises en application de la LCart (ATF 139 I 72) et de la législation sur les jeux d'argent (ATF 140 II 384).

A l'inverse, l'application des principes issus de la jurisprudence Engel a conduit à ce que le Tribunal fédéral nie un caractère pénal aux sanctions suivantes :

- interdiction de périmètre, obligation de se présenter à la police et garde à vue prévues par le Concordat du 15 novembre 2007 instituant des mesures contre la violence lors de manifestations sportives (ATF 137 I 31);
- interdiction disciplinaire d'exercer une fonction dirigeante prévue par la loi sur la surveillance des marchés financiers (LFINMA; RS 956.1; ATF 142 II 243);
- une amende de procédure de 300 francs (ATF 135 I 313);
- une amende disciplinaire de 300 francs infligée à un fonctionnaire (ATF 121 I 379);
- des amendes disciplinaires de respectivement 500 francs (ATF 125 I 417) et 5'000 francs (ATF 128 I 346) imposées à des avocats.

Le législateur n'est pas constant s'agissant de la prise en compte de la jurisprudence du Tribunal fédéral et de la Cour. Ainsi, le message sur la modification de la loi sur les travailleurs détachés, tout en citant la jurisprudence du Tribunal fédéral et la doctrine, affirme simplement que les sanctions administratives pouvant être prononcées contre les entreprises à hauteur de 30'000 francs sont des sanctions administratives dépourvues de tout caractère pénal (FF 2015 5359, 5370). A l'inverse, la Commission des institutions politiques du Conseil national (CIP-N) a récemment renoncé à instaurer des sanctions

administratives pécuniaires dans le cadre de la révision de la loi sur la protection des données. Ces dernières auraient en effet dû, selon les critères développés par la Cour, être considérées comme des sanctions administratives à caractère pénal, ce qui aurait entraîné des incertitudes quant à la protection juridique des administrés (FF 2017 6565, 6713ss). La CIP-N a dans le même temps déposé un postulat chargeant le Conseil fédéral d'examiner les solutions envisageables pour introduire en droit suisse un régime général de sanctions administratives pécuniaires avec les garanties juridiques nécessaires (Postulat de la CIP-N 18.4100 du 11 novembre 2018 "Régime général de sanctions administratives pécuniaires").

15. Dans quels cas votre système national recourrait-il à des sanctions administratives (infraction moins grave, infractions intentionnelles/négligence, importance de l'intérêt protégé, procédures plus rapide, etc.) ? Quelle est la valeur ajoutée respective des sanctions administratives et pénales? Merci de fournir des exemples représentatifs.

La question se pose surtout lors du choix entre, d'une part, des amendes disciplinaires et des sanctions administratives pécuniaires et, d'autre part, des amendes pénales. Le type et l'importance des intérêts protégés, la rapidité de la procédure et la technicité d'un domaine entrent notamment en ligne de compte.

Les sanctions pénales ont comme avantage d'être prononcées selon une procédure bien déterminée qui garantit pleinement le respect des droits des justiciables. Les sanctions administratives suivent quant à elles les règles de la procédure administrative, laquelle est moins formelle et plus rapide (sous réserve de la procédure pénale d'amende d'ordre, qui est très rapide aussi). Elles permettent aussi de sanctionner une entreprise directement, tandis que les sanctions pénales s'adressent, sauf exception, aux personnes physiques qui ont commis l'acte répréhensible.

En ce qui concerne la question de la négligence nous renvoyons à la réponse au ch. III/9.

On peut noter que de manière générale, hors droit disciplinaire, la législation suisse privilégie le recours au droit pénal. Les lois prévoyant des sanctions administratives pécuniaires sont peu nombreuses, et limitées à certains domaines particulier (voir ch. I, 1).

16. En matière de sanctions pénales/administratives, comment avez-vous appliqué les dispositions ci-dessous du Conseil de l'Europe :

16.1. Art. 4 de la Convention sur la protection de l'environnement par le droit pénal (STE 172)²⁰⁷.

La Suisse n'a ni signé ni ratifié cette convention.

16.2. Art. 78 (3) de la Convention sur la prévention et la lutte contre la violence à l'égard des femmes et la violence domestique (STE 210).²⁰⁸

Chaque Partie peut se réserver le droit de prévoir des sanctions non pénales, au lieu de sanctions pénales, pour les comportements mentionnés aux art. 33 et 34 (art. 78, par. 3 Convention).

La Suisse ne s'est pas réservé le droit de prévoir des sanctions non pénales, au lieu de sanctions pénales, pour les comportements mentionnés aux art. 33 (violence psychologique) et 34 (harcèlement). Ces comportements sont punis par le droit pénal. De plus, des mesures civiles existent pour protéger les victimes.

16.3. Si vous n'avez ratifié aucune de ces conventions, merci de donner un autre exemple de mise en œuvre de Conventions du CdE permettant l'adoption de sanctions administratives à l'encontre de personnes physiques.

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II. Voies de sanctions distinctes ou combinées

17. Existe-t-il des types d'infractions établies dans votre législation nationale qui prévoient des sanctions administratives uniquement ?

Le droit disciplinaire ne prévoit en principe pas de sanctions pénales.

²⁰⁷ <https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168007f3f4>

²⁰⁸ <https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168008482e>

18. Votre droit interne permet-il une combinaison de sanctions pénales et administratives ? Existe-t-il des domaines où ces deux types de sanction coexistent ?

Le droit suisse prévoit une double procédure pénale et administrative en matière de répression des infractions relatives à la circulation routière: le juge pénal se prononce sur les sanctions pénales (amende, peine pécuniaire ou peine privative de liberté) prévues par les dispositions pénales de la loi sur la circulation routière (LCR; RS 741.01; art. 90 ss) et par le Code pénal (art. 34 ss, 106 et 107 CP), tandis que les autorités administratives compétentes décident de mesures administratives (avertissement ou retrait de permis) prévues par les art. 16 ss LCR.

Par ailleurs, les lois qui prévoient des sanctions pécuniaires administratives prévoient aussi systématiquement des sanctions pénales à l'attention des personnes physiques (en particulier art. 49a ss/54ss LCart; 90 et 101s LRTV, 49ss/60 LTC, 122a et b LEtr/115ss LEtr, 9/12 LDét). Les états de fait incriminés ne se recoupent jamais entièrement.

19. Selon vous: le principe ne bis in idem est-il applicable lorsque les deux moyens de sanctions s'appliquent ? Pouvez-vous donner des exemples de jurisprudence pertinente à cet égard dans votre droit interne ?

L'application du principe ne bis in idem n'est pas exclue.

En matière de droit de la circulation routière, le Tribunal fédéral admet qu'une personne puisse être condamnée pénalement à une amende par l'autorité pénale, puis à une sanction administrative de retrait du permis de conduire par l'autorité administrative, en raison notamment des finalités différentes de ces deux sanctions et des compétences limitées de chacune des autorités (ATF 137 I 363). Cet avis a été confirmé par la Cour dans un arrêt du 4 octobre 2016, qui a relevé notamment que les procédures étaient coordonnées, l'autorité administrative ne pouvant sans raison s'écarter de l'avis de l'autorité pénale (Affaire Rivard c. Suisse, Req 21563/12).

Pour les mêmes raisons, en matière disciplinaire, le Tribunal fédéral admet que, malgré un non-lieu ou un acquittement, une personne puisse être sanctionnée au plan administratif (Arrêt 8C_98/2016 du 15 décembre 2016).

Le Tribunal fédéral ne s'est à ce jour pas prononcé sur le cumul d'une sanction pécuniaire administrative et d'une sanction pénale. Dans la mesure où les destinataires de ces sanctions ne sont en principe pas les mêmes (les premières étant traditionnellement adressée aux entreprises, les secondes aux personnes physiques), le principe ne bis in idem devrait être préservé (s'agissant de soustraction fiscale, voir l'arrêt du Tribunal fédéral 6B_1053/2017 du 17.05.2018). Néanmoins, la question pourrait se poser dans le cas de raisons individuelles ou de sociétés ne comptant qu'un seul administrateur car le patron pourrait alors, pour le même comportement, être sanctionné administrativement comme entrepreneur et pénalement comme auteur du comportement répréhensible.

III. Identification des grandes différences entre la voie administrative et la voie pénale

Veillez identifier les principales conséquences découlant de l'application de la voie administrative :

Droit matériel

20. La complicité est-elle sanctionnée si un comportement est seulement constitutif d'une infraction administrative ?

En principe non.

Principes généraux

21. Les sanctions administratives relèvent-elles des principaux généraux du droit administratif ou des principes généraux du droit pénal ?

Les sanctions administratives relèvent dans la règle des principes généraux du droit administratif. Toutefois, compte tenu de leur caractère punitif, certains principes issus du droit pénal s'appliquent.

Ainsi, les exigences concernant la légalité de l'infraction (*nullum crimen sine lege*) et celle de la peine (*nulla poena sine lege*) se rapprochent plus de celles du droit pénal que de celles du droit administratif général.

Par ailleurs, les sanctions administratives présupposent une faute de l'administré, alors que ce n'est pas le cas de mesures administratives qui ont uniquement pour but de rétablir une situation conforme au droit. Le Tribunal fédéral l'a expressément déclaré s'agissant d'une sanction pécuniaire prévue par le droit fiscal à l'attention d'une entreprise, celle-là devant être fixée en fonction du degré de faute des organes et en fonction de la situation économique de la personne morale au profit de laquelle la soustraction a eu lieu (ATF 135 II 86).

Enfin, le Tribunal fédéral admet l'application par analogie du principe de la *lex mitior* aux sanctions disciplinaires (ATF 130 II 270).

Droit procédural

19. Est-ce que les droits procéduraux caractéristiques en matière pénale s'appliquent-ils en cas de sanctions/infractions administratives (comme la présomption d'innocence, le droit d'être entendu, le droit d'accès au dossier, le droit de garder silence)?

Il n'est pas possible de répondre de manière générale, car l'application de ces garanties n'est pas automatique pour l'ensemble des sanctions administratives.

Les garanties de procédure propres au droit pénal ne semblent pas s'appliquer s'agissant des amendes disciplinaires, en tous les cas jusqu'à 5'000.- francs (ATF 128 I 346).

Le Tribunal fédéral a eu l'occasion de se prononcer sur l'application de certaines garanties s'agissant de sanctions administratives pécuniaires à l'encontre d'entreprises dans le domaine du droit des cartels (ATF 139 I 72) et celui des jeux d'argent (ATF 140 II 384). Il admet dans ces cas l'application de principe des art. 6 et 7 CEDH. Il relève cependant que leur portée doit être déterminée de cas en cas, selon le domaine concerné. La compatibilité des obligations administratives de collaborer - dont la violation est soumise à une sanction administrative pécuniaire - avec l'interdiction de s'auto-incriminer suscite les discussions les plus nourries.

En cas de sanctions pécuniaires administratives (ATF 139 I 72), d'amendes pour infractions à la LCR (ATF 115 la 183), et lors d'un retrait du permis de conduire (ATF 121 II 219), le droit à être jugé par un tribunal indépendant et impartial s'applique.

20. Quels types d'autorités sont impliqués dans la décision d'imposer des sanctions administratives ?

Il s'agit en principe d'autorités administratives. Au plan fédéral, celles-ci relèvent de l'administration fédérale centralisée (unités administratives fédérales) ou de l'administration décentralisée (commissions).

21. Les autorités administratives ayant pouvoir de sanction respectent-elles les principes d'indépendance et d'impartialité ? La décision relative à la sanction est-elle susceptible de faire l'objet d'une revue judiciaire complète (sur le fond et les faits)? Quelles autorités judiciaires/tribunaux sont chargées de contrôler les sanctions administratives?

Les autorités qui prononcent les sanctions administratives ne satisfont souvent pas au principe d'indépendance. Le Tribunal fédéral a en particulier eu l'occasion de constater que la procédure relative aux sanctions administratives prononcées par la Commission

fédéral de la concurrence n'est pas conforme aux exigences de l'art. 6 CEDH (ATF 139 I 72, consid. 4.3). Cependant, compte tenu du fait que la jurisprudence de la Cour admet que ces exigences peuvent être remplies au stade d'un recours devant une juridiction administrative, il est arrivé à la conclusion que la procédure ne nécessitait pas d'être modifiée au plan institutionnel (ATF 139 I 72, E. 4.4). Cette conclusion s'applique par analogie aux autres procédures de sanctions administratives, des voies de recours étant aménagées auprès de tribunaux disposant d'un plein pouvoir de cognition en fait et en droit (au niveau fédéral, auprès du Tribunal administratif fédéral).

IV. Coopération et coordination

21. Au niveau national, les autorités respectives se coordonnent-elles/coopèrent-elles lorsqu'elles infligent des sanctions pénales et administratives ?

Les cas de double incrimination sont, nous l'avons vu, assez rares. Les lois prévoyant des sanctions administratives pécuniaires ainsi que des sanctions pénales (voir ch. 6) ne prévoient pas de règles de coordination. Elles ne l'interdisent pas non plus. Dans la mesure où dans certains cas la même autorité est compétente pour prononcer la sanction pénale et la sanction administrative (cartels ou télécommunications), une coordination devrait s'imposer d'elle-même.

Un exemple réside dans l'application des dispositions pénales et administratives de la LCR (voir supra ch. II/6 et 7). Dans ce cas, les deux procédures sont en quelque sorte coordonnées, dans la mesure où les autorités administratives sont en principe liées par les constatations du juge pénal, de sorte que le retrait de permis s'apparente à une sanction complémentaire à la condamnation pénale.

22. Au niveau européen, les autorités respectives se coordonnent-elles/coopèrent-elles lorsque des procédures/sanctions administratives sont applicables dans un Etat et des dispositions pénales dans l'autre ? Veuillez également mentionner ici les situations dans lesquelles seules les sanctions administratives peuvent être imposées à une personne morale dans un Etat alors que le droit de l'autre Etat prévoit la responsabilité pénale des personnes morales.

A la base de toute demande d'entraide pénale doit donc reposer une procédure pénale. Si la procédure est une procédure administrative uniquement dans l'Etat étranger, la Suisse ne peut y répondre par l'entraide pénale.

22.1. Si oui, au moyen de quel(s) mécanisme(s) / instruments juridiques?

22. 2. Des problèmes se sont-ils produits ? Lesquels ?

L'entraide en matière pénale est régie, en Suisse, par la loi fédérale sur l'entraide internationale en matière pénale (RS 351.1; EIMP) ainsi que par les conventions bi- ou multilatérales en la matière.

L'EIMP prévoit à son art. 1^{er} qu'elle ne s'applique « [...] qu'aux affaires pénales dans lesquelles le droit de l'Etat requérant permet de faire appel au juge. » L'EIMP prévoit donc deux conditions : l'affaire doit être une affaire pénale et la procédure doit être menée par une autorité judiciaire. L'art. 63 al. 3 EIMP précise que l'entraide peut être accordée dans une procédure liée à une cause pénale, ce qui inclut les mesures administratives qui peuvent être prononcées à l'égard de l'auteur d'une infraction pénale. Il s'ensuit que, à moins qu'un traité international ne prévoit une solution différente, les autorités suisses en charge de l'entraide pénale coopèrent si la procédure est, en Suisse et à l'étranger, une procédure pénale instruite par une autorité judiciaire. La Suisse peut accorder l'entraide si une procédure administrative est connexe à une procédure pénale. La Suisse peut par exemple coopérer si la personne risque des sanctions administratives à l'étranger dans le cas où ces sanctions administratives

sont ajoutées à des sanctions pénales. L'affaire qui relève au fond du juge administratif peut également donner lieu à l'entraide pénale si le juge administratif étranger est compétent pour prononcer des sanctions de nature pénale telles que des amendes ou s'il est appelé à trancher une question préjudicielle décisive pour le procès pénal.

La Convention européenne d'entraide judiciaire (RS 0.351.1 ; CEEJ) prévoit également à son art. 1^{er} qu'elle ne s'applique que dans les procédures visant des infractions pénales de la compétence des autorités judiciaires. Les autorités judiciaires sont précisées par les Etats parties dans une déclaration. La Suisse a ainsi précisé que « les autorités habilitées par le droit cantonal ou fédéral à instruire des affaires pénales, à décerner des mandats de répression et à prendre des décisions dans une procédure liée à une cause pénale » doivent être considérées comme autorités judiciaires aux fins de la Convention. L'autorité doit être une autorité judiciaire figurant dans la déclaration de l'Etat partie et l'affaire doit être une affaire pénale. En ce qui concerne l'autorité, l'accent doit être mis sur la nature pénale de la procédure et le caractère judiciaire de l'autorité plus que sur la désignation de ladite autorité. Certains traités internationaux que la Suisse a ratifiés prévoient une coopération plus large. Ainsi, le Deuxième Protocole additionnel à la Convention européenne d'entraide judiciaire (RS 0.351.12; PA II) prévoit expressément que l'entraide judiciaire peut être accordée si l'infraction est poursuivie par une autorité administrative mais peut donner lieu à un recours devant une juridiction compétente. Cet article élargit donc le champ d'application de la Convention à l'ensemble du droit pénal administratif. Il a pour but notamment d'éviter que pour certaines infractions considérées comme administratives dans un Etat et pénales dans l'autre, l'entraide ne puisse être octroyée. L'art. 49 de la Convention d'application de l'accord de Schengen (JO L 239 p.19; CAAS) prévoit également que l'entraide pénale peut être accordé dans le cadre d'une procédure menée par une autorité administrative si un recours devant une juridiction compétente en matière pénale est ouvert. Certains accords bilatéraux prévoient une possible coopération dans le cadre d'infractions dites administratives dans un Etat et pénales dans l'autre. C'est par exemple le cas de l'Accord entre la Suisse et l'Italie en vue de compléter la Convention européenne d'entraide judiciaire en matière pénale du 20 avril 1959 et d'en faciliter l'application (RS 0.351.945.41 ; art. II) ou de l'Accord entre la Confédération suisse et la République d'Autriche en vue de compléter la Convention européenne d'entraide judiciaire en matière pénale du 20 avril 1959 et de faciliter son application (RS 0.351.916.32 ; art. I). C'est aussi le cas du Traité entre la Confédération Suisse et les Etats-Unis d'Amérique sur l'entraide judiciaire en matière pénale (RS 0.351.933.6; TEJUS) et en particulier de l'Echange de lettres du 3 novembre 1993 entre la Suisse et les Etats-Unis relatif à l'entraide judiciaire dans des procédures administratives complémentaires concernant les requêtes ayant trait aux infractions commises en relation avec l'offre, l'achat et la vente de valeurs mobilières et de produits financiers dérivés (« futures » et « options ») (RS 0.351.933.66).

Concernant les personnes morales, les autorités suisses ne peuvent octroyer l'entraide pénale que si la personne morale poursuivie peut se voir infliger une sanction pénale. Si l'amende qui risque d'être infligée à la personne morale au cours de la procédure est administrative, l'entraide sera refusée. En Suisse, les personnes morales ne peuvent faire l'objet d'une procédure pénale qu'aux conditions restrictives de l'art. 102 du Code pénal (RS 311.0; CP) et se voir alors infliger une sanction pénale. Sont bien sûr réservés les traités internationaux prévoyant une coopération plus large. Le PA II, à ce titre, est important à mentionner puisqu'il permet une coopération élargie dans les procédures impliquant les personnes morales.

TURKEY

I. General questions

1. Does your national law provide for administrative offences, allowing to impose administrative sanctions against natural persons, which are comparable to criminal sanctions? If so, what categories/types of administrative sanctions comparable to criminal sanctions exist in your legal system (e.g. punitive and/or preventive measures, such as fines, disqualifications, etc.)?

Types of misdemeanours which allow administrative sanctions to be applied to both real persons and legal entities in the Turkish law, are regulated in the domestic law of Turkey. The general principles of misdemeanours, types of administrative sanctions and consequences, the decision process thereof, the legal remedies against the sanctions, and the execution of them are set out in Misdemeanours Law No.5326, independently from the Criminal Code of Turkey. This law entered into force in 2005, after being promulgated in the Official Gazette and is currently in force.

Along with the above mentioned law containing various misdemeanours and the sanctions to be applied for them, certain special laws also provide different administrative sanctions for some misdemeanours.

Misdemeanour is defined in Art.2 of the above law as “an unjust action, for which the law imposes administrative sanctions”.

Types of administrative sanctions in the Turkish law, are divided in Art.16 of the law into administrative fines and administrative measures. Administrative measures refer to transferring the ownership to the public and any measures specified by other laws as stated under Art. 16. Art. 19 lists the following (non-exhaustive) examples of the other measures, provided in the relevant laws: - disqualification from conducting a profession or craft, - seizing and suspending owner’s driving licence, - shutting down of a business, - off-road bans or deregistration of land, sea and air transport vehicles.

It should be also highlighted that the types of administrative fines in the Turkish law are relative and variable. That is to mean, while fixed fines are imposed for certain misdemeanours, for others the lower and upper limits are determined and the discretion to fix the amount of the fine, is granted to the relevant authority imposing the fine.

2. How do you define an administrative and a criminal offence/sanction?

The definition of these concepts vary in the academic framework depending on their different features. In the Turkish legal system these are defined as follows:

Administrative sanctions: Penalties and sanctions, imposed directly by the administrative authorities in line with the principles of administrative law, without any need for court orders, for actions whereby the law has been violated.

Criminal sanctions: can be defined as a pain, suffering, applied by judicial authorities through a criminal procedure on a person who has violated a provision of law by committing an action that is perceived by law as a threat. This form of sanction can also be defined as a sanction, issued through a judicial decision comprising sorts of deprivation against the commission of a “crime” elements of which provided by the relevant provisions of the criminal or other types of laws, and which is defined as a faulty and illegitimate action in violation of law.

Misdemeanour: defined in the Law of Misdemeanours as “an unjust action, for which the law imposes an administrative sanction”.

Offence: an action, which is in violation of an order or a prohibition, provided by the penal code, which is prohibited by the legal system by threat of punishment. Therefore, offences refer to acts, defined in penal laws and conduct of which require a punishment.

a. How do you distinguish the two?

The main distinction of a misdemeanour and an offence, is a quantitative difference between the unjust actions according to the crime policy followed. In other words, certain actions that violate the law, are regarded by legislature as more serious and requiring punishment and are classified as crimes, while other actions, with regards to their nature and consequences, are considered minor offences and are considered misdemeanours with the purpose of protecting the public order, the general ethics, the general health, the environment and the economic order. These actions are punished by administrative sanctions.

On the other hand, an offence and a misdemeanour differ in the practices and principles applied to each of these. For instance, offences as a principle can be committed intentionally. While offences, committed by negligence, are not considered offences, provided that the law does not provide otherwise, unjust actions in the form of misdemeanours can be committed as a rule both intentionally and by negligence. Accordingly, while an attempt to commit a crime is punishable, an attempted misdemeanour is not punished, unless there is a provision in the law to the contrary. Furthermore, in case of complicity in an offence, in a crime accomplices are differentiated as to the perpetrators and the accomplices, while in misdemeanour a single type of perpetrator system is adopted and the accomplices are imposed sanctions as perpetrators. Apart from these listed above, there are many other practices used to differentiate between the two concepts and we are willing to provide examples if a detailed explanation is requested.

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

The national laws of Turkey have been amended with regards to certain sanctions in line with the judgment, rendered by the European Court of Human Rights in the case of *Engel v. The Netherlands* (1976).

c. If so, to what extent?

As the Court stated in its judgment on *Engel*, when assessing if an action as a crime or a misdemeanour, according to Article 5 of the Convention, the action is differentiated according to its legal nature, regardless if the action is classified as a punishable or a disciplinary offence.

The practice of imposing room confinements on military staff for their actions of disciplinary offences, were previously imposed directly by the upper level military superintendent and were not subject to judicial control in Turkey. Both as a result of the *Engel* judgment and certain other judgments, the practice of imposing room confinements has been subjected to judicial control.

3. 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 the respective added value of administrative and criminal sanctions? Please provide representative examples.

Pursuant to the Law of Misdemeanours, the main purpose of the law is to subject unjust acts against public order, general ethics, general health, environment and economic order, to administrative sanctions.

As stated above, according to the penal policy, pursued in general by the law-makers, considering also the nature of the protected legal values and the importance and gravity of the action, certain actions are regulated as misdemeanours and others - as crimes.

Actions, constituting misdemeanours, can either be explicitly defined in the law and or by a framework decision, the scope and conditions of which is defined by the law and that can be filled with the general and regulatory procedures of the administration.

The authorities, authorised to decide on administrative sanctions, are the administrative board, institution or officials thereof, stated explicitly in the relevant laws. And where the law provides so explicitly, the public prosecutor may issue administrative sanctions. If during the investigation stage it is ascertained that the action being investigated constitutes a misdemeanour, the Prosecutor has the power to order an administrative sanction. If it is found out during the prosecution stage that the action is a misdemeanour, the court is entitled to order an administrative sanction. In rendering an order for an administrative sanction, principally the power is vested in the administrative authorities, and in exceptional cases - in the judiciary.

The general elements concerning the field of application of administrative sanctions, are provided below:

- Misdemeanours can be committed both intentionally and by negligence.
- If the law does not stipulate a special provision, attempt in committing misdemeanour shall not be sanctioned.
- In principle misdemeanours are subject to administrative sanctions only for actions, committed in Turkey, unless the law provides otherwise.
- Regarding practice of time limitations for misdemeanours, the provisions of the Criminal Code of Turkey apply. Therefore, no one can be imposed an administrative sanction order for an action that is not considered a misdemeanour pursuant to the law in force at the time of commitment, as well as no one is imposed an administrative sanction order for an action that is not considered a misdemeanour pursuant to the law that enters into force after the action has been committed. If the provisions of the law in force at the time of commission of the misdemeanour and the law that becomes effective afterwards differ, the law that is in favour of the person shall be applied.
- Misdemeanours can be committed by act or omission. However, in order for a misdemeanour to be committed by omission, there should be a legal requirement to act.
- Persons under 15 years of age when committing the action, are not imposed administrative fines by law.
- Administrative fines are not imposed on mentally deranged persons, who lack the ability to perceive the legal meaning and consequences of the actions or the ability of whom to control his/her actions is severely diminished.
- Concerning complicity, all the accomplices to the crime shall be given administrative sanctions as perpetrators no matter if they are accomplices or actual perpetrators, unlike the differentiation in criminal sanctions.
- In case more than one misdemeanours are committed by a single action, and where only administrative fines are designated as sanction in the relevant laws, the highest administrative fine shall be imposed. If the law envisages other administrative sanctions in addition to the administrative fine, all types of sanctions shall be imposed.
- If the same misdemeanour is committed multiple times, each of acts shall require individual administrative fines.
- In case an action is established by law both as an offence and a misdemeanour, solely the sanction prescribed for the offence shall be imposed. Though this is the general practice, there is an exception. If the law, regulating the misdemeanour has entered into force after the Law of Misdemeanours (No. 5326), and if the law provides that an

administrative fine shall be imposed even if the action constitutes an offence, then both administrative and criminal sanctions can be imposed.

The added value provided by administrative sanctions, *inter alia*, are: prevents the overloading of the judiciary with trivial violations, prevents waste of time, as decisions are given quicker compared to the trial process, it partly has the power of deterrence provided by the criminal law, through different types of administrative sanctions.

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

a. Art. 4 of the Convention on the protection of the environment through criminal law (ETS 172).²⁰⁹

Turkey is not a party to the said Convention.

b. Art. 78 (3) of the Council of Europe Convention on preventing and combating violence against women and domestic violence (ETS 210).²¹⁰

Turkey is a party to this Convention (ETS 210). Article 78(3) of the Convention, provides that any Party may declare that it reserves the right to provide for non-criminal sanctions instead of criminal sanctions for the behaviour referred to in Articles 33 and 34.

Turkey has no reservations to this Convention. Article 33 deals with psychological violence against women and Article 34 provides that States shall take the necessary legislative or other measures to ensure repeated threatening conduct to another person is criminalized. The actions under Articles 33 and 34 of the Convention are in general categorized as criminal offences in our country and subject to criminal sanctions, severity of which differ according to the nature of the action.

Psychological violence against women (Article 33), depending on the way the action is committed, is subject to criminal sanctions in different articles of the Criminal Code of Turkey.

To exemplify, attributing to someone an act or fact in a manner that may impugn that person's his/her honour, dignity or prestige; or attacking someone's honour, dignity or prestige by swearing constitutes the offence of defamation under Art.125 of the Criminal Code.

Similarly, whoever threatens a person or his relatives by an act that threatens the life, physical or sexual immunity of this person or a relative, constitutes the offence of "Threat" under Art.106 of the Criminal Code.

Likewise, "Ill-treatment" is criminalized in Art.232 thereof, providing that whoever mistreats his cohabitants shall be sentenced to a criminal penalty.

Additionally, a public officer whose treatment a person that is incompatible with human dignity, and which causes that person to suffer physically or mentally, or affects the person's capacity to perceive or his ability to act of his own will or insults him, constitutes the crime of "torture" under Art. 94 thereof.

Other than those listed, psychological violence against women is being prevented at every level, in many types of offences, such as "torment" in Article 96, "hatred and discrimination" in Article 122, "Disturbing peace and order" in Article 123, etc., depending on the way the incident occurred.

With regards to Article 34 of the Convention on stalking, again according to the way the incident occurred, the above types of offences have been criminalized and in addition stalking can be charged under Article 105 of the Criminal Code of Turkey, "Sexual harassment" and Article 151 "Damage to property".

²⁰⁹ <https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168007f3f4>

²¹⁰ <https://www.coe.int/fr/web/conventions/search-on-treaties/-/conventions/rms/090000168008482e>

In addition to these, Law No.6284 on the Protection of Family and Prevention of Violence against Women, in the incidents of domestic violence and violence against women, violence is defined in its widest meaning to the extent that it covers psychological and sexual violence. Under this law, victims of violence are taken under protection and the perpetrator is imposed restriction (banned from approaching the family house) and in case the suspect fails to comply with the restriction order, the court may sentence him to imprisonment.

- c. 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

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

In the Turkish law, principally, administrative sanctions for misdemeanours and criminal sanctions for criminal offences, may not be applied simultaneously. Pursuant to Article 15 of the Law on Misdemeanours, if an action is established both as a misdemeanour and an offence, only the criminal sanction may be applied. Therefore, the national law of Turkey envisages only administrative sanctions for almost all misdemeanours. An exception to this rule is the rule that if a law that comes into effect after the Law on Misdemeanours, and explicitly requires both administrative sanctions (misdemeanour) and criminal sanctions for the same actions, the latest law will prevail and in this case both administrative and criminal sanctions can be applied for the same action.

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

Reply to 5th question provides a sufficient answer to this question.

7. In your view: is the *ne bis in idem* applicable in case both tracks apply? Can you give examples of relevant national case law in this respect?

As stated in Reply No.5, according to Article 15 of the Law on Misdemeanours, if an action is described as both a misdemeanour and a criminal offence, the principle of *ne bis in idem* is applied and therefore imposing two penalties for the same action is prevented. This rule is being applied progressively in trial courts' decisions. An example of these decisions is the decision of the Court of Cassation of 12.03.2018, No.2018/2619, which reads: "The Court orders to lift the administrative sanction order, handed down to the applicant due to a misdemeanour, by which the person has been fined with an administrative fine for gambling and for organizing a cockfight under both Law No.5199 on the Protection of Animals, Art.28/h, since a criminal case has been brought by the Prosecutor's Office for the same action".

This rule has one single exception. If a law that comes into effect after the Law on Misdemeanours has become effective, explicitly sets out for the same actions both administrative sanctions (misdemeanour) and criminal sanctions, the latest law will prevail and in this case both administrative and criminal sanctions can be applied for the same action.

III. Identification of main differences between administrative and criminal tracks

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

Substantive law

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

In cases when the action is only constitutive of an administrative offence, aiding and abetting is sanctioned. Pursuant to Art.14 of the Law on Misdemeanours, in case more than one person take part in the misdemeanour, each of these persons are fined by an administrative fine as perpetrators.

General principles

9. Are administrative sanctions governed by general principles of administrative law or general principles of criminal law (such as proportionality, nullum crimen sine lege, legality, lex mitior, non-retroactivity etc)?

A part of the fundamental principles of the penal code are set out directly in the Law on Misdemeanours and for the other part of these principles the law provides that the provisions of the Criminal Code of Turkey shall apply for these misdemeanours as well, without being regulated separately, thus setting a connection between the two. In this respect, it can be asserted that some fundamental principles of criminal law are applicable for misdemeanours as well.

An example of this is the Law on Misdemeanours, which provides that when establishing the amount of an administrative fine – “the principle of proportionality”, and when establishing the amount of an administrative sanction – “the principle of legality” shall be observed. On the other hand, the Law on Misdemeanours expressly states that the provisions of the Criminal Code shall be applied with regards to mistakes, applying a law in favour of someone, and the principle of non-retroactivity of law. In this regard, the said principles apply also for administrative sanctions as they are laid down in the Criminal law.

Due to the nature of misdemeanours, however, the said principles are not applied as they are construed in criminal law, but with some differences in practice.

Procedural law

10. Do typical criminal procedural rights apply in case of administrative offences/sanctions (such as presumption of innocence, right to be heard, right of access to the case-file, right to remain silent)?

Do typical criminal procedural rights apply in case of administrative offences/sanctions (such as presumption of innocence, right to be heard, right of access to the case-file, right to remain silent)?

Certain rights in the code of criminal procedure apply to misdemeanours and administrative sanctions.

For instance, presumption of innocence is protected by Art.38 of the Turkish Constitution, providing that “no guilt can be presumed until the charge has been proven beyond reasonable doubt”. Although there is no separate provision in this regard in the Law on Misdemeanours, the Constitutional Court, in a case where the concerned person applied personally, in a decision it rendered on 27.06.2018, ruled that presumption of innocence must be taken into consideration when rendering an administrative sanction decision as well. The details of the decision can be provided if requested.

The right to be heard is a principle that does not have a mandatory nature in the Law of Misdemeanours of Turkey. Therefore, an administrative sanction decision can be rendered without hearing the person.

The right to access the case file, the right to access administrative sanction decisions given about themselves and the materials of the case, is under protection. Article 26 of the Law on Misdemeanours which states that it is mandatory to notify a person about a decision that concerns himself.

It is obligatory to provide the other materials forming the basis of the decision, pursuant to the provisions of different laws, at the request of the concerned person. On the other hand, if the person uses his right to appeal the administrative sanction decision, the person has the right to access all the materials available in the court.

Additionally, concerning taking of evidence, in the judicial investigation to be conducted in case an administrative sanction decision has been appealed, the provisions of the Code of Criminal Procedure Code on witness testimony, expertise, and exploration apply.

11. What kind of authorities are involved in the decision to impose administrative sanctions?

Article 22 of the Law on Misdemeanours, the jurisdiction in rendering administrative sanction decisions is vested in the administrative board, authority or public officials, stated in the relevant law. In cases where there is no exact provision in this regard, the highest level public official of the relevant public institution is entitled to render such decisions. Administrative boards, authorities or public officials are entitled to impose administrative sanctions for misdemeanours only where their own areas of service is concerned.

On the other hand, where the law explicitly provides so, the Public Prosecutor is entitled to impose administrative sanctions for misdemeanours. In case it is established under the scope of an investigation of an offence, that the underlying offence require an administrative sanction, the Public Prosecutor may either communicate the situation to the relevant public offices and institutions, or impose administrative sanctions himself.

If the behaviour under investigation is established to be a misdemeanour, an administrative sanction is imposed by a court.

12. Do administrative authorities vested with a sanctioning power comply with the principles of independence and impartiality? Is the decision on the sanction subject to a full judicial review (in law and in facts)? Which judicial authorities/courts are in charge of reviewing administrative sanctions?

As the law explicitly states which administrative authority is vested with a sanctioning power, they act independently and impartially in this regard, and do not take instructions and orders in this regard from another office.

The person upon whom the administrative sanction is notified has the right to appeal the sanction with judicial authorities. The judicial authority for appeal varies depending on the type of the administrative decision, and on the availability of a special provision in the law dealing with the particular misdemeanour.

In this connection, the authorities for appealing against administrative fines and administrative sanctions that nationalize private property, are Criminal Courts of Peace. As to appeals concerning the other types of administrative sanctions listed above, (e.g. shutting down a business, cancelling a licence, etc.), the concerned person can apply to the administrative courts. Additionally, in some exceptional cases, even if the sanction concerns administrative fine or nationalization of property, the law that sets out the misdemeanour may provide that the authority for application are the administrative courts.

IV. Cooperation and coordination

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

At the national level, both judicial and administrative authorities act in coordination/cooperation and when necessary they provide mutual assistance to one another.

When orders for administrative sanctions are appealed with the judicial authorities, a copy of the petition for appeal shall be forwarded to the public authority issuing the sanction order and the relevant institution is provided the opportunity to submit its grounds for its order of administrative sanction. Apart from this, all the documents which form the basis for the administrative sanction order, shall be mandatorily submitted to the judicial authority as required by the Law on Misdemeanours.

22. At the European level, do respective authorities coordinate / cooperate when administrative procedures / sanctions are applicable in one State and criminal law provisions in the other? Please refer here also to situations where only administrative sanctions may be imposed against a legal person in one State whereas the law of the other State provides for criminal liability of legal persons.

It should be noted that, pursuant to the Law on Misdemeanours, Turkey does not apply administrative sanctions for misdemeanours, committed in another country. Therefore, in case a criminal investigation/prosecution or an administrative sanction process is initiated in a foreign country for an action committed in that country, no misdemeanour sanctions shall be imposed separately in Turkey.

However, even if a judicial proceeding is initiated in a foreign country for an action committed in Turkey, this shall not prevent imposing an administrative sanction in our country.

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

22. 2. Have problems occurred? Which ones?

UNITED KINGDOM

1. Within the UK, there are three jurisdictions: England and Wales; Northern Ireland; and Scotland. The information below therefore reflects this distinction, where appropriate, and does not consider European Union law.

Fines and sanctions

2. In criminal proceedings, and depending on the offence, fines can be imposed as part of (or as the totality of) the sentence following a criminal conviction. Further information on fines in criminal trials can be found in the following websites:
 - For England and Wales: Sentencing Council (<https://www.sentencingcouncil.org.uk/about-sentencing/types-of-sentence/fines/>);
 - For Northern Ireland: Sentencing Guidelines (<https://judiciaryni.uk/sites/judiciary-ni.gov.uk/files/media-files/Fines.pdf>)²¹¹;
 - For Scotland: Scottish Sentencing Council (<https://www.scottishsentencingcouncil.org.uk/about-sentencing/sentences-and-appeals/>).
3. The term “administrative sanction” and “civil sanction” are used interchangeably. They are sanctions that specified regulators have the power to impose as an alternative to prosecution; the main legislation in the UK that confers this power is the Regulatory Enforcement and Sanctions Act 2008²¹² (RESA). Administrative/civil sanctions are imposed by the regulator without intervention by a court or tribunal. Three types of regulators can be given the power to use civil sanctions: the "designated regulators" set out in Schedule 5 of the RESA²¹³; any other person who has an enforcement function under an Act, or sections of an Act, specified in Schedule 6 of the RESA²¹⁴; any other person who has an enforcement function under secondary legislation made under an Act listed in Schedule 7 of the RESA²¹⁵.

Safeguards for an administrative sanction

4. There are various safeguards for defendants on the receiving end of a civil sanction, including, for example:
 - The principle of *ne bis in idem* or double jeopardy (the principle that if you have been prosecuted for an act once, you cannot be prosecuted for the same act again). For example, if the offender fails to pay a monetary penalty, they cannot later be criminally prosecuted for the original offence.
 - Statutory safeguards, including the right to appeal, contained in the RESA in respect of a fixed monetary penalty (see sections 39-41 of the RESA²¹⁶).

²¹¹ This document has not yet been updated to reflect changes made by Part 1 of the Justice Act (Northern Ireland) 2016. The 2016 Act introduced changes to the Permissible Duration/Conditions section of the table. The Justice Act (Northern Ireland) 2016 can be found at: <http://www.legislation.gov.uk/ukpga/2016/21/contents>

²¹² <http://www.legislation.gov.uk/ukpga/2008/13/contents>

²¹³ <http://www.legislation.gov.uk/ukpga/2008/13/schedule/5>

²¹⁴ <http://www.legislation.gov.uk/ukpga/2008/13/schedule/6>

²¹⁵ <http://www.legislation.gov.uk/ukpga/2008/13/schedule/7>

²¹⁶ <http://www.legislation.gov.uk/ukpga/2008/13/part/3/crossheading/fixed-monetary-penalties>

The human rights framework and the case of Engel

5. The Human Rights Act 1998²¹⁷ (HRA) gives further effect to the European Convention on Human Rights (ECHR) in domestic law. Section 6 of the HRA makes it unlawful for a public authority, including courts and tribunals, to act in a way that is incompatible with the Convention rights, including Article 6 ECHR on the right to a fair trial, unless the authority could not have acted any differently under primary legislation. Under section 19 of the HRA, the Minister responsible for a Bill in Parliament (that is, for what would become primary legislation) must make a statement of compatibility of the Bill with the Convention rights.
6. Although Article 6(1) ECHR applies to both civil rights and obligations and criminal charges, Articles 6(2) and (3) ECHR apply only to criminal charges, providing additional safeguards. It is therefore crucial to know what amounts to a “criminal charge”. Some matters which are domestically classified as civil rights may in fact amount to criminal charges for the purposes of Article 6 ECHR, applying the case of *Engel v Netherlands* (1976) 1 EHRR 647.
7. The *Engel* case has received positive treatment in the domestic courts. Using the *Engel* criteria to determine whether domestic sanctions amount to criminal charges for the purposes of Article 6 ECHR, the domestic courts consider: the domestic classification; the nature of what a person is “accused” of (including whether the offence is of general application or applied only to a specific group); the severity of the civil penalty.

²¹⁷ <http://www.legislation.gov.uk/ukpga/1998/42/contents>