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The Principles of Administrative Punishment under the ECHR

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ABBREVIATIONS

CFR	Charter of Fundamental Rights of the European Union
CHR	Commission for Human Rights
CJEU	Court of Justice of the European Union
CM	Committee of Ministers
CoE	Council of Europe
GDPR	General Data Protection Regulation of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
Ed(s)	Editor(s)
Edn	Edition
Et seq.	and following
ibid	*ibidem*
MN	Marginal number(s)
n.	footnote
OWiG	*Ordnungswidrigkeitengesetz* (German Law on Administrative Offences)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
USSR	Union of Soviet Socialist Republics

Table of Contents

CHAPTER 1
INTRODUCTION

"A state that wishes to claim legitimate authority will need to protect individuals from the coercion of others as well as to avoid unjust coercion of its own"

S. Anderson

1.1. Setting the Scene

1.01 Administrative sanctions are flexible, variegated and less costly tools of law enforcement if compared to criminal law measures. Their imposition does not require setting the wheels of criminal procedure in motion and shifts the burden of proof of a particular offence to the detriment of the individual.[1] Instead, the criminal procedure is replaced by a deleterious act taken in the exercise of public authority, which encroaches upon property or other individual rights, yet at the same time is accompanied by less rigorous procedural safeguards. Due to these and other qualities, the use of administrative sanctions tends to be extremely appealing to various policy-makers who are willing to set their agenda in a speedy and cost-efficient manner, i.e. to inflict punishment without having to undergo a judicial action. Their regulatory range is thus very broad: from speeding tickets to exorbitant fines for antitrust, market regulation or data protection breaches, administrative sanctions abound in a modern legal system. However, if misconceived, their imposition can quickly degrade into arbitrary practices of punishment or sanctioning facilitating the bureaucratic interests of the administrative authorities in regard to which any state subscribing to the rule of law and aspiring to claim legitimate authority over its citizens should not turn a blind eye.

1.02 At the same time, public resources are scarce and thus only the rights and interests that are of fundamental importance to the society can be safeguarded by means of criminal law and deserve the enhanced level of procedural protection whose primary aim is to minimize the hazard of a wrongful conviction.[2] This begs the question, how can one reconcile the need to ensure the protection of the individual from an almighty, Leviathan-like administration exercising its penalizing powers in an ever-expanding number of regulatory domains (procedural fairness) and the 'legitimate' use of administrative sanctions aimed at achieving

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1 As A. Bailleux eloquently puts it: "the task left for the accused in such cases to demonstrate the flaws of accusations made against him is considerably more onerous than having to sit and wait until the prosecuting authority has adduced evidence of guilt 'beyond reasonable doubt'", see more in A. Bailleux, "The fiftieth shade of grey. Competition law, "criministrative law" and "fairly fair trials" in F. Galli/A. Weyembergh (eds.), *Do labels still matter? Blurring boundaries between administrative and criminal law. The influence of the EU* (2014), pp. 137–152 (pp. 146–147).

2 K. Svatikova, *Economic Criteria for Criminalization: Optimizing Enforcement in Case of Environmental Violations* (2012), p. 151.

compliance with public policy goals without squandering public resources too much (its efficiency)?

1.03 Inspired by the foregoing considerations, this doctoral thesis seeks to deepen the understanding of administrative sanctions and their appropriate use on the pan-European plane. Even though the traditional claim is that public law has "particularly deep roots inside a cultural and political framework" of a country,[3] the exercise of administrative powers is no longer a national enclave[4] but clearly goes beyond the confines of the State. The idea that citizens identify themselves with particular legal notions found within their national administrative law framework is also nothing but a fiction.[5] Quite the opposite, nowadays the traditional concept of sovereignty – cultural peculiarities aside – seems to be overridden by human rights as a fundamental concept.[6] Administrative authorities, for their part, are operating within the multi-level legal framework, including being part of various networks, and supranational tendencies are capable of impacting the national practice of sanctioning to a great extent.[7]

1.04 The following academic quest will be undertaken by exploring the theoretical background, nature, idiosyncratic features, and goals and functions of administrative sanctions as well as their possible implications for individual rights. The guiding idea here is that a thorough

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3 C. Harlow, "Voices of Difference in a Plural Community" in P. Beaumont/C. Lyons/N. Walker (eds.), *Convergence and Divergence in European Public Law* (2002), pp. 199–225 (p. 208).

4 G. della Cananea, *Due Process of Law Beyond the State* (2016), p. 2; S. Cassese, "The Administrative State in Europe" in A. von Bogdandy/P.M. Huber/S. Cassese (eds.), *The Max Planck Handbooks in European Public Law: The Administrative State (Vol. 1)* (2017), pp. 57–72 (p. 58). See further for a call to de-nationalize administrative law scholarship in S. Cassese, "New paths for administrative law: A manifesto", (2012) 10 *International Journal of Constitutional Law* 3, pp. 603–613; for a claim that administrative law has both distinctive and common features see also G. della Cananea, "Administrative Law in Europe: A Historical and Comparative Perspective", (2010) 22 *European Review of Public Law* 2, pp. 162–211.

5 U. Stelkens, "Kodifikationssinn, Kodifikationseignung und Kodifikationsgefahren im Verwaltungsverfahrensrecht" in H. Hill/K.-P. Sommermann/U. Stelkens/J. Ziekow, *35 Jahre Verwaltungsverfahrensgesetz – Bilanz und Perspektiven: Vorträge der 74. Staatswissenschaftlichen Fortbildungstagung vom 9. bis 11. Februar 2011 an der Deutschen Hochschule für Verwaltungswissenschaften Speyer* (2011), pp. 271–295 (p. 294).

6 A. von Bogdandy/I. Venzke, *In Whose Name?: A Public Law Theory of International Adjudication* (2014).

7 In the case of the UK, e.g., this supranational impact has even translated into the introduction of administrative sanctions previously unknown in the national system (cf. MN. 3.13 et seq.). Further impact is clearly discernible in at least Italian, Swedish, Dutch and Czech systems that had to recast their administrative sanctioning procedures after some friction with the ECHR's regime was established. This data is taken from the research project on the pan-European principles of good administration, see U. Stelkens/A. Andrijauskaitė, *Good Administration and Council of Europe: Law, Principles and Effectiveness* (2020). Further indications to this effect can be discerned from the case law, where it appears, for example, that Romania had to desist from the inclination to supplement administrative sanctions with possibility of imprisonment in case of non-execution after condemnations from the ECtHR, see *Nicoleta Gheorghe v Romania* (23470/05) 3 April 2012 ECtHR at [29].

knowledge thereof, especially when it comes to putting a halt to unwarranted instances of punishment, cannot be achieved without including the fundamental rights and freedoms that the majority of European States have undertaken to observe (Art. 1 of the ECHR). In this vein, this thesis intends to uncover how administrative sanctions are perceived and applied within the framework of the Council of Europe (hereafter the 'CoE') with a special emphasis on the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter the 'ECHR, Convention') by conducting a doctrinal study of the rationale of (administrative) sanctions and by subsequently analysing a rich trove of principles pertinent to their imposition as developed and explicated by the European Court of Human Rights (hereafter the 'ECtHR').

1.05 The ultimate goal of this research is thus to distil, systematize and assess the application of such principles as well as to identify the possible gaps in individual protection and other drawbacks that the current perception thereof may entail. This thesis furthermore seeks to verify the hypothesis that there are certain guarantees that are recognized by the ECtHR that any public administration that is willing to be in line with the ECHR cannot be aloof from whilst imposing administrative sanctions (the so-called 'ironclad guarantees'). As will transpire later on, the ECtHR is 'trapped' in the semantics of the 'criminal charge' requirement and other terminology embedded in the ECHR's letter (cf. MN. 4.03 et seq.) and, thus, it focuses primarily on the 'punitive and deterrent' purposes of administrative sanctions and not on their 'compensatory' or 'administrative' function, although, as a matter of principle, they can be imposed even without any intent to punish (cf. MN. 3.49 et seq.). Having this in mind, the current title of the thesis – the principles of administrative punishment under the ECHR – encapsulates the gist of the research endeavour most suitably.

1.2. Research Originality and the Main Contribution

1.06 Administrative sanctions constitute a vibrant field of research in national[8] as well as in the European Union (hereafter 'EU') law, in particular since the EU introduced a whole range of

[8] For a comparative overview in different European legal systems see in English: O. Jansen (ed.), *Administrative Sanctions in the European Union* (2013); European Commission (ed.), *The System of Administrative and Penal Sanctions in the Member States of the European Communities*. *Volume I – National Reports* (1994); in selected states see Council of Europe (ed.), *The administration and you: Principles of administrative law concerning the relations between administrative authorities and private persons* (1996), pp. 218–224. There are also multiple works on administrative sanctions available in other languages see, e.g., in French: J. Mourgeon, *La répression administrative* (1967); in French from a Belgian perspective: R. Andersen/D. Déom/D. Renders (eds.), *Les sanctions administratives* (2017); in Italian: M. A. Sandulli, *La potestà sanzionatoria della pubblica amministrazione* (1981); in German: W. Mitsch, *Recht der Ordnungswidrigkeiten* (2005); in Polish: M. Stahl/R. Lewicka/M. Lewicki, *Sankcje administracyjne* (2011); in Swedish: L. Halila/ V. Lankinen/A. Nilsson, *Administrativa sanktionsavgifter: En nordisk komparativ studie* (2018), and many more.

'new' administrative sanctions in the 1990s – some of which were 'foreign' to certain national legal systems, such as the reduction of refunds, exclusion from the benefit of a scheme of aid, loss of security or the like in the field of common agricultural policy and beyond. Over the years, a further array of sanctions in the competition and data protection fields and – following the advent of the financial crisis of 2008 – also in the financial markets has been introduced.[9] What is more, new actors, such as the European Securities and Markets Authority or the European Central Bank, were entrusted with their application on a supranational level.[10] In addition, the interest in, and awareness of, the 'administrative approach' grew in regard to preventing and tackling crimes, for example, by denying the use of the 'legal administrative infrastructure' in licensing or tender procedures.[11] Finally, since crimes no longer have only a national dimension, various sanctions - above all, the so-called targeted financial restrictive measures – have been employed by the EU on a wider scale and on multiple legal bases (as well as by the UN Security Council) to safeguard international peace and security in the recent decades, bringing scholarly discussions as to the 'true' nature of these measures (administrative or criminal) in their wake (cf. MN. 3.37).

1.07 However, whilst at the EU level the academic attention grew in line with the gradual expansion of the use of administrative sanctions as efficient tools aimed at facilitating the enforcement of sectoral policies (cf. MN. 3.77 et seq.), even if some reservations towards their

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9 J. Reichel, "Sanctions Against Individuals and the Rule of Law: Can the Member States Let the EU Decide?" in A. Bakardjieva Engelbrekt/K. Leijon/A. Michalski/L. Oxelheim (eds.), *The European Union and the Return of the Nation State: Interdisciplinary European Studies* (2020), pp. 191–217 (pp. 206–207). See more on the current EU framework of market abuse in R. Kert, "The relationship between administrative and criminal sanctions in the new market abuse provisions" in Galli/Weyembergh (n. 1), pp. 95–107; A. Perrone, "EU Market Abuse Regulation: The Puzzle of Enforcement", (2020) *European Business Organization Law Review* 21, pp. 379–392.

10 See on the latter's toolbox of administrative measures and sanctions in S. Allegrezza/O. Voordeckers, "Investigative and Sanctioning Powers of the ECB in the Framework of the Single Supervisory Mechanism: Mapping the Complexity of a New Enforcement Model", (2015) *The European Criminal Law Associations' Forum* 4, pp. 151–161.

11 See more in A.C.M. Spapens/M. Peters/D. Van Daele (eds.), *Administrative measures to prevent and tackle crime: legal possibilities and practical application in EU member states* (2015).

full transfer linger,[12] as is reflected by various general[13] as well as specific studies[14] the same cannot be said about the legal framework of the CoE. A preliminary inquiry into the current state of the research within this legal framework revealed that comprehensive scholarly works are missing and that only a few authors are researching administrative sanctions under the ECHR more profoundly, i.e. in a cross-cutting manner.[15] Other authors deal with this topic in a rather fragmentary manner, i.e. only to the extent that the application of these sanctions touches upon or correlate with the specific topics of their research,[16] or in a narrow (topical) manner, i.e. usually the focus is put only on specific types of administrative sanctions under the ECHR

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12 The main one being the general reluctance of the Member States to hand over sanctioning powers to the EU, see more in J. Reichel, "The Rule of Law in the Twilight Zone – Administrative Sanctions Within the European Composite Administration" in R. L. Weaver/D. Fairgrieve/S.I. Friedland (eds.), *Administrative Law, Administrative Structures, and Administrative Decisionmaking* (2019), pp. 73–90.

13 See, e.g., for a cross-cutting research in a chronological order: S. Montaldo/F. Costamagna/A. Miglio (eds.), *EU Law Enforcement: The Evolution of Sanctioning Powers* (2021); Galli/Weyembergh (n. 1); A. de Moor-van Vugt, "Administrative Sanctions in EU law", (2012) 5 *Review of European Administrative Law*, pp. 5–41; S. Bitter, *Die Sanktion im Recht der Europäischen Union – Der Begriff und seine Funktion im europäischen Rechtsschutzsystem* (2011); M. Poelemans, *La sanction dans l'ordre juridique communautaire* (2004); S. Bitter, "Procedural Rights and the Enforcement of EC Law through Sanctions" in A. Bodnar et al. (eds.), *The Emerging Constitutional Law of the European Union* (2003), pp. 15–46; M. Zuleeg, "Enforcement of Community Law: Administrative and Criminal Sanctions in a European Setting" in J.A.E. Vervaele et al. (eds.), *Compliance and Enforcement of European Community Law* (1999), pp. 349–358; A. Heitzer, *Punitive Sanktionen im Europäischen Gemeinschaftsrecht* (1997); W. van Gerven/M. Zuleeg (eds.), *Sanktionen als Mittel zur Durchsetzung des Gemeinschaftsrechts* (1996); M. Böse, *Strafen und Sanktionen im Europäischen Gemeinschaftsrecht* (1996); R. Milas, *Au nom de L'Europe. La sanction dans l'ordre juridique communautaire* (1988).

14 See, e.g., in fisheries law: P. Caucad/M. Kuruc/M. Spreij, *Administrative sanctions in fisheries law* (2003), in food law: G. Dannecker (ed.), *Lebensmittelstrafrecht und Verwaltungssanktionen in der Europäischen Union* (1994).

15 See a recent study on 'fair trial' guarantees in administrative sanctioning regimes by M. Arslan, *Procedural Guarantees for Criminal and Administrative Criminal Sanctions: A Study of the European Convention on Human Rights* (2019). The topic has also been dealt with in a fragmentary or marginal manner in: Galli/Weyembergh (n. 1); A. Weyembergh/N. Joncheray, "Punitive Administrative Sanctions and Procedural Safeguards: a Blurred Picture that needs to be addressed", (2016) 7 *New Journal of European Criminal Law*, pp. 190–210. For a very rudimental manner see, Council of Europe (ed.), *The Administration and You: A Handbook – Principles of administrative law concerning relations between individuals and public authorities* (2018), pp. 38–41. It is found/discussed in Italian: F. Goisis, *La tutela del cittadino nei confronti delle sanzioni amministrative tra diritto nazionale ed europeo* (3d edition, 2018).

16 See, e.g., in relation to tax law: G. Marino, "Limitation of Administrative Penalties by the European Convention of Human Rights and the EU Charter of Fundamental Rights" in R. Seer/A.L. Wilms, *Surcharges and Penalties in Tax Law (2015 EATLP Congress Milan, 28 – 30 May 2015)*, pp. 133–161; in relation to antitrust fines: W.P.J. Wils, "The Increased Level of EU Antitrust Fines, Judicial Review and the ECHR", (2010) 33 *World Competition* 1, pp. 5–29; in relation to the principle of legality: M. Timmerman, *Legality in Europe: On the principle nullum crimen, nulla poena sine lege in EU law and under the ECHR* (2018) and C. Peristeridou, *The principle of legality in European criminal law* (2015); in relation to the principle of *ne bis in idem*: P. H. van Kempen/J. Bemelmans, "EU protection of the substantive criminal law principles of guilt and *ne bis in idem* under the Charter of Fundamental Rights: Underdevelopment and overdevelopment in an incomplete criminal justice framework", (2018) 9 *New Journal of European Criminal Law* 2, pp. 247–264; and in relation to 'legislating' administrative sanctions: M. Bernatt, "Administrative Sanctions: Between Efficiency and Procedural Fairness", (2016) *Review of European Administrative Law* 1, pp. 5–32.

or a specific principle[17] or in a 'mélange' manner, i.e. including a chapter on the ECtHR's perspective in works covering very diverse topics.[18] The 'sporadic' interest in the topic also appears from time to time in the form of the ECtHR's case comments, especially when the latter renders judgements with controversial or far-reaching effects, and short articles, which will be quoted throughout this thesis when a particular question is discussed.

1.08 The lack of academic attention given to administrative sanctions within this framework is surprising because the CoE – whose (normative) sources should be taken into consideration whilst interpreting the ECHR[19] – has been actively engaged in administrative matters since the 1970s and since then has managed to develop an extensive body of administrative law .[20] Its administrative law provisions can even be said to form a 'coherent whole' as demonstrated by the recent research.[21] In the field of administrative sanctions, the CoE has also codified various principles applicable to their imposition in Recommendation No. R (91) 1 on administrative sanctions to the Member States of the Committee of Ministers of 13 February 1991 (hereafter 'Recommendation No. R (91) 1'). This academic gap is furthermore glaring because even though the ECHR does not stipulate its applicability to administrative sanctions *expressis verbis*, by developing and applying the famous *Engel* criteria,[22] the ECtHR proved, as early as in the 1970s, its willingness to defend standards of individual protection against so-called 'mislabelling' tendencies; i.e. the practice of using administrative punishment in cases deserving higher safeguards offered by a criminal procedure.

1.09 That is to say, the ECtHR recognized the attribution of ECHR guarantees to administrative sanctions provided that the 'criminal charge' within the meaning of Article 6 ECHR could be determined in each case put before it (cf. MN. 4.03 et seq.). Over time, the *Engel* criteria have

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17 On specific sanctions in market regulations, see, e.g., F. P. Mateo, "Harmonising national sanctioning administrative law: An alternative to a single capital-markets supervisor", (2018) *European Law Journal* 24, pp. 321–348. Regarding their relationship with the presumption of innocence see, e.g., N. Raschauer/G. Granner, "Europäische Verwaltungssanktionen und Unschuldsvermutung" in R. Feik/R. Winkler (eds.), *Festschrift für Walter Berka* (2013), pp. 197–217.

18 See, e.g., J.-P. Marguénaud, "Les sanctions par la Cour européenne des droits de l'homme" in C. Chainais/D. Fenouillet (eds.), *Les sanctions en droit contemporain: La sanction, entre technique et politique, Volume 1* (2012), pp. 553–571.

19 This is recognized by the ECtHR itself in the landmark case of *Demír and Baykara v Turkey* (34503/97) 12 November 2008 ECtHR [GC] at [128] and confirmed in *Magyar Helsinki Bizottság v Hungary* (18030/11) 8 November 2016 ECtHR [GC] at [124]. See also A. Andrijauskaitė, "Creating Good Administration by Persuasion: A Case Study of the Recommendations of the Committee of Ministers of the Council of Europe", (2017) 15 *International Public Administration Review* 3-4, pp. 39–58 (p. 41).

20 Stelkens/Andrijauskaitė (n. 7), MN. 1.63 et seq.

21 See more in Stelkens/Andrijauskaitė (n. 7), MN. 1.88.

22 See *Engel and Others v Netherlands* (5100/71, 5101/71, 5102/71, 5354/72, 5370/72) 8 June 1976 ECtHR.

evolved and been progressively broadened into a vast range of activities within the field of administrative law, such as regulatory offences, tax surcharges, minor offences of breaching public order, traffic law, customs law, competition law, financial markets law, agricultural law, etc.[23] The level of protection of individual rights has thus been raised significantly even beyond the framework of the ECHR and has influenced various national courts.[24] What is more, these criteria have reverberated on the EU level, especially before the EU developed a catalogue of its own on legally binding fundamental rights, with the Union's courts *de facto* invoking the *Engel* test.[25]

1.10 This thesis intends not only to fill the said academic gap and contribute to the legal scholarship, but also to be a useful source for practitioners working within the field of public law who are empowered to regulate on or impose administrative sanctions. More concretely, by providing a deeper understanding of this legal tool and (above all) its various declinations within the framework of the CoE, it aims to be helpful for any European legislators and public authorities who wish to stay compliant with the ECHR guarantees whilst drafting or inflicting punishment for administrative wrongs. The thorough and systematic analysis of the ECtHR case law on administrative sanctions may be deemed the most important contribution to that effect.

1.3. Research Questions and Outline

1.11 As outlined above, this thesis explores the principles underlying administrative punishment within the framework of the CoE. In order to reach this research goal and achieve a deeper understanding thereof, more specific sub-questions will be raised, amongst them: What is a sanction? What purposes does it serve in a legal system? What is an administrative sanction in particular? What are its role and idiosyncratic features? What aims does it follow? How can it be differentiated from other types of public admonition, i.e. from criminal law measures? How do the CoE and the ECtHR conceptualize an administrative sanction? What guarantees stipulated by the ECHR are applicable to these sanctions? To what extent do they apply? Are there any limitations? If so, then what are the implications thereof on the individual rights? Is

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23 The exact references to this case law are not provided here out of consideration for space, but can be found throughout the thesis.

24 For example, in France the *Conseil Constitutionnel* and *Conseil d'État* extended guarantees stipulated by Article 6 ECHR even to measures of 'pure administrative nature', see Weyembergh/Joncheray (n. 15), p. 199.

25 See, e.g., *Lukasz Marcin Bonda* (C-489/10) 5 June 2012 CJEU at [37].

the current level of protection in the field of administrative punishment regarding fundamental rights sufficient?

1.12 The thesis furthermore seeks to verify the following hypothesis:

The ECtHR acknowledges certain (minimum) requirements stemming from the ECHR from which the administrative authorities imposing a punitive administrative measure upon the individual cannot deviate.

The drafting of this hypothesis was inspired by the wording of Article 6 (3) ECHR, which, together with other paragraphs of this Article, enlists fundamental individual guarantees for (any kind of) punishment ("*Everyone charged with a criminal offence has the following minimum rights* […]"). This thesis will often refer to the 'enhanced protection' under the ECHR and exactly the latter provision together with a few other guarantees[26] can be said to embody this notion because while the first paragraph of Article 6 ECHR applies to the determination of both civil rights and criminal charges, the third paragraph protects only persons "charged with a criminal offence". However, at this juncture it ought to be noted that the Parties to the ECHR – taking into account its subsidiary nature– are free to apply even higher standards of protection than those guaranteed by it (Article 53 ECHR), meaning that the verification of the hypothesis may reveal only the 'bare minimum' of standards emanating from the ECHR but should in no way be understood as setting out 'the ideal'. The ECtHR is usually concerned with verifying exactly the said 'bare minimum' as predicated on articles 19 and 32 ECHR.

1.13 This thesis is structured in view of the questions that it tackles. After the introductory part, which together with the last chapter, serves to frame the thesis, and before delving into the practical/positivistic dimension of this research, it was deemed necessary to include a more philosophical inquiry. More concretely, Chapter 2 of this thesis is dedicated to exploring the perception of a sanction in legal theory. By adding a theoretical study of sanctions, the core features of this legal tool and its rationale(s) in a legal system could be distilled, in turn, laying the groundwork for its proper application at a later stage. This is warranted by the fact that legal theory touches upon the very 'dignitarian' aspects whose deeper understanding can help to preclude arbitrariness in administrative punishment. Namely, it seeks to answer important questions about what is 'good' and 'evil' in a social order. Are these categories conceptually elusive and morally relative? Can coercion stemming from the State against the individual stretch endlessly in order to facilitate societal goals? Or are there limits thereon? If so, is it

[26] Namely, Article 7 ECHR and articles 2 and 4 of Protocol 7 for the ECHR, which is also directed towards *ius puniendi*.

possible to identify them? By discussing and comparing various viewpoints expressed in the selected theoretical writings on sanctions, more light will be shed on these pertinent questions. Moreover, the insights from legal theory turned out to be instrumental in allowing for the depiction and differentiation of the whole variety of sanctions, the comprehension (of the limitations of) of various 'practical' concepts employed in the sanctioning context such as 'stigma', as well as the real value of an intrinsic approach to punishment, at later stages of this work.

1.14 Chapter 3 of this thesis continues by enhancing the doctrinal understanding of an (administrative) sanction. Before zooming in on the actual examination of administrative sanctions within the chosen framework of law, this chapter explores the doctrinal core of an administrative sanction, namely, its ontological features, aims and typology. For this purpose, this chapter firstly illustrates the diversity in the perception of administrative sanctions on the European plane by examining the German, French and English systems. Not only are these systems routinely explored as the 'usual suspects' in European comparative law, but they have also been influential when it comes to sanctioning: whilst the first two systems, as the founding EU States, have perceptibly moulded solutions on the EU level, when they first needed to be developed (see the early days of competition law as an example, cf. MN. 3.78), the latter merits more scrutiny due to its unique approach, which is in opposition to the continental law tradition (see the inclusion of 'judge-made' law in the definition of law, cf. MN. 7.08). Chapter 3 then goes on to discuss a couple of positivistic (the relevant notion enshrined in Recommendation No. R (91) 1 of the CoE – as a source capable of expressing a minimum level of pan-European consensus on standards of individual protection as well as a source containing "much of the detail when it comes to administrative law"[27]) and doctrinal attempts to define administrative sanctions and their conceptual insufficiencies as well as the typology of administrative sanctions according to the aims that they may pursue. More precisely, this part will explore punitive, preventive and remedial sanctions – conceptual categories that are invoked in this thesis early on in order to highlight their different *ratio legis* and the standards attached thereto. It is furthermore a typology of practical significance as the ECtHR itself relies on it whilst attributing a 'criminal charge' to various sanctions. This typology by aim is supplemented by a *sui generis* overview of sanctions by their tradition and utilization, which analyses the post-communist punitive tradition, a dual-track enforcement and the lack of corporate criminal

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[27] G. de Vel/T. Markert, "Importance and Weaknesses of the Council of Europe Conventions and of the Recommendations addressed by the Committee of Ministers to Member States" in B. Haller/H.-C. Krüger/H. Petzold (eds.), *Law in Greater Europe* (2000), pp. 345–353 (p. 352).

liability in certain legal systems as idiosyncratic sanctioning practices that have the potential to fall foul of the ECHR standards. Finally, this chapter compares administrative sanctions with criminal sanctions by discussing the paradigmatic distinctions between these two forms of public admonition. The latter part seeks to demonstrate that a (full) demarcation is hardly possible and that the boundaries between the two domains are bound to remain 'fluid'.

1.15 Chapter 4, for its part, contextualizes the previous theoretical ponderings and explores the notion of an administrative sanction within the chosen normative framework of the CoE. Namely, it aims to dissect a pan-European administrative sanction as conceived by the CoE and above all by the ECtHR. Therefore, the gradual percolation of administrative sanctions into the case law of the ECtHR, the reasons behind this development and the current perception found therein are explored. A separate part of this chapter is also dedicated to deciphering the so-called '*Jussila* concession' by which the ECtHR started to differentiate between 'hard-core' sanctions deserving an increased level of individual protection in accordance with Article 6 ECHR and 'fringe' sanctions capable of attracting only lowered standards thereof. In addition, the conceptual shortcomings and the possible way forward for the '*Jussila* concession' are discussed.

1.16 Chapter 5 turns to the most extensive part of the research, i.e. the procedural guarantees of administrative punishment as developed by the ECtHR. Above all they include various declinations of Article 6 ECHR, protecting the right to a fair trial. More precisely, after briefly introducing the pertinent regulatory framework of *ius puniendi administrativus*, this chapter examines the salient requirements of reasonable time, control of legality, and defence rights. The category of 'control of legality' is broken down into sub-categories and touches upon questions such as the lack of a tribunal and its safeguards, a fair and public hearing, the requirement for a tribunal to exercise 'full jurisdiction', the duty to give reasons, and the right of appeal to a higher court. The category of 'defence rights' is also broken down and encompasses the study of the importance of granting access to the case file as well as representation, participatory and language rights in punitive proceedings. The chapter concludes with the handling of the question of the burden of proof and the presumption of innocence and related legal problems.

1.17 Chapter 6 is dedicated to the exploration of the principle of *ne bis in idem* encapsulated in Article 4 of Protocol No. 7 to the ECHR and the attendant issue of the so-called 'multiple punishment', given the 'conceptual kinship' of administrative and criminal sanctions. This principle can be said to encompass both dimensions – procedural as it prohibits not only double

punishment (*ne bis punieri*) but also double prosecution (*ne bis vexari*), and substantive as is evinced by its non-derogable nature. Or, as put by the ECtHR itself, the *ne bis in idem* principle is "mainly concerned with due process, which is the object of Article 6, and is less concerned with the substance of the criminal law than Article 7 ECHR".[28] It was thus placed between the two structural categories of this thesis, which deal with the procedural and substantive sides of administrative punishment. This chapters tracks the evolution of the *ne bis in idem* principle by depicting the 'early developments' of its interpretation and highlighting the divergences found in the ECtHR's case law. It goes on to study the refinements of the *idem* and *bis* elements and concludes with a synthesis of when the dual-track punishment is actually allowed and other observations relevant to the future of this paramount guarantee against excessive *ius puniendi* by the State.

1.18 Chapter 7 addresses a topic of less academic interest but that is no less significant in terms of administrative punishment, i.e. the principle of legality that stems from Article 7 ECHR. It elucidates on how this principle and its relation to administrative sanctions is perceived by Recommendation No. R (91) 1 as well as by the ECtHR itself. It goes on to demonstrate that even though the bar for 'Article 7 guarantees' with regard to administrative sanctions is set rather high when speaking of 'law', this Article embodies the very same concept as defined in the very wording of articles 8-11 ECHR as well as in Article 1 of Protocol No. 1 ECHR. Hence, the protection of this requirement in the sanctioning context is fused. Finally, it deciphers the concrete implications (sub-requirements) of this principle for administrative punishment, namely, its regulatory quality, non-retrospective application and the need to establish personal liability before imposing administrative sanctions.

1.19 Chapter 8 reflects on the major findings of this thesis and assesses them. It furthermore verifies the hypothesis posed in the introductory part of this thesis, identifies the (current) gaps in individual protection in administrative punishment under the ECHR and provides recommendations.

1.4. Research Methods

1.20 The methods used in this thesis are largely, for lack of a better term, the usual ones employed in doctoral legal theses. However, the author of this thesis holds the strong belief that it is the case law that is the real currency of the lawyer and the 'lifeblood' of the law itself. In fact, legal science is unique compared to other disciplines in that it has vast swathes of empirical material

[28] *A and B v Norway* (24130/11 and 29758/11) 15 November 2016 ECtHR [GC] at [107].

in the form of case law at the ready. Notwithstanding this, legal science goes beyond the empirical realm and reflects a broader range of considerations in regard to the law as a phenomenon other than the case law dealing with concrete real-life situations where the law needs to be applied.[29] However, many vexing legal questions do come down to an interpretation, so it is crucial to have regard for authoritative elucidations (before one can make up one's mind whether to agree with them or not). Thus, the primary focus of this thesis lies exactly on the analysis of the ECtHR's case law, which forms a sort of 'empirical pillar' of this work. It is through siphoning off throngs of cases and the different situations that they tackle in concert with studying the normative provisions and other sources that we can truly learn something about the meta-ideas and patterns guiding the chosen domain for analysis.

1.21 Among the multiple research methods employed in this thesis, the following ones can be distinguished: the *literal (textual)* method, which allowed for gaining a primary understanding of the content of the law and identifying accurate legal concepts. This method was, of course, insufficient, since the ECHR itself, for historic reasons, is silent on 'administrative law' let alone 'administrative sanctions' or 'administrative punishment' and the ECtHR interprets many key terms, such as 'criminal charge' and 'penalty', autonomously. Considering this limitation, the *systemic (contextual), logical* and *analytical* methods came in handy by allowing the author to put the textual expressions against the backdrop of wider ideas and go beyond what is explicitly written in the legal texts. By using these methods, for example, the scope and meaning of an administrative sanction as a legal device were extracted and the critique, to this end, is provided in Chapter 3. Moreover, they allowed for perceiving the relevant legal notions as a (complex) system of ideas and for discovering the conceptual links and interdependencies among them.

1.22 A *functional* method was furthermore adopted as a way to look 'beyond appearances' and include some of the measures that ostensibly might have a different legal label but are administrative sanctions in their essence or in the autonomous understanding of the ECtHR and thus, may have yielded valuable insights to the research. For example, in the case of *Vyerentsov v Ukraine*[30] a sanction on the applicant for taking part in an unlawful demonstration was imposed by a court and not by an administrative authority but all of the other indications showed that it was, in fact, an administrative sanction in its essence (cf. MN. 7.21). Moreover,

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[29] See more in H. C. Röhl, "Öffnung der öffentlich-rechtlichen Methode durch Internationalität und Interdisziplinarität: Erscheinungsformen, Chancen, Grenzen", (2015) *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 74, pp. 7–37 (pp. 21 et seq.).

[30] *Vyerentsov v Ukraine* (20372/11) 11 April 2013 ECtHR.

administrative sanctions may also appear in the guise of disciplinary measures, as happened, for example, in the case of *Guisset v France*[31] and the functional approach helped to extract their true nature for the purposes of this research. It was moreover invoked in order to provide a typology of administrative sanctions by underscoring their different functions as they determine whether a sanction can benefit from the ECHR's protection.

1.23 The *historic* method was also employed to trace back the origins and the reasons behind administrative punishment forging its own path, i.e. separately from criminal punishment. It was also used in order to dissect the variations in the perceptions of a sanction in legal theory and the administrative law scholarship. It furthermore facilitated the understanding of the diversity of forces and motivations that have driven the proliferation of administrative sanctions and their dynamic evolution in post-war Europe as well as their gradual percolation into the case law of the ECtHR (cf. MN. 4.03 et seq.). This method was moreover helpful in deriving the political and societal factors that have shaped or impeded the convergence in modern-day European law regarding this topic. The *diachronic* method supplemented the historic one in that it shed more light on how the *Engel* criteria and the 'criminal charge' condition were interpreted over time, thus opening the 'semantical door' to administrative sanctions in the ECHR's case law.

1.24 *Descriptive* and *comparative* methods, for their part, allowed for deepening the understanding of the (intricacies of the) notion of administrative sanctions. The former method was predominantly employed to filter out and order the basic precepts of the various legal theories dedicated to this matter in Chapter 2. The writing up of the theoretical part meanwhile was not a *pro forma* act but was extremely useful in not only understanding with what 'one deals with' but also in reflecting on the research and the strategies that the ECtHR employs (such as a pivot to extraneous factors of punishment, cf. MN. 4.46 et seq.) in a more conceptual manner as well as in formulating the final conclusions and recommendations of the work. The latter method served as a key instrument in gaining insights regarding the prevailing divergence in perceptions of administrative sanctions and their functions as well as the varying operationalization of certain procedural principles relevant to their imposition in European legal systems (something that, for its part, might lead to resistance by the Member States to the 'harmonizing' developments undertaken by the ECtHR). The 'specifical topical comparison' conducted to this end in Chapter 3 indeed revealed a wide ideational spectrum with which the ECtHR is confronted in its adjudication.

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[31] *Guisset v France* (33933/96) 9 March 1998 CHR (dec.) [Plenary].

1.25 Finally, the *teleological (purposive)* method was oftentimes invoked with the aim of attaining knowledge about the real intentions behind the legislative provisions (both in 'hard' and in 'soft' law on administrative sanctions), especially when their textual expressions were vague or insufficient, and, thus, facilitating the (correct) interpretation of different safeguards. Since the ECHR is silent on the use of administrative sanctions, it was important to check whether the Contracting States expressed their will to integrate the then novice legal device of administrative sanctions into the ECHR's system by other means and what scope of protection they could have been ready to give to them in concrete terms.

1.26 The methods employed in this thesis naturally merge and build on one another, as none of them is sufficient in itself to gain a clear view of such a complex topic. For instance, the systemic method was invoked together with the historical method in dissecting the genesis of (the percolation of) administrative sanctions into the case law of the ECtHR against the backdrop of increased normative activity and scholarly developments regarding the protection of the individual *vis-à-vis* the administration in Chapter 4. The functional and comparative methods can be named as a further example of such a combined use in providing the typology of administrative sanctions or taking stock of theories dedicated to finding the dividing line between administrative and criminal punishment.

1.27 Overall, it must also be briefly noted that a full understanding of administrative sanctions and their effective application is hardly possible without turning to other disciplines such as sociology or psychology (cf. MN. 2.32). The current thesis, however, remains within legalistic boundaries due to its author lacking competence in these other domains. This implies that the 'qualitative' analysis of the case law forms its backbone together with the theoretical insights stemming from the legal scholarship and other authoritative sources. The author of this thesis subscribes to the notion that "all science is either physics or stamp collecting"[32] and is well aware of the selectivity and the limits of any research conducted within the sphere of the social science that law is. At the same time, the author (especially in more mundane phases of the writing) took consolation in perceiving her work – philosophically put – as a fight against chaos given the scattered nature of protection that the ECHR can offer to administrative punishment.

1.28 The case law analysed in this thesis was selected by using the following keywords in the HUDOC's database: 'administrative sanctions', 'administrative penalties', 'administrative offences', 'administrative fines', 'punitive and deterrent', '*Engel* criteria' and the like; and subsequently verifying their relevance to the topic. Some of it was also discovered upon reading

[32] This epigram is popularly attributed to Nobel price winner Ernest Rutherford.

scholarly works on the ECHR's law in general. The search was limited to articles 6 and 7 ECHR and Protocol No. 7 to the ECHR. To filter the relevant case law out, a broad definition of an administrative sanction was adopted as a 'departure point'. This means that not only were adverse measures imposed by administrative authorities taken into consideration but also sanctions of an administrative nature inflicted by (combined) means of a judicial process, e.g. by administrative courts or ordinary courts in the so-called administrative offences field that is typical for some of the CoE Member States. The case law shows that despite the involvement of judicial bodies in the imposition of sanctions in some Member States, these processes cannot usually be equated with the criminal procedure and weaker standards consequently apply.[33]

1.29 The research is up to date as of 1st of January, 2022. Any developments (legislation, case law, and literature) that may be relevant for this thesis beyond that date have been not incorporated into the research. All the usual disclaimers regarding mistakes apply.

1.5. Delimitation of the Research Topic and Limitations

1.30 As hinted at above, administrative sanctions tend to be variegated, broad and complex. Hence, not all of the facets pertaining to this topic could realistically have been covered in a single thesis without any kind of limitations. The first concession was made in the theoretical part of the study. It is restricted to three influential strands of legal theory – natural law, legal positivism and legal realism. Although far from providing the full picture, they were selected as they are capable of amply depicting the intellectual richness and diversity in the perception of sanctions.[34] Likewise, not all of the theories dedicated to the delimitation between criminal and administrative sanctions could be discussed in a comprehensive manner. In fact, the first traceable discussion on the matter goes back to the 19th century[35] and, thus, more contemporary accounts were deemed to be sufficient to plausibly illustrate how elusive the finding of the *summa divisio* between these two punitive fields of law tends to be. The same concession was also made in the part dealing with the doctrinal endeavours to define an administrative sanction.

1.31 Furthermore, this thesis does not comprehensively cover the topic of disciplinary measures, i.e. measures imposed by various professional associations and other bodies exercising their

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33 Such as, e.g., in the case of *Gumeniuc v the Republic of Moldova* (48829/06) 16 May 2017 ECtHR wherein the sanctioning for the failure to pay administrative fines was imposed by a judge filling in by hand pre-existing templates. Quite expectedly, such a practice was declared to be at variance with the ECHR, but can precisely for this reason reveal insights conducive to the boundaries of administrative punishment.

34 This however does not mean that other theories of law, such as critical legal studies or feminist legal theory, have nothing to contribute to the subject.

35 See more in n. 221.

disciplinary authority over a limited number of persons. Although the *Engel* criteria (which laid the groundwork for applying ECHR guarantees to administrative sanctions) were conceived in relation to disciplinary measures, the ECtHR went on to modify these criteria and introduced the general scope of a measure as a necessary precondition for the application of the said guarantees (cf. MN. 4.19 et seq.).[36] This means that the ECtHR in general does not deem disciplinary measures addressed to a limited number of persons to fall within the ambit of the ECHR, although there are deviations and domains in which the dividing line between the two becomes especially blurry (cf. MN. 3.26; 4.20 et seq.). They should, however, not be confused with the so-called disciplinary fines imposed by public authorities on individuals for their failure to meet special requests made during an administrative procedure. In fact, disciplinary fines in their 'purest' form cannot be considered to be the manifestation of public punitive power of the same calibre since they relate to *ex ante* formulated special duties and encompass a special relationship between the parties involved. This thesis furthermore does not explore political sanctions applying to persons with a special status and responsibility within the public sphere although certain aspects thereof are touched upon in order to highlight the difference between them and administrative sanctions according to the ECtHR. The same holds true for sanctions (above all, the targeted financial restrictive measures of the EU and UN Security Council) that are imposed as counter-terrorism measures.

1.32 This thesis also does not deal with the so-called penalty clauses in contracts, i.e. the fixing of sanctions whose aim is to vindicate for the breach of contractual trust even if one party is a public authority. This is because contractual penalties are not conceived to be administrative sanctions from the CoE's point of view.[37] Furthermore, it is highly debatable as to whether, and to what extent, administrative authorities may rely on the general freedom of contract in juxtaposition with general administrative rules whilst concluding public contracts and how this affects the legal status of their contractors. Different legal systems have heterogenous approaches to the validity and execution of public contracts and no consensus has so far been found to that effect on the European level. Needless to say, these issues relating to the nature and function of public contracts merit a study of their own that goes beyond the focus of this thesis.[38] This thesis also does not tackle the question of other sanctions that do not relate to

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[36] See for the non-applicability of the 'criminal limb' under Article 6 ECHR of disciplinary proceedings in *Ramos Nunes de Carvalho e Sá v Portugal* (55391/13, 57728/13 and 74041/13) 6 November 2018 ECtHR [GC] at [123] and the case law cited therein.

[37] Penalty clauses are not conceived as an 'administrative sanction' within the framework of the CoE, see Explanatory Memorandum of Recommendation No. R (91) 1 in CoE (n. 8), p. 461.

[38] See more in J.-B. Auby/M. Mirschberger/H. Schröder/U. Stelkens/J. Ziller, "Introduction to Book IV" in H. C. H. Hofmann/J.-P. Schneider/J. Ziller et al. (eds.), *ReNEUAL Model Rules on EU Administrative*

pouvoirs publics in the strict sense, such as, for example, sports law sanctions imposed by international sports organizations under the law of associations or 'hybrid' public-private sanctions, e.g., sanctions imposed in the digital space.[39] Finally, this thesis also excludes community sanctions and measures from its scope.[40]

1.33 Last but not least, a few more 'cartographic' limitations are immanent to the normative framework in which this thesis is conceived. This thesis does not explore the conception of administrative sanctions in EU law or in a particular European legal system with clear normative boundaries and clearly-defined executive power. Reservations, declarations and a limited scope of application, especially regarding Protocol No. 7 to the ECHR, which contains some significant elements of individual protection against punishment, should at all times be kept in mind before one draws any cross-cutting conclusions.[41] In other words, the protection one might expect with regard to administrative sanctions is scattered throughout different provisions of the ECHR. This means that some aspects thereof can be found in cases that go beyond the core provisions relevant to administrative punishment indicated in this thesis, such as, for example, Article 5 ECHR and its relation to administrative detention, but this will not form a separate part of the research as it would clearly require the carrying out of a way more comprehensive study.

1.34 It goes without saying that the ECtHR, whilst adjudicating in such a multilateral field, is confronted with various European legal systems and their cultures (which the Member States are keen on defending from supranational incursions, cf. MN. 6.23).[42] In these legal systems, the notion of administrative law let alone administrative sanctions differs greatly. Therefore, some examples taken from these (national) legal frameworks were deemed necessary in order to showcase the differences in conception or other ontological traits, or, quite in contrast, to demonstrate that the common denominator is possible on the pan-European level when it comes to administrative punishment. However, knowing that different minds react differently to the

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Procedure (2014) [available online], pp. 143–154; See further in R. Noguellou/U. Stelkens, "Propos Introductifs" in R. Noguellou/U. Stelkens/H. Schröder (eds.), *Droit comparé des contrats publics* (2010), pp. 1–24.

39 This occurs even if their potential to affect the interests of third parties and, hence, the thorny issue of legitimacy, must be acknowledged, see more in E. Marique/Y. Marique, "Sanctions on digital platforms: beyond the public-private divide", (2019) 8 *Cambridge International Law Journal* 2, pp. 258–281.

40 See more on this topic in Recommendation of the Committee of Ministers to Member States on the European Rules on community sanctions and measures CM/Rec(2017)3 of 22 March 2017.

41 At the time of writing this thesis, Germany and Netherlands, e.g., have not ratified this protocol and the UK has never even signed it.

42 See for an overview of this melting pot in N.-L. Arnold, *The Legal Culture of the European Court of Human Rights* (2007).

same problem, it seems fair to admit that sometimes the diversity of legal systems results in an undesirable blurring of lines and obfuscation of issues.[43] Finally, the selection of examples used in this thesis to illustrate certain points also implies some 'patchiness', which is due to the (limited) availability of academic sources and other limitations of resources (such as the linguistic capacities of the author of this thesis). At the same time, this patchiness *ipso facto* demonstrates the original contribution of this thesis to the scholarship – as information within the chosen domain had to be garnered and studied piece by piece from different sources in the hope of developing a coherent and condensed body of knowledge.

1.6. Pan-European General Principles of Good Administration as a Source of Inspiration

1.35 As mentioned earlier, the originality of this research is predicated on the fact that there is a gap in the scholarship in regard to what the CoE has normatively achieved within the chosen domain of administrative punishment despite it being active in administrative standard-setting since the 1970s. This is, however, part of a bigger academic lacuna, which was first systematically spotted and tackled by a project dedicated to the so-called pan-European general principles of good administration, in which scholars from 28 CoE Member States joined forces to explore whether and to what extent these principles have shaped their national legal systems (henceforth 'the Speyer project').[44] The pan-European general principles of good administration cover the entire range of general organizational, procedural and substantive legal institutions that are meant to ensure a democratically legitimized, open, and transparent administration respecting the rule of law.[45] In fact, their purpose is the very precondition for implementing democratic policy choices as well as effective public services with the purpose of serving citizens.[46]

1.36 By studying a 'critical mass' of the legal orders of the CoE Member States using a bottom-up approach, this project shows that a certain harmonization of them regarding the core questions and concepts of administrative law exists. In fact, one can even talk about 'a package of good administration' reflecting common European heritage on the matter. This common heritage *a fortiori* embodies regional international law and represents an authentic (but still developing) concretization of the 'administrative law components' of the founding values

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43 T. Bingham, *The Rule of Law* (2010), p. 47.

44 Stelkens/Andrijauskaitė (n. 7).

45 Stelkens/Andrijauskaitė (n. 7), MN. 0.25; 1.95.

46 Stelkens/Andrijauskaitė (n. 7), MN. 31.01.

stipulated by Article 3 SCoE, i.e. rule of law and enjoyment of human rights and fundamental freedoms.[47] The said 'package' also forms a 'coherent whole' of legal tools serving to frame administrative activities across the CoE Member States. These legal tools include not only CoE Conventions but also a host of CM Recommendations and standard-setting activities of other institutions of the CoE (such as the Venice Commission, the Parliamentary Assembly of the CoE, the Congress of Local and Regional Activities and the like).[48] The Speyer project has by and large affirmed the effectiveness of this CoE package of good administration. Even if domestic legal systems, depending on their *Gestalt*, i.e. the level of (democratic) development and particular principles or legal institutions at issue, have been guided by, and respect the pan-European general principles of good administration to varying degrees, it has been revealed that overall these principles are never considered completely irrelevant by CoE Member States.

1.37 The author of this thesis was part of this project and deemed it to be worthwhile to zoom in on the topic of administrative punishment for several reasons. Firstly, the inception of the CoE's work in administrative matters coincided with the decriminalization movement across Europe as a catalyst for the proliferation of administrative sanctions (cf. MN. 4.03 et seq.). The use of administrative sanctions has, furthermore, been nothing but increasing along with the general expansion of the functions that a modern-day administration is currently expected to exercise, as any viable regulation will need means to ensure its enforcement.[49] Thus, the topic is not short on practical significance. But, even more importantly, it is its repressive nature that especially nudged the author to pick this niche of the CoE's work among other classical and modern administrative law topics that the 'Speyer project' has touched upon. It goes without saying that coercion will not dissipate any time soon but it is important for the public power to be reminded of its limits – in a similar vein to the pan-European general principles of good administration, which place an emphasis on the 'limiting function' of administrative law and nudge national administrations and other actors to refrain from arbitrary practices.[50]

1.38 This research takes a methodology, normative sources, ways to interpret them and other underlying assumptions of the Speyer project as its base, together with its own methods, and will not prove their validity anew. However, a few differences should be highlighted at this

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47 Stelkens/Andrijauskaitė (n. 7), MN. 31.98 et seq.

48 See Stelkens/Andrijauskaitė (n. 7), MN. 1.55 for an overview of these legal tools and their interdependencies.

49 This logic appears to be valid regarding any kind of legal system: the EU example also shows that the more developed and integrated this system has become, the more expansion and sophistication of administrative sanctions it saw, cf. MN. 3.77 et seq.

50 Stelkens/Andrijauskaitė (n. 7), MN. 0.25.

junction: this research does not focus on the effectiveness of the pan-European general principles of good administration on the legal systems of the CoE Member States but is constructed the other way around. In concrete terms this means that its mission is way more prescriptive in that it seeks to identify and gauge the scope of individual protection when it comes to administrative sanctions. By setting this goal, it simultaneously endeavours to not only ensure that the minimum standards of this protection are followed and the CoE Member States stay congruent with the ECHR obligations (hence, the hypothesis of this thesis) but also that the awareness of the subject-matter increases and, thus, there is a space for reflection on, and improvement of the punitive practices.

1.39 Notwithstanding this, precepts that have been crystalized in the course of the Speyer project were extremely beneficial in drawing conclusions about the findings of this particular research in a holistic manner. The Speyer project has credibly demonstrated that multifarious CoE normative sources form a 'coherent whole' by cross-referencing and building onto one another. Relying on older concepts and developing them further in a congruent way, for its part, allows for being better prepared to respond to new forms and newer forms of administrative action.[51] The state is a complex mechanism that is not only mandated to balance and guard public and private interests – sometimes by the (unavoidable) exertion of force – but that should also idealistically follow the Aristotelian concept of good life. This implies its own betterment by cultivating and adapting to emerging concepts and modes of governance. Administrative punishment and good administration are, thus, inextricably linked. If anything, the latter is of utmost importance in such a repressive domain where one should safeguard fundamental rights. For example, any delays or omission on the part of administrative authorities in communicating the specifics of the impugned administrative offence to the applicant may gravely impact her ability to exercise her defence rights. Good administration, thus, inevitably impacts justice. To go further on this entanglement, any failure to motivate a sanction, even if its imposition has merit, will undercut its legitimacy and corrode citizens' trust, which, for its part, would do a great disservice to the enterprise of law enforcement as a whole. In terms of finding out about the precise relationship between these two provinces of administration law, as seen from the standpoint of the ECtHR, the reader of this thesis will have to be patient enough to reach the conclusion.

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[51] Stelkens/Andrijauskaitė (n. 7), MN. 17.5 et seq.

CHAPTER 2
THE NOTION OF A SANCTION IN LEGAL THEORY

"*Punishment and rewards are the nerves and tendons that move the limbs and joints of a Commonwealth*"

T. Hobbes

2.1. Introduction

2.01 This chapter seeks to deconstruct the conceptual understanding of a sanction in legal theory as well as to depict its evolution throughout the history of ideas. Since sanctions have always played a role in the construct of law[52] and helped to transform legal rules into 'legal reality', thus shielding the legislator from 'frustrated expectations' and reconstructing the binding force of the violated norms,[53] it is not surprising that they have managed to attract a great deal of attention in the legal scholarship. In the early days, the role of a sanction in the legal order was discussed within the (broader) framework of the right to punish. However, comprehensively examining the rationale of 'punishment theories' developed within the framework of criminal law, such as retribution, prevention and rehabilitation, would lead us into depths far beyond the limits of this thesis. For this reason, various theoretical discussions on sanctions were shortlisted with a view of their particular relevance to the research question. Later, as legal systems became more complex and the legal discourse was emancipated from religious and other metaphysical underpinnings due to the advancements made in science and society, sanctions were placed within the discourse on such topics as power, sovereignty, authority, law's normativity, etc. Not only were they perceived as coercive tools of societal control but also the analytical focus turned to their ability to foster compliance with the law.

2.02 In order to get a clear and broad (even if incomplete) picture of the varying theoretical perspectives towards sanctions, the theoretical strands of natural law, legal positivism and legal realism were chosen for the purposes of this study. Furthermore, the wide definition of a sanction as a legal tool attaching any kind of detriment for a violation of a legal rule was adopted as a point of departure. Positive sanctions – as legal provisions granting a reward for the

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[52] E.g., in Roman law the final chapter of laws – *sanctio legis* – was an indispensable part thereto determining their legal power and attendant consequences of the failure to fulfil them. This also served as a prototype of concluding clauses of modern-day laws in European continental legal tradition, see more in Bitter (2011, n. 13), pp. 12–13; Böse (n. 13), pp. 5–6. Laws without sanctions, for their part, were deemed to be *lex imperfecta*.

[53] As expressed by German sociologist J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (2007), pp. 23–25.

prescribed behaviour – for their part, although recognized by some of authors,[54] will be explored only in a cursory manner, i.e. when it is strictly necessary to reveal a particular aspect of how a sanction is perceived in various theories because they are not directly related to the research topic. Their value, however, should not be underrated: it goes without saying that sometimes "honey catches more flies than vinegar" and there have been inspiring practices of their utilisation in the punitive context.[55] Within the administrative law context, working on the other side of the spectrum instead of focusing only on the (inevitable) transgressions could easily be employed in domains where administrative authorities need data whose collection is pricey in order to perform their duties. A *locus classicus* in this regard is environmental law, where rewarding the disclosure of information critical to discovering breaches and protecting the environment as well as encouraging other forms of cooperation is sometimes a more efficient tool than simply waiting for violations to occur.[56] By examining the works of paradigmatic authors of the aforementioned schools of legal thought, the (variety of) perception(s) of the role of a sanction in a legal system and its nature shall be extracted. In the later stages of the thesis, this will allow us to gain a more profound understanding of the rationale behind the principles of administrative punishment.

2.2. Sanctions in the Natural Law Theory

2.03 Natural law theory is the oldest school of legal thought and has gone through multiple transformations over the course of time. The overarching feature of this legal theory is the fact that its ontological base transcends the 'empirical frontier' of human knowledge. More concretely, its legal authority rests upon some 'supra-empirical' source, be it nature,[57] cosmic

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54 Some authors recognizing this Thomas Hobbes (hence, the opening quote of this chapter expressed in the Leviathan), Jeremy Bentham (see J. Bentham, *Of Laws in General* [1970], pp. 133 et seq.) and Hans Kelsen (see to this effect H. Kelsen, *Pure Theory of Law* [2009], pp. 24–25).

55 For example, a decrease in youth criminality occurred in 2014 when the Canadian police in the city of Prince Albert issued positive tickets in 2014 in the form of coupons or gift certificates for things like hamburgers, ice cream, movie tickets to reward young people for doing something good.

56 A. Ransiek, *Unternehmensstrafrecht: Strafrecht, Verfassungsrecht, Regelungsalternativen* (1996), pp. 400 et seq.

57 As indicated by Marcus Tulius Cicero, see more in B.S. Jackson, *Making Sense in Jurisprudence* (1996), p. 11.

order,[58] the will of the 'creator',[59] human nature,[60] the social contract[61] or a practical reason that characterizes some of the contemporary accounts of natural law theory.[62] Such a metaphysical stance as well as the close nexus to morality of this strand of legal theory is a double-sided coin: on the one hand, the latter feature results in the periodic rebirth of natural law theory after various moral crises and "disclosures of human wickedness" take place,[63] while on the other hand, it is precisely these factors that attract a great deal of criticism and put natural law theory outside of scientifically verifiable reality.[64] Against this background, the perception of a sanction will be examined more closely in two salient interpretations of natural law – the classical interpretation developed by Saint Augustine and Thomas Aquinas as well as the account of Thomas Hobbes, in which the full-blown theory of punishment together with the scheme of natural rights that are the direct and immediate forebear of modern-day human rights[65] were elucidated.[66]

2.2.1. 'Classical' Natural Law Theory: Sanctions as 'Reforms of the Soul' and Validity Criteria

2.04 The classical school of natural law theory goes all the way back to ancient Greek thinkers, such as Aristotle, who understood the need for punitive sanctions to fend off recalcitrance.[67] It

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58 Cosmic order such as, e.g., the authority of *Moira* that embodies fate and puts all human rulers and mortals in a special place of the cosmic order in the earliest period of Greek philosophy, see more in W. E. Conklin, *The Invisible Origins of Legal Positivism: A Re-Reading of a Tradition* (2001), pp. 22–34.

59 Medieval scholars, such as Saint Thomas Aquinas and Saint Augustine, claim this factor to be the source of law.

60 Namely this regards the notion of *appetitus societatis* (desire for society), which served as a basis for natural law and legality of justice in the doctrine of Hugo Grotius, see more in B. Straumann, *Roman Law in the State of Nature: The Classical Foundations of Hugo Grotius' Natural Law* (2015), pp. 94 et seq.

61 Social contract has played a profound role in the theories of Enlightenment thinkers, such as John Locke, Jean-Jacques Rousseau and Thomas Hobbes.

62 See more on the 'new natural law' in S. Pope, "Reason and Natural Law" in G. Meilaender/W. Werpehowski (eds.), *The Oxford Handbook of Theological Ethics* (2007), pp. 148–167 (pp. 94 et seq.).

63 Pope (n. 62), p. 149.

64 The main criticism was eloquently presented by Alf Ross: "Metaphysical assertions do not admit of being disproved, precisely because they disport themselves in a sphere beyond the reach of verification", A. Ross, *On Law and Justice* (2004), p. 254.

65 P. Zagorin, *Hobbes and the Law of Nature* (2009), p. 21.

66 Although regarded as of 'secondary' importance for a long time, especially compared with later philosophers (A. Norrie, "Thomas Hobbes and the Philosophy of Punishment", [1984] *Law and Philosophy* 3, pp. 299–320 [p. 299]), the theory of punishment by Hobbes experiences a reinvigorated interest capable of offering many valuable insights by recent scholarship, see more in S. Allen, *Thomas Hobbes's Theory of Crime and Punishment* (2016).

67 In other words, he was aware that "the need for coercion arises from the recalcitrance of the selfish, the brutish many whose unprincipled egocentricity can be moderated only by a direct threat to their self-interest", J. Finnis, *Natural Law and Natural Rights* (2011), p. 260.

was further elaborated by masters in canon law in the twelfth century by means of a 'scholastic method'.[68] The paradigmatic 'natural law theorist' in this era was Saint Thomas Aquinas, who intellectually dominated the period from the "church fathers down to Kant".[69] The (predominant) theocentric origin and nature of his account resulted in the idea that sanctions (quite in contrast to, e.g., command theory) were not considered to be the defining criteria of law because the 'true' law did not come from human provenience. Instead it hung like a chandelier from something higher.[70]

2.05 However, this does not mean that the role of a sanction in a legal system was side-lined or neglected by classical natural law theorists. On the contrary, its significance was recognized by Saint Augustine, who was one of the first thinkers in the Western world to formulate a justification for coercion and punishment.[71] In his theory, he distinguished between the temporal or human law (*lex temporalis*) and the eternal law (*lex aeterna*), which encapsulates 'the Divine Intellect and the Will of the God' (*voluntas Dei ipsa lex est*). He furthermore claimed that "it is the fear of losing temporal goods as a punishment by temporal laws for evildoing that coerces human beings and bends their souls in whatever direction it pleases".[72] It follows that, according to St. Augustine, by inducing the fear of losing important goods, the behaviour of the people can be steered towards compliance with temporal laws and safeguarding temporal goods. Legal retribution (sanction) is thus a precondition for (the validity of) *lex temporalis*. It is not a precondition for *lex aeterna*, however, because this law as the highest reason must be observed at all times regardless of sanctions.[73] Another important precept of Augustinian philosophy in the context of sanctioning is that he – in line with the common teachings of Christians[74] – warned against 'unbridled' and 'unchecked' retaliation for transgressions of law. Furthermore, the important idea that the punishment should fit the crime

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68 R. Saccenti, *Debating Medieval Natural Law – A Survey* (2016), p. 15.

69 Finnis (n. 67), p. 28.

70 J. Budziszewski, *Commentary on Thomas Aquinas's Treatise of Law* (2014), p. xxi.

71 J. von Heyking, "Augustine on Punishment and the Mystery of Human Freedom" in P. K. Koritansky (ed.), *The Philosophy of Punishment and the History of Political Thought* (2011), pp. 54–73 (p. 54).

72 Augustine [Translated by Thomas Williams], *On Free Choice of the Will* (1993), p. 26.

73 Augustine (n. 72), p. 11.

74 Above all, *lex talionis* enshrined in the Old Testament is meant here. See more on its conceptual kinship with the principle of proportionality in M. Fish, "An Eye for an Eye: Proportionality as a Moral Principle of Punishment", (2008) 28 *Oxford Journal of Legal Studies* 1, pp. 57–71 (p. 62), even if it remains questionable how well this age-old idea actually reflects the modern interpretation of this principle. According to the proponents of the former view, *lex talionis* should be understood not as fostering vengeance but rather as prescribing "no more than a tooth for a tooth; at most, an eye for an eye" as a guideline for punishment, see more in M. Escamilla-Castillo, "The Purposes of Legal Punishment", (2010) 23 *Ratio Juris* 4, pp. 460–478 (p. 461).

was emphasized by St. Augustine, clearly hinting at the need for fairness in the sanctioning context as it is perceived today.

2.06 The said reasoning was expanded upon by Thomas Aquinas in his endeavour to explicate the nature of law. In a similar vein to St. Augustine, he recognized that sanctions were a tool that could be used to shape (reforming) people's behaviour,[75] thus foreshadowing a classical idea that punishment should have a long-lasting impact on the human soul.[76] He furthermore held that coercive power was a validity criterion of human laws (*lex humana*) that determines the details of how a given political society will live, in contrast to natural law (*lex naturalis*).[77] He conceptualized this in the context of deriving the former from the latter in a two-fold manner: first, as a conclusion from premises and, secondly, by way of the determination of certain generalities (the legislator conceives the laws in an analogous way as the architect constructs a house using his own specifications).[78] More precisely, if one derives human laws using the first method, then some legal consequences (sanctions) need to be added to them; otherwise they will remain in the province of natural laws, which, for their part, constitute the reflection of eternal law in a rational mind.[79] If one, on the other hand, derives human laws using the second method, then sanctions serve the function of determining (specifying) natural laws. For instance, natural laws require the evildoer to be reasonably punished for his transgressions but they do not lay out the exact details of the punishment. This is left for human laws, by applying the said 'general model' engraved in *lex naturalis* to specific situations. The idea that the punitive inclination (although being natural to humans) should be carried out in a reasonable manner that is tied to the (broader) need to restore justice is another progressive aspect of Thomist thought.[80] It can furthermore be seen as a precursor of the principle of proportionality that was subsequently elaborated in the Hobbesian teachings and spanned into the

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75 He states in the *Summa Theologiae*: "Laws were made that in fear thereof human audacity might be held in check <…> and that the dread of punishment might prevent the wicked from doing harm", Budziszewski (n. 70), p. 304.

76 One of the greatest penologists, Cesare Beccaria, expressed this in his treatise "On Crimes and Punishments" (1764).

77 P. K. Koritansky, "Thomas Aquinas' Premodern Retributivism" in Koritansky (n. 71), pp. 74–95 (p. 81).

78 See more in Question 95, Article 2 of *Summa Theologiae* and its comment in Budziszewski (n. 70), pp. 311–322.

79 H. Davies/D. Holdcroft, *Jurisprudence: Texts and Commentary* (1991), p. 157; Budziszewski (n. 70), p. 436.

80 That is not to say that Thomist penology (at least from the modern-day perspective) was spotless: he as well as St. Augustine for example, justified capital punishment for mortal sins, see more in Koritansky (n. 71), pp. 88 et seq.

Enlightenment years where it assumed a central place in the pursuit of an ideal of limited punishment (cf. MN. 2.09).[81]

2.2.2. Thomas Hobbes: Limits of Punishment and its Antinomy with the Right of Survival

2.07 As already noted, amongst the early modern thinkers the contribution of Thomas Hobbes regarding punishment, especially the one developed in his most famous work – the Leviathan –[82] deserves to be singled out.[83] Writing in the time of the English civil wars he advocated the idea of absolute sovereignty, which remains the most criticized aspect of his theory,[84] and based his teachings on the social contract designed to protect individual security. In other words, he believed that only by instituting a state (commonwealth) could the people "live peaceably among themselves, and be protected against other men" and thus escape the (natural condition) of "war of every one against every one".[85] To cement this social contract some form of institutionalized coercion[86] is needed because "without the fear of some coercive power", according to Hobbes, "the bonds of words are too weak to bridle men's ambition, avarice, anger and other passions".[87] Punishment as "an evil inflicted by a public authority"[88] for a transgression of law fills this gap by being able to discipline those who are not willing to lead social lives[89] and make their contribution to the security of society, which for Hobbes was the

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81 N. Lacey, "The Metaphor of Proportionality", (2016) 43 *Journal of Law and Society* 1, pp. 27–44 (p. 30).

82 Exactly in this work (in particular – Chapter 28 'Of Punishments and Rewards') Hobbes gave the most detailed account of the right to punish, which includes the definition of punishment, the retained rights of subjects, and the right to resist punishment, Allen (n. 66), pp. 58, 63 et seq.

83 Thomas Hobbes is classified differently in legal theory because he started his theory on the premise of natural law but ended it in the "solid construction of a positivistic conception of the state", N. Bobbio, *Thomas Hobbes and the Natural Law Tradition* (1993), p. 118; see also K. Doliwa, "Positive and Natural Law in Thomas Hobbes's Philosophy", (2012) 28 *Studies in Logic, Grammar and Rhetoric* 41, pp. 95–104 (p. 95). For the purposes of this thesis, this thinker is classified as a 'naturalist' because his conception of sanctions is quite distinctive from the one voiced by 'legal positivists'.

84 Namely, the rejection of any form of a limited government, such as constitutional monarchy, remains highly polemicized, with some critics even making patently false claims regarding Hobbes as a precursor of the totalitarian state, see in this regard Bobbio (n. 83), pp. 69–73.

85 T. Hobbes [edited by M. Oakeshott], *Leviathan* (2008), pp. 94, 134.

86 Zagorin (n. 65), p. 56.

87 Hobbes (n. 85), p. 103.

88 Hobbes (n. 85), p. 241.

89 M. Green, "Authorization and the Right to Punish in Hobbes", (2016) *Pacific Philosophical Quarterly* 97, pp. 113–139 (p. 116).

primum bonum.[90] Furthermore, this 'evil' is not to be understood as retribution but should be inflicted for the sake of deterrence, be it individual or general.[91]

2.08 It follows from the Hobbesian definition of punishment that only an authorized sovereign holds the 'public sword' and has the right to punish.[92] However, such an authorization of the sovereign to use force as punishment on a contractual basis (at least taken at face value) is contradictory to the Hobbesian theory. This is because it clashes with another conceptual pillar of the same theory, namely, an inalienable right of self-preservation,[93] which ought to be understood within the broader framework of the Hobbesian 'laws of nature', which are always binding in conscience (*in foro interno*)[94] in the state of nature and implicate, among other things, the right to resist punishment.[95] Critics[96] of this aspect of Hobbes's theory point out that it is not possible to authorize the sovereign to punish when at the same time a man is not allowed to transfer "any right to another to lay violent hands upon his person".[97] Proponents, for their part, respond that Hobbes's philosophy was so complex that it was mistakenly perceived as inconsistent and the authorization of the sovereign is possible for individuals, not by extending their right to harm themselves but by taking ownership of their punishment.[98]

2.09 Despite this caveat that the legal theorists are still grappling with, the important contribution of Hobbes lies in the fact that he developed safeguards of punishment that resemble modern-day due criminal process guarantees, which are also relevant for administrative punishment to

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90 Bobbio (n. 83), p. 26.

91 "Men look not at the greatness of the evil past, but the greatness of the good to follow", Hobbes (n. 85), pp. 115; 242.

92 Hobbes (n. 85), p. 242.

93 Hobbes perceives this right to be the liberty of each man to use the aptest means for the preservation of his own nature; that is to say, of his own life, Hobbes (n. 85), p. 97.

94 However, they are not necessarily binding in external actions (*in foro externo*) because a man would make himself "a prey to others, and procure his own ruin" if he followed laws of nature in the state of nature when nobody else does the same, Bobbio (n. 83), p. 44.

95 The right to resist punishment should not be understood as an endorsement of criminal activity because often to do so would simply be irrational. However, it should also not be expected that individuals under punishment 'dig their own graves or supply the rope for their own hangings', see more in A. Ristroph, "Respect and Resistance in Punishment Theory", (2009) 97 *California Law Review* 2, pp. 601–632 (pp. 618 et seq.).

96 See, e.g., D. Gauthier, *The Logic of Leviathan* (1969), pp. 146–149; T. Schrock, "The Rights to Punish and Resist Punishment in Hobbes's Leviathan", (1991) 44 *The Western Political Quarterly* 4, pp. 853–890.

97 Hobbes (n. 85), p. 241.

98 In a similar way, sureties can create ownership of a certain action without necessarily extending rights of the person who has signed a surety, see more in Green (n. 89).

a certain degree. Apart from the 'authorization clause', which has already been emphasized,[99] and 'transgression of law' as indispensable elements for the imposition of punishment, according to Hobbes, it also has to be accompanied by certain *sine qua non* guarantees or otherwise there is a risk that the punishment will be nothing but 'an act of hostility'.[100] These guarantees include the (necessary) preceding public condemnation of what is a transgression of the law ('no pain inflicted without a public hearing'), no retroactive punishment ('no harm inflicted for a fact done before there was a law that forbade it'), no punishment of the innocent and a ban on excessive punishment ('where the punishment is annexed to the law, a greater hurt is not punishment but hostility'). The latter enunciation together with the precept of 'effective' punishment ('no harm lesser than the benefit gained from a transgression of law')[101] in Hobbes's theory seems to echo the principle of proportionality whose rudimentary form was discussed above. Even though they are far from being conclusive from a modern day-perspective,[102] these guarantees were remarkably conceived in the theoretical paradigm of almost absolutist obedience with only a few limits on power. Thus, they make a strong case that (as put in the instrumentalist terminology of Hobbes) even *machina machinarum* faces restrictions when it comes to exercising violence in the name of punishment against its subjects.

2.3. Sanctions in Legal Positivism

2.10 Legal positivism was conceived against the background of scientific and technological progress of the 18th and 19th centuries and, thus, tried to distance itself from various metaphysical origins of law outlined above (cf. MN. 2.03) and place legal theory within the 'anti-speculative' discourse. The harsh realities of industrial societies (especially in the early stage of legal positivism) resulted in sanctions playing an important role in explications of law[103] along with such concepts as 'coercion', 'force' and 'the will of the sovereign'. Furthermore, the 'necessary connection' between the law and morality was disbanded, in sharp contrast to the natural law theory. The discussion on the sanction's role in this legal school of

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99 Divine punishment, punishment, or revenge by a private person or usurped power, for their part, are expunged from the domain of punishment, Hobbes (n. 85), p. 242.

100 Hobbes (n. 85), pp. 242 et seq.

101 This idea – an economic calculus of punishment – was later echoed by Beccaria and Bentham during eighteen and nineteenth centuries and resurrected in the modern economic approach to law of the twentieth century, see G. S. Becker, "Crime and Punishment: An Economic Approach", (1976) *Journal of Political Economy*, pp. 169–217 (p. 209).

102 Hobbes, e.g., did not go so far as to develop the fully-fledged principle of legality, including the protection from double jeopardy (*ne bis in idem* principle), that were 'intellectual fruits' of the Enlightenment, see Peristeridou (n. 16), pp. 33 et seq.

103 H. Oberdiek, "The Role of Sanctions and Coercion in Understanding Law and Legal Systems", (1976) 21 *American Journal of Jurisprudence* 1, pp. 71–94 (p. 94).

thought will be presented as follows. First, the perception of a sanction as the hallmark of law developed by the 'great utilitarians', also known as the proponents of the 'command theory' of law – Jeremy Bentham and John Austin – who were the first thinkers to try to excise mysticism from the philosophy of law,[104] will be analysed. Subsequently the focus will shift to the Kelsenian 'sanction-based' account of law's normativity and, finally – as a somewhat countervailing account – to the interpretation offered by Hart, who developed a sort of 'soft' legal positivism and mitigated the formalistic overemphasis placed on sanctions in a legal system by his predecessors.

2.3.1. The Command Theory of Law: Sanctions as Obligational Forces

2.11 The discussion of a sanction in the early stage of legal positivism was launched by Jeremy Bentham, who was a staunch critic of natural laws and natural rights.[105] Instead of these terms that (supposedly) lack an ontological basis he propounded the use of the principle of the greatest happiness (utility) in legislation and discussions about the nature of law.[106] Ascribing to the imperatival view of the latter, he mostly understood law to be a set of coercive commands that were an expression of the sovereign's will.[107] In contrast to Austin or Kelsen, Bentham did not integrate the idea of a sanction into the definition of law, i.e. it plays no constitutive role in his theory (cf. MN. 2.13 et seq.; 2.17).[108] However, measuring everything in utilitarian terms resulted in the perception of sanctions as motives for human action[109] and, thus, as forces capable of effectuating the will of the sovereign. More precisely, the prospect of incurring pleasure or – conversely – pain or any other unpleasant condition that may be inflicted upon an individual as a consequence of his disobedience was seen as facilitating the adherence to this

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104 C. Harlow/R. Rawlings, *Law and Administration* (2009), p. 3.

105 This is most tellingly expressed by his critique of the Declaration of Rights and Duties of Man and Citizen (1795) calling its content 'Nonsense upon stilts' and claiming that it may lead to anarchy, see P. Schofield, "Jeremy Bentham's 'Nonsense upon Stilts'", (2003) 15 *Utilitas* 1, pp. 1–26.

106 "Happiness of the individuals, of whom a community is composed that is their pleasures and their security, is the sole end which the legislator ought to have in view <…>", J.H. Burns/H.L.A. Hart (eds.), *The Collected Works of Jeremy Bentham: An Introduction to the Principles of Morals and Legislation* (2005), p. 34.

107 He provided the full definition thereof in Bentham (n. 54), p. 1. Against the tendency to oversimplify this theory see D. Lyons, "Logic and Coercion in Bentham's Theory of Law", (1972) 57 *Cornell Law Review* 3, pp. 335–362.

108 Also because, as hinted above, Bentham did not rule out the possibility of imposing 'positive sanctions' as 'alluring' stimuli in order to encourage adherence to the laws, Lyons (n. 107), p. 359.

109 H. Barth, *The Idea of Order* (1960), pp. 150–151.

will.[110] Therefore, according to Bentham, it behoved the legislator to understand the force and value of these pleasures and pains in whatever denomination they came.[111]

2.12 Despite acknowledging the existence of extra-legal sanctions, such as political, moral and religious sanctions,[112] Bentham believed that only physical (legal) sanctions were "reliable, effective, unambiguous and functioning without being subject to error or misuse".[113] Such a reductive view of sanctions (as well as other 'utilitarian moments') in Bentham's works has been criticized, mostly for overlooking the *forum internum*, or the conscience, without which the very concept of a sanction is inconceivable (cf. MN. 2.25; 2.28).[114] Put differently, obedience to the legal norms can be clearly induced by intrinsic motives (e.g., when a legal offence coincides with a religious offence). Despite these caveats, Bentham's account undeniably laid the groundwork for further elaboration of a sanction undertaken by his analytical heir, another apologist of the so-called command theory, i.e. Austin, whose conception thereof (although not without its share of flaws) is said to be one of the most insightful in the legal theory.[115]

2.13 Quite in line with the Benthamian teachings, Austin tried to 'free' the theory of law from morality and other 'paralegal' phenomena by conceptually delimiting 'the province of jurisprudence' whilst using the sovereign's will as a departure point. In order to delimit the said province, he distinguished between two categories of human laws as a species of command – the laws properly so-called (set by men as political superiors or by men, as private persons, in pursuance of legal rights) and the laws improperly so-called (positive moral rules or the laws of nature).[116] The science of jurisprudence, according to Austin, shall concern itself only with the former type of laws, which he also termed 'positive laws'.[117] Every such law properly so-called must be backed by a threat of sanctions (or what Austin also indicated as an 'enforcement

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110 Lyons (n. 107), p. 359.

111 In fact, Bentham went to great lengths to meticulously enumerate various types of pleasures and pains, see Burns/Hart (n. 106), pp. 38–41 (pp. 42 et seq.).

112 Burns/Hart (n. 106), pp. 34 et seq.

113 Barth (n. 109), pp. 151–152.

114 Barth (n. 109), p. 154.

115 And – according to some legal theorists – remains unsurpassed in terms of its originality neither by Hart, nor by Kelsen, see more in A.T. Kronman, "Hart, Austin, and the Concept of Legal Sanctions", (1975) 84 *Yale Law Journal* 584, pp. 584–607. For a more critical view about Austin's account see C. Tapper, "Austin on Sanctions", (1965) 23 *The Cambridge Law Journal* 2, pp. 271–287.

116 J. Austin/S. Austin, *The Province of Jurisprudence Determined (Band 1)* (1861), pp. 109 et seq. (pp. 18; 111; 117).

117 Austin/Austin (n. 116), p. 114.

of obedience'),[118] which he perceived as an 'evil inflicted' by an 'uncommanded commander' who is habitually obeyed by the bulk of the population. It was precisely this possibility of incurring evil[119] by disobedience that differentiated laws properly so-called from other forms of rules or desires in his theory. Furthermore, since the law threatens individuals with a sanction, the force of the obligation lies in our desire to avoid evil. Hence, according to Austin, a sanction also constitutes a source of legal obligations. The magnitude of the sanction is, for its part, irrelevant: it is true that more severe sanctions may be more efficacious; however, even the "smallest chance of incurring the smallest evil" suffices to turn an expression of a desire into a command and therefore imposes a duty to follow it on its addressees.[120]

2.14 Whereas integrating a sanction into the very definition of positive laws is a logical outcome of Austin's endeavour to clearly delimit 'the province of laws' as the object of jurisprudence from other social systems governed by prescriptive rules, the conclusion that the obligation to follow the sovereign's will stems from sanctions shall be taken more critically. Austin seems to have fallen prey to the *non sequitur* logical fallacy: it can plausibly be inferred from the fact that everyone who wants to avoid evil should adhere to the will of the sovereign in order to avoid this evil because that would be a rational thing to do but it does not necessarily follow that everyone has an obligation to do so. The source of an obligation to adhere to the laws is located elsewhere depending on the theoretical viewpoint (e.g., in the social contract or the perception of law as an expression of the general will).[121] This is not the only problematic aspect of Austin's conception of sanctions: it has also been criticized for advocating too vertical a view of law.[122] More precisely, his sanction-based approach to law fits very well into the edifice of criminal law but not necessarily elsewhere (e.g., into constitutional or civil law or into international law, in which rules backed by a threat of sanctions are still an exception rather

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118 Austin/Austin (n. 116), p. 6.

119 Austin recognized that rewards may serve as motives to comply with wishes of others but excluded them from the ambit of sanctions quite contrary to Bentham. The withdrawal of a benefit, for its part, can serve as a sanction and induce pain only if receiving it has been actively communicated to the party whose conduct the sovereign hopes to influence, Tapper (n. 115), p. 279; Austin/Austin (n. 116), pp. 6 et seq.

120 Austin/Austin (n. 116), pp. 7–8.

121 The latter conception is attributed to Jean-Jacques Rousseau's theory of democracy, J. Ziller, "The Continental System of Administrative Legality" in B. G. Peters/J. Pierre (eds.), *The Handbook of Public Administration* (2007), pp. 167–175 (p. 168).

122 Jackson (n. 57), p. 41.

than the rule and remain outnumbered by power-conferring rules)[123]. It furthermore fails to convincingly explain the existence of customary laws.[124]

2.15 To refute the said theoretical weakness, Austin proposed the so-called 'nullities', which are most often used in civil law and are capable of making various transactions void or voidable and thus can be perceived as substituting sanctions.[125] However, 'nullities' can only partially address the aforesaid criticism because there are clearly domains of law in which even they are neither prevalent nor necessary. In addition, it remains questionable as to whether a failure to meet a legal precondition and a consequential 'legally imposed deprivation' in certain cases (e.g., non-recognition of a contract for a failure to meet specific conditions) is really a sanction arising from a breach of a norm (at least in the Kelsenian sense of this legal notion).[126] Besides, in contemporary legal systems it is not always clear who this 'uncommanded commander' is, who issues these commands backed by sanctions; moreover, he can no longer be said to be immune from being 'commanded' himself.[127] Finally, Austin tended to overlook that the threat of sanctions is not the only way to ensure compliance. Most often the sovereign's will is followed not because it is backed by sanctions but because of its authority (legitimacy)[128] or because people tend to internalize social norms or simply due to rational calculation.[129] In fact, at least for strongly socialized individuals, moral values and peer pressure are such powerful inhibitors that they preclude the possibility of breaking the law regardless of the threat of 'external' sanctions.[130] In any event, the current rise of the 'regulatory invasiveness' of the State

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123 On the contrary, international law is strongly adhered to due to its perceived legitimacy, and despite the lack of centralized sanctions as demonstrated in such domains like telecommunication, postal services, aviation, etc., see more in S. Raponi, "Is Coercion Necessary for Law? The Role of Coercion in International and Domestic Law", (2015) 8 *Washington University Jurisprudence Review* 35, pp. 35–58 (p. 45).

124 S. J. Shapiro, *Legality* (2011), pp. 72–73.

125 J. Austin, *Lectures on Jurisprudence, Or, The Philosophy of Positive Law* (1875), p. 252.

126 Oberdiek (n. 103), p. 79.

127 This is because, as Ronald Dworkin incisively points out, the political control in such societies is pluralistic and shifting, 'a matter of more or less', see R. Dworkin, *Taking Rights Seriously* (2013), p. 34.

128 This was also empirically attested by the famous Milgram experiment (although amply criticized on its methodological grounds) in which a significant proportion of people fully obeyed the instructions by a perceived authority which in effect had no special powers to enforce the commands given, see S. Milgram, "Behavioural Study of Obedience", (1963) 67 *The Journal of Abnormal and Social Psychology* 4, pp. 371–378.

129 See on this point, e.g., T. Tyler, *Why People Obey Law* (2006).

130 Tyler (n. 129).

and/or supranational organizations into an ever-expanding number of domains clothed with legal sanctions is rehabilitating the Austinian approach and its importance.[131]

2.3.2. Kelsenian Approach: Sanctions as Coercive Acts Attached to Delicts

2.16 Following in the footsteps of Austin, two centuries later Hans Kelsen also endeavoured to demarcate the boundaries of law from its 'neighbouring disciplines' and develop a 'pure' science thereof, as is attested by his most seminal work "Pure Theory of Law" of 1967. Achieving this goal implied cutting the 'umbilical cord' between law and morality or other metaphysical considerations expounded by the natural law doctrine and employing a coercion-based[132] view as the key notion in differentiating the former from the latter and from other forms of social orders.

2.17 According to Kelsen, sanctions constitute an inherent part of any social order; however, different social orders prescribe different types of sanctions.[133] A legal order usually prescribes socially immanent (as opposed to transcendental) and socially organized (as opposed to mere approval or disapproval) sanctions.[134] The decisive criteria capable of distinguishing a legal sanction from other types of sanctions (and, hence, the whole legal order from other social orders) is, however, the element of force. This element implies the possibility of imposing a sanction on the offender even against its will, thus rendering it nothing but a 'coercive act'.[135] Such coercive acts include the deprivation of life, freedom, and economic and other values, which are inflicted as a consequence of failing to adhere to a legally prescribed conduct, i.e. acting in a certain way or refraining from doing so, and thus committing a delict, upon the transgressor of a legal norm.[136] And conversely, such an act or refrainment from it can only assume the character of a delict if the legal order makes it the condition of a coercive act as a sanction.[137] Thus, the nexus between a sanction and a delict in a legal order is unbreakable

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131 See for a current scholarship on the importance of sanctions F. Schauer, *The Force of Law* (2015) and C. Bezemek/N. Ladavac (eds.), *The Force of Law Reaffirmed: Frederick Schauer Meets the Critics* (2016).

132 The concept of coercion has been a vibrant field of study in its own right starting from 1960's when Robert Nozick published his seminal work "Coercion" (1969) in S. Morgenbesser/P. Suppes/M. White (eds.), *Philosophy, Science, and Method: Essays in Honor of Ernest Nagel* (1969), pp. 440–472, for an overview see S. Anderson, "The Enforcement Approach to Coercion", (2010) 5 *Journal of Ethics and Social Philosophy* 1, pp. 1–31. For a collection of essays on coercion see also D.A. Reidy/W.J. Riker (eds.), *Coercion and the State* (2008).

133 Kelsen (n. 54), pp. 27–28.

134 Kelsen (n. 54), p. 33.

135 Kelsen (n. 54), p. 33–34.

136 Kelsen (n. 54), p. 35.

137 Kelsen (n. 54), p. 111.

except for a very limited number of cases, such as, for example, the internment of dangerous psychopaths in order to avert danger to public safety even without them actually having committed a delict, which according to Kelsen, can still be characterized as a sanction in the broadest sense.[138] However, such an extension of a sanction is not only incongruent with the 'consequence of a delict' logic underpinning his theory but also with the motivational function of law as a social order.[139] The claim made by Kelsen in his earlier work that the legal order simply makes an exception in such cases thus appears to be more consistent with his own theory.[140]

2.18 Coercive acts designated as sanctions, according to Kelsen, are ubiquitous in a legal system, i.e. they operate in civil, criminal and administrative law.[141] Due to their coerciveness and encroachment upon multiple individual rights, Kelsen also called for an enhanced, judicial-like type of administrative procedure corresponding to the ideal of 'due process of law'.[142] This, however, did not prevent Kelsen from escaping the 'Austenian question': namely, how could one explain the conspicuous instances in which legal norms do not rely on coercive power? In this vein, his inclusion of coercion in the definition of law was highly criticized. He answered this critique by claiming that in civil law sanctions are given effect indirectly, i.e. only in cases when somebody disregards civil transactions.[143] However, in constitutional law, sanctions either do not come into question at all (e.g., when constitutional norms authorize the creation of norms but are not put into effect) or are dependent on and connected with norms that stipulate coercion.[144] In general, 'sanctionless' norms are possible in a legal order but they do not constitute any significant number. If they did, only then could the definition of law as a coercive order be questioned.[145] Such insights from Kelsen appear to be more comprehensive and

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138 Kelsen (n. 54), pp. 40–42.

139 Kelsen identified this as "to bring about a certain behaviour … by motivating individuals to refrain from certain acts deemed as socially detrimental and perform certain acts deemed as socially useful", Kelsen (n. 54), p. 24.

140 Namely, in "General Theory of Law and State" Kelsen claimed that by authorizing administrative authorities to perform coercive acts which are not conditioned by a certain human behaviour, the legal order makes an exception to the rule that coercive measures are allowed only as sanctions attached to delicts, see H. Kelsen, *General Theory of Law and State* (1961), p. 279.

141 Kelsen (n. 140), p. 274.

142 Kelsen (n. 140), p. 278.

143 Jackson (n. 57), p. 109.

144 Kelsen (n. 54), pp. 50–51.

145 Kelsen (n. 54), p. 54.

plausible than the Austenian approach, by which he tried to address the same problem by exclusively employing 'nullities'.

2.19 Finally, having eliminated moral values as being too relative for the (pure) legal science, Kelsen consequently claimed that there are no delicts that are bad in themselves (*mala in se*), only those that are deemed undesirable by the legislator (*mala prohibita*). This, for its part, is a by-product of the *nullum crimen sine lege, nulla poena sine lege* principle, which is relevant not only to criminal, but to all types of, sanctions and a consequence of legal positivism.[146] Whereas the latter claim can be seen as an especially valuable contribution of Kelsen together with other 'rule-of-law' considerations found in his account because it clearly enunciates the legality principle (only rudimentarily developed by Hobbes and other earlier theorists) in the sanctioning context, the credibility of the '*mala prohibita* rhetoric' is more difficult to maintain: even if it is undeniable that moral values are of a relative nature, in every social order there seems to be a minimum core of them (provided that a particular community governed by this order does not seek to become a 'suicide club').[147] For example, studies ranking the 'relative' seriousness of various crimes have revealed that traditional non-regulatory crimes (such as killing, rape or kidnapping) have maintained their moral weight in the view of the public.[148] In other words, some rules have to be adhered to simply because from an anthropomorphic perspective they secure the survival of a particular group.[149] Besides, empirical studies on deterrence and crime prevention have further shown that people tend to transgress less from rules that they believe exist to protect wrongs in themselves (*mala in se*) rather than from those that are illegal as such (*mala prohibita*),[150] even if the former category is not set in stone.[151] This can be seen as a logical outcome of the claim made by some legal realists that people tend to form strong beliefs about 'what is good' and 'what is bad' through socialization (cf. MN.

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146 Kelsen (n. 54), p. 112.

147 H. L. A. Hart, *The Concept of Law* (1994), p. 192.

148 See more in S. P. Green, "Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses", (1997) *Emory Law Journal*, pp. 1533–1614 (pp. 1564 et seq).

149 F. A. Hayek, *Law, Legislation and Liberty (vol. 1) – Rules and Order* (1973), p. 18.

150 D. M. Kennedy, *Deterrence and Crime Prevention*: *Reconsidering the Prospect of Sanction* (2009), p. 33.

151 The controversial case of *Stübing v Germany* (43547/08) 12 April 2012 ECtHR could be mentioned in this regard. This case concerned incest between a brother and a sister. However, there were no allegations of sexual abuse, and the brother had undergone a vasectomy meaning that the offspring could not have been endangered. See more in D. Hayes, *Confronting Penal Excess: Retribution and the Politics of Penal Minimalism* (2019), pp. 197–198. In fact, the criminalization of incest between consenting adults, along with prostitution, is one of the most contentious issues in the philosophy of criminal law. This is because these acts are morally wrongful - but not obviously socially harmful - and reflect practices of 'legal moralism', see more in Green (n. 148), pp. 1551–1552.

2.28). Thus, turning a blind eye to the content of a delict in the sanctioning context is not convincing and can lead to situations that are detrimental to the initial aims that the sanctions aimed to achieve in the first place.

2.3.3. Hartian Approach: From Centre to the Periphery

2.20 While trying to answer the perennial ontological question of 'what is law', Herbert Lionel Adolphus Hart, as the most influential modern positivist in the English-speaking world,[152] was also confronted with the (sub)question of the role of sanctions in a legal system. Hart based his theory, for the most part, on the critique of Austin and claimed that the concept of law cannot be reduced to '[the totality of] commands backed by sanctions' because this does not account for some of the salient features of a modern legal system. Furthermore, the said coercion-based model can easily be refuted by demonstrating that law without sanctions is perfectly conceivable.[153] Namely, alongside the sanctions-backed rules, there exist rules of a different nature, i.e. power-conferring - as opposed to duty-imposing - rules, which enable individuals to create (at least part of their) legal environment in a private-law context or to exercise their public law powers (such as the right to vote).[154] Such a union of different norms can, thus, be said to express the very essence of law. The equation of 'nullities' with 'sanctions' proposed by Austin, for its part, is not accurate, according to Hart, because the former may not represent 'a threatened evil' at all for people who have failed to satisfy the conditions required to achieve legal validity: for example, this seems to be the case for a judge issuing an invalid order and having no material interest in the matter. This becomes even more glaring within the context of constitutional law. For instance, a statement that a 'sanction' for failing to adhere to legislative procedures and obtain the required majority for passing a law is the non-enactment of this law is hardly plausible.[155]

2.21 Bearing these drawbacks in mind, Hart set out to recast the Austinian account by offering 'a fresh start' to the notion of law. This included conceiving of law as the union of primary and secondary rules. The primary rules concern actions involving physical movement or changes, whereas the secondary rules envision how to introduce, modify or extinguish rules of the primary type.[156] Among the secondary rules, the 'ultimate' one is the rule of recognition that

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152 K. Greenawalt, "Too Thin and Too Rich: Distinguishing Features of Legal Positivism" in R. George (ed.), *The Autonomy of Law: Essays on Legal Positivism* (1996), pp. 1–30.

153 Hart (n. 147), p. 38.

154 Jackson (n. 57), p. 171.

155 Hart (n. 147), pp. 31–35.

156 Hart (n. 147), p. 81.

facilitates certainty in a legal order and allows individuals to discern the validity of the primary rules.[157] However, these rules or, more precisely, their union do not tell anything about law's substance and, hence, Hart could not evade pondering thereon. In this regard, he conceded that there is a 'core of good sense' within natural law doctrines and incorporated several of its tenets into his theory.[158] He went on to elucidate the relationship between law and morals and worked out four cardinal features that distinguish these two different social phenomena: 1) importance [of the rules]; 2) [their] immunity from deliberate change; 3) the voluntary character of moral offences; and 4) the form of moral pressure.[159] The latter criteria can be said to be paramount in discerning the role of a sanction in a legal system for Hart: here the pressure is exerted by threats of physical punishment or other unpleasant consequences whereas the typical form of moral pressure can be said to be appeals to have respect for the rules or other 'empathic reminders'.[160]

2.22 In fact, sanctions are a 'natural necessity' for every community that does not want to become a 'suicide club', as they guarantee that those who voluntarily obey the rules will not fall prey to malefactors, who would, in the absence of such sanctions, "reap the advantages of respect for law on the part of others, without respecting it themselves".[161] What is more, because these threats are "often actually and always potentially physical in nature",[162] they are administered in a centralized manner (except for in international law, which can be said to constitute a peculiar case),[163] i.e. relying on some sort of legal authority, as opposed to the moral pressure that can be exerted in a diffused manner by any member adhering to the same morality.[164] The mode of administration of sanctions, thus, is a crucial factor that is capable of distinguishing between these two forms of social control. All in all, whilst criticizing the Austinian coercion-based conception of law, Hart paradoxically came to the conclusion that sanctions are one of the hallmarks of a legal order. However, in his theory, they do not assume the central role but

157 Hart (n. 147), pp. 100 et seq.

158 Davies/Holdcroft (n. 79), p. 179.

159 Hart (n. 147), pp. 173–180.

160 Hart (n. 147), p. 180.

161 Hart (n. 147), pp. 198–199; p. 218.

162 Kronman (n. 115), p. 601.

163 In this case, the power is distributed differently and states, unlike human beings, do not possess 'approximate equality', therefore sanctions add very little to natural deterrents like the resort to war, Hart (n. 147, pp. 213 et seq. [p. 219]).

164 Hart (n. 147), p. 86.

can also dwell at the margins of a legal system[165] or not accompany certain rules at all, which is a realistic depiction of a modern-day legal system characterised by a multiplicity of rules, many of which are non-coercion-based.

2.4. Sanction in Legal Realism

2.23 The role of a sanction was also discussed in legal realism, which was conceived in the first part of XXth century and challenged both natural law theory and legal positivism. Legal realism originated in America and was later developed by Scandinavian theorists. Instead of dwelling on the metaphysical origins of law or its formal structure, legal realists proposed to observe law as it is 'here and now' and focus on the (actual) behaviour of its participants.[166] The vanguard of this movement – the American legal realist Oliver Wendell Holmes – was the first one to offer a pragmatic approach to law and use the 'bad man' as a departure point. According to this thinker, the 'bad man' cares very little about 'axioms and deductions' when he thinks of law; instead, he cares about how the courts will react in a particular situation.[167]

2.24 This also means that sanctions are of great interest to this 'bad man'. In other words, knowing that the state has coercive power, most people just want to know how to keep out of the way of that power.[168] Hence, the focus of legal scholars should primarily turn to predicting exactly that. In fact, this pragmatic approach even led Holmes to claim that legal sanctions are nothing but a 'tax on conduct', meaning that one simply has to pay up if one opts to breach a legal provision.[169] The American strand of legal realism was continued by other thinkers who expressed scepticism about (the intelligibility of) facts or rules, such as Karl Llewelly and Jerome Frank.

2.25 The Scandinavian strand of legal realism was, for its part, inspired by Axel Hägerström, who at the very outset of his theory declared that 'metaphysics must be destroyed'.[170] He deconstructed many commonly accepted legal notions such as rights, duties, and transfers of rights and showed that they are partially based on superstitious beliefs, myths, fictions and other

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165 See for a critique of relegating coercion to the jurisprudential sidelines in Schauer (n. 131), pp. 23 et seq.

166 Jackson (n. 57), p. 150.

167 Davies/Holdcroft (n. 79), pp. 446–447.

168 R. A. Posner, *The Problems of Jurisprudence* (1993), p. 223.

169 This 'amoralism' shocked his contemporaries, see more in R.W. Gordon, "Holmes' Common Law as Legal and Social Science", (1982) 10 *Hofstra Law Review* 3, pp. 719–746 (pp. 737–736). See in a similar vein, R. Posner, *Economic Analysis of Law* (2014) who held that fines are a sort of tort remedy rather than penalties of retributive nature.

170 A. Hägerström, *Philosophy and Religion* (2002), p. 74.

sorts of 'magic'.[171] Hence, placing too heavy an emphasis on these notions distorts the real picture of law. In fact, the uttering of 'legal' words or the doing of actions that have a legal meaning produces psychological states in the minds of those who observe them.[172] These mental effects, according to Hägerström, constitute exactly the analytical lens through which law as a phenomenon should be viewed and appraised. Such a psycho-social dimension can be said to be the prime strength of legal realism. In the context of sanctioning, taking this dimension into account becomes relevant not only whilst deciding which type of a sanction the lawmaker should prescribe for a particular type of offence, but also whilst measuring the (intrinsic) effects that a sanction may bring about (cf. MN. 4.47; 4.62).[173] The work of Hägerström was continued by such thinkers as Karl Oliveronca and Alf Ross. The latter will come under closer scrutiny in the subsequent part, accompanied by the study of American legal realist Roscoe Pound, whose original insights are essential to do justice to the full complexity of the topic of sanctions.

2.4.1. Alf Ross: Sanctions as 'Compelling Inner Impulses'

2.26 Alf Ross sought to coalesce both the psychological and logical viewpoints of legal norms into his theoretical account and was the pioneer of the so-called 'deontic logic'.[174] In his most notable work "Directives and Norms" of 1968, he endeavoured to differentiate between the prescriptive function of a legal norm ('directive') and its actual existence. According to him, a legal norm should not be conflated with the 'directive' that it expresses through its regulatory content. Instead, a legal norm should be understood as a 'directive that corresponds in a particular way with certain social facts'.[175] Such a correspondence implies that, firstly, the pattern of behaviour expressed by a legal norm needs to be followed on the whole in a particular society and, secondly, that it is perceived as binding by the members of this society. While trying to identify from where the perception of a particular normative pattern as binding (valid) can be said to derive, Ross was confronted with the question of the role of a sanction. Quite in contrast to the command theory, however, he refuted the idea that people follow legal norms only due to a fear of sanctions (cf. MN. 2.16).

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171 H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (1983), p. 161.

172 Jackson (n. 57), p. 132.

173 See more on the emotional impact on the individual of certain forms of punishment in R. Rodogno, "Shame, Guilt, and Punishment", (2009) 28 *Law and Philosophy* 5, pp. 429–464.

174 Jackson (n. 57), p. 141.

175 A. Ross, *Directives and Norms* (1968), p. 82.

Instead, sanctions should be analysed against the broader background of social and psychological factors: according to Ross, an individual who finds herself in a particular situation in which a certain course of action is expected experiences a special prompting or an urge to act in such a way. Such an urge can only be partially explained by the threat of sanctions but goes beyond that because it also has 'a stamp of unintelligibility and mystery'.[176] Moreover, the said urge to behave in a particular way can be expressed through deontic terminology, i.e. asked why an individual is behaving according to the expected pattern, she might respond, 'because it is my duty to do so', 'because it is the right thing to do' or the like.[177] Put differently, most people abstain from shoplifting not due to a fear of sanctions but because of the 'internal moral forces' stopping them.[178] For outsiders, such a 'compelling impulse' in an individual to act in a certain way translates into an expectation that the said pattern of conduct will be followed. If it is not, then the particular society has to find a way of responding to transgressors of legal norms, which, in modern legal systems, takes place by establishing an institutional order of organized sanctions.[179]

2.28 From the foregoing, it follows that the binding force of legal norms cannot be reduced to the fear of sanctions but is instead an outcome of their internalization, i.e. it can be described as a feeling of obligation embedded in mental experiences and reactions. This also means that the normativity of sanctions cannot be explained from the behaviourist perspective, i.e. the external observation of behaviour alone. A sanction is closely connected to the internal approval by the society of the concrete model of conduct.[180] According to Ross, this helps explain why, for example, the duty to pay income tax is not experienced as 'a sanction against work' or customs tariffs as 'sanctions against import'.[181] Such an emphasis on the impact of a sanction *in foro interno* without veering off into a transcendental dimension (typical for natural law theorists) along with the recognition that sometimes psychological disapproval (stigma) is a much bigger

176 Ross (n. 175), p. 85.

177 Ross (n. 175), p. 85.

178 J. C. Cheney, "On Guilt, Responsibility and Punishment", (1975) 35 *Louisiana Law Review* 5, pp. 1307–1312 (p. 1308). See further Tyler (n. 129) on personal morality as a prime factor for obeying the law.

179 Ross (n. 175), p. 93.

180 Ross highlights the role of socialization in this regard, i.e., particular ideas of 'proper behaviour' which are planted during the growing period of a person through 'suggestive pressure', see more in Ross (n. 64), p. 61.

181 Ross (n. 175), p. 87.

disvalue than the actual sanction[182] can be said to be the most important contribution of Ross' theory (cf. MN. 4.46 et seq.).

2.4.2. Roscoe Pound: Sanctions as Tools for Achieving Societal Goals

2.29 The proponent of so-called 'sociological jurisprudence', Roscoe Pound, sought to perceive law by drawing upon philosophy, ethics, politics, sociology, and the like. His theoretical discourse regarding sanctions, as opposed to that of Holmes, was not reduced to 'keeping the people out of [coercion's] way' (cf. MN. 2.24) but was instead placed against the broader societal background. Inspired by the German 'jurisprudence of interests', particularly the theory of Rudolf von Jehring, he understood law as a living force in society and called for its employment with a view to achieving social betterment.[183] Hence, Pound was at times said to be the apologist of 'social engineering'.[184] According to him, goods are limited and, thus, the primary task of the state is to satisfy the maximum number of claims or demands for such goods with the "least friction and the least waste".[185]

2.30 Even if the said claim evokes strong utilitarian connotations, Pound, quite in contrast to the command theory of law, did not perceive sanctions to be the source of legal obligations. The contrary is true: he 'reversed' their role and asserted that sanctions lie in the social ends that law is designed to serve. In certain domains, Poundian insights come very close to reality, with some states introducing a panoply of sanctions to achieve broad policy goals that can even be deemed to be 'societal control'.[186] The said societal ends happen to be in constant flux in a particular society at a particular time (cf. MN. 4.46 et seq.) and, thus, law has to continue to reinvent itself in order to regulate them efficiently. Laying stress upon these societal ends in lieu of conceiving sanctions as self-serving devices sharply distinguishes the Poundian account from other theories.

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182 Empirical studies show this effect, revealing that people sometimes prefer jail sentences over the so-called 'shaming sanctions' (e.g., the duty to drive around with DUI bumper stickers), see Rodogno (n. 173), pp. 444 et seq.

183 J. A. Gardner, "The Sociological Jurisprudence of Roscoe Pound (Part I)", (1961) 7 *Villanova Law Review* 2, pp. 1–26 (p. 9).

184 F. J. Powers, "Some Reflections on Pound's Jurisprudence of Interests", (1953) 3 *Catholic University Law Review* 1, pp. 10–26 (p. 12).

185 R. Pound, *Social Control Through Law* (1968), p. 134.

186 See, e.g., the study on the 'benefit sanctions' in which the author claims that these sanctions have become one of the main instruments for disciplining and managing the poor in the United Kingdom, M. Adler, "A New Leviathan: Benefit Sanctions in the Twenty-first Century", (2016) 43 *Journal of Law and Society* 2, pp. 195–227.

Furthermore, the legal-sociological approach of Pound also deserves acknowledgment in the context of sanctioning because it emphasized the importance of relying on empirics in the process of law-making[187] – an idea that is receiving an increasing amount of attention in the current scholarship.[188] Such reliance can, for its part, optimize the imposition of sanctions and facilitate compliance with the law, which they eventually aim to secure, since people tend to adhere to legal provisions that they believe to be right (cf. MN. 2.19). In fact, a 'smart' fining policy should make sure that the relevant parties have real incentives to comply with the regulations by fitting the fine to the type and duration of the infringement, concrete conduct of the transgressor and other extra-legal factors aimed to individualize penalties. Moreover, it is well known that people who are called upon to apply an unjust law (one lacking an ethical-retributive or utilitarian-preventive justification) will be reluctant to do so, be they policemen or judges.[189]

2.32 Secondly, Pound sought to forge links between legal theory and other disciplines such as sociology and psychology. In this regard, Pound was throwing down a challenge to Kelsen who so vehemently tried to retain legal theory and the role of a sanction unadulterated by the teachings of the said disciplines (cf. MN. 2.16 et seq.). The approach adopted by Pound appears to do the subject-matter of sanctions more justice because they constitute a vibrant field of research in their own right in sociology, knowledge of which can enable one to grasp the complexity of this legal institution in a more profound way and improve its operationalization. The input from sociology appears to be especially beneficial in (de)criminalizing a certain type of behaviour because it can provide the legislator with insights into what people consider to be (no longer) *mala in se*. The full consideration of sanctions from a sociological point of view would, however, clearly go beyond the confines of this thesis.[190]

2.5. Conclusion

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187 R. Pound, "The Theory of Judicial Decision. III. A Theory of Judicial Decision for Today", (1923) 36 *Harvard Law Review* 8, pp. 940–959 (p. 953).

188 See more for a cross-national spread of evidence-based legislative policies and procedural rationality review by the ECtHR in P. Popelier, "Evidence-Based Lawmaking: Influences, Obstacles and Role of the European Court of Human Rights" in J. Gerards/E. Brems (eds.), *Procedural Review in European Fundamental Rights Cases* (2017), pp. 79–94.

189 L. Rubini, "Sanctionary Administrative Law in Practice: Administrative Sanctions in Road Traffic Matters" in *Les problèmes juridiques et pratiques posés par la différence entre le droit criminel et le droit administratif pénal* (*Revue internationale de droit penal*) (1988), pp. 507–515 (p. 512).

190 The role of the sanctions were analysed by sociologists like Max Weber, Theodor Geiger, Frank Oppenheimer, Émile Durkheim, Talcott Parsons.

The foregoing theoretical study has revealed that whilst the notion of a (negative) sanction is quite homogenous in all of the legal schools presented (be it perceived as a 'detriment', 'evil', 'pain', 'deprivation' or any other 'disvalue' inflicted for a contravention of rules by some legal authority), its role or 'functionality' differs greatly. The various strands of legal thought, which were highly influenced by the particular historical or societal setting in which they were conceived, as well as their ontological base, ascribe different roles to a sanction in a legal system: it can be understood as a tool for shaping human behaviour or a validity criterion of laws (cf. MN. 2.04 et seq.), an obligational force (cf. MN. 2.11 et seq.), a 'compelling impulse' to act in a particular way (cf. MN. 2.26 et seq.) or a means to further societal ends (cf. MN. 2.29 et seq.). In many legal schools of thought, (the existence of) a sanction also serves as a 'demarcation line' between law and other forms of social control (cf. MN. 2.17; 2.22). Moreover, some legal theorists such as Kelsen or Austin ascribe sanctions a constitutive role in the notion of law, whereas others such as Hart and legal realists do not. The latter hinges on whether one takes an essentialist view of the nature of law or not.[191] And – rather inevitably – all of these theoretical conceptions seem to capture nothing but a 'small subset of truths'[192] about the real nature and utility of a sanction.

2.34 It also transpired from the theoretical study that law as a social order requires protection to be able to counteract intentional or unintentional offences and it is precisely sanctions that are able to serve this goal.[193] In fact, legal theorists grasped quite early on that sanctions validate and effectuate a legal system by imposing a detriment in the event of non-compliance or, as it as eloquently put by Hart, sanctions are its 'natural necessities'. The developments happening in the 'real life' evince this claim: the EU legal order, for example, pivoted to administrative sanctions in the course of its legal integration in order to respond to the need to secure the *effet utile* of the then new legal system (cf. MN. 3.77 et seq.).[194] Empirical studies also show that there are a substantial number of 'habitual offenders' despite the efforts of the regulators to persuade them to comply.[195] In other words, persuasion alone leaves a huge compliance deficit. This has been acknowledged by the ECtHR itself: for example, in regard to tax matters it has

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191 Schauer (n. 131), p. 41.

192 J. Dickson, "Contemporary Debates" in A. Marmor (ed.), *The Routledge Companion to Philosophy of Law* (2012), pp. 48–64 (p. 55).

193 Barth (n. 109), p. 147.

194 Weyembergh/Joncheray (n. 15), p. 200.

195 Namely, the empirical study which was undertaken in the field of environmental, occupational health and safety regulations. See the full study and its results in R. Brown/M. Rankin, "Persuasion, Penalties and Prosecution: Administrative v. Criminal Sanctions" in M. L. Friedland (ed.), *Securing Compliance: Seven Case Studies* (1990), pp. 325–353.

stated that "a system of taxation … would not function properly without some form of sanction".[196] The role of sanctions, however, should not be overemphasized; there are clearly fields of law in which sanctions are perfectly dispensable *contra* the teachings of legal positivists. Moreover, sanctions cannot cogently explain law's normativity. On the contrary, the very imposition of them is "a sign that the law has failed to motivate compliance on its own terms".[197] Hence, sanctions do not always assume centre stage, nor should they.

2.35 It goes without saying that the whole legal edifice cannot be shoehorned into sanctions because there is much more to it than compulsion. If this were not the case, then, for example, the existence of 'soft law' would become a *contradictio in adjecto*. Moreover, whereas at times sanctions seem to exert a great 'motivational pull' to adhere to legal provisions,[198] at other times coercion is simply not the most effective method to achieve compliance, especially in fields where the legal actors may lack the necessary means to do so[199] or where incentives are preferred over penalties. In fact, sanctioning or a deterrence strategy may be even less effective in securing compliance in that they generate greater resistance from regulated actors.[200] And, finally, by placing too heavy an emphasis on sanctions other important factors may be unduly written off, such as the fact that most people comply with the legal rules because of their authority or because they resonate with their moral convictions (cf. MN. 2.15).

2.36 At the same time, legal theory also imparts a significant lesson, which is that in cases where coercion is inevitable it should not be unbridled or take place without adequate safeguards, as it touches upon the very 'dignitarian' interests of the individual. Put differently, sanctions or, rather, their prescription in a legal system should not be eviscerated from the axiological content and mutate into arbitrariness. The Kelsenian '*mala prohibita*' rhetoric clearly does not suffice

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196 *Janosevic v Sweden* (34619/97) 23 July 2002 ECtHR at [103]; *Västberga Taxi Aktiebolag and Vulic v Sweden* (36985/97) 23 July 2002 ECtHR at [115].

197 J. L. Coleman/B. Leiter, "Legal Positivism" in D. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory* (2010), pp. 228–248 (p. 232).

198 The exorbitant sanctions prescribed by the GDPR (n. 699) provides an interesting example in this regard. Exactly these sanctions may be deemed to have motivated many relevant parties to follow the new rules on data protection and adjust their handling of personal data. This was evinced by the concerned economic actors having to rely heavily on internal and external consultants and their expertise to achieve compliance therewith.

199 See an interesting case study challenging the assumption that social security regime backed by benefit sanctions is effective in encouraging the benefit recipients' engagement with paid work, J.P. Dwyer, "Punitive and ineffective: benefit sanctions within social security", (2018) *Journal of Social Security Law*, pp. 142–157. For the similar conclusion also see Adler (n. 186), pp. 218–219.

200 In such cases some authors emphasize the importance of generating a culture of shared commitment to regulatory goals between the regulator and the regulated intended to provide the necessary foundation for compliance, see more in K. Yeung, "Better regulation, administrative sanctions and constitutional values", (2013) 33 *Legal Studies* 2, pp. 312–339 (p. 317).

if a State wishes to retain legitimacy as well as trust and increase compliance with the legal rules among its citizenry, since the existence of sanctions can only be partially attributed as the reason why people obey laws. In fact, sanctioning cannot be in the public interest and, hence, legitimate if it conflicts with the elements of the minimal value structures that define society.[201]

2.37 Naturally, it remains open to debate, from where the lawmaker should derive this axiological content – legal naturalists sought it in the idea of justice, Hobbes in the inalienability of the right of survival, legal realists drew upon mental experiences and reactions and emphasized socialization as an important factor in this regard, etc. Most certainly, the said content will also be an outcome of a particular form of governance (such as a liberal-democratic order) and the structure of the interactions of the state, individual and the market. Additionally, the perception of the value and the extent given to the protection of individual rights *vis-à-vis* the furtherance of collective aims at a particular point in time will be decisive. In any event, the question of, what are the eventual purposes pursued by concrete punitive measures (retributive only or accompanied by, e.g., educational functions?) and how probable is it that they will reach these purposes should not be evaded either by the lawmaker or by judicial bodies. As mentioned above, this thesis seeks to unlock the contemporary understanding of administrative punishment by mapping out the principles reflecting the said axiological content that ought to facilitate 'fair' sanctioning at the European human rights level. It will also highlight the importance of *foro interno*, which often tends to (conveniently) slip under the radar whilst imposing administrative sanctions of a rather meagre size, if compared to criminal law measures (cf. MN. 4.47; 4.62).

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201 To rephrase the general idea found in V. Held, *Public Interest and Individual Interests* (1970), p. 222.

CHAPTER 3
WHAT IS AN ADMINISTRATIVE SANCTION?

„Ich halte es nun für einen großen Fehler, Unterschiede, die jedermann fühlt, deshalb hinwegzuleugnen, weil wir sie nicht formulieren können und weil es eine Stelle gibt, an der die Grenze flüssig zu werden beginnt"

A.B. Frank

3.1. Introduction

3.01 The previous chapter, which was dedicated to the exploration of theoretical insights into sanctions and their role in a legal system, showed that even though no universal perception thereof exists they are salient and necessary tools aimed at protecting a legal system from contraventions. From this general argument, it may *a fortiori* be deduced that administrative sanctions as a specific genus of legal sanction are essential for rendering administrative law valid and effective by protecting this field of public law from non-compliance, among other things.[202] They furthermore facilitate the fulfilment of its *telos* by impinging upon people's behaviour regarding its demands. Acknowledging the regulatory breadth of administrative law, this *telos* could be said to consist of a large number of divergent sub-goals that the specific branches of administrative law, such as tax law, construction law, competition law, etc., are pursuing.[203] As stated by Hans Kelsen, like civil and criminal law, administrative law tries to bring about a certain behaviour by attaching a coercive act (administrative sanction) to the opposite behaviour (administrative offence).[204]

3.02 But where exactly do administrative sanctions fit on the broad theoretical canvas outlined above and what goals are they pursuing in particular? Throughout the years, administrative sanctions have either been attributed to the 'police power',[205] thus placing them outside the realm of law altogether, put under the rubrics of civil law or criminal law, or characterised as a middle ground between the two.[206] Moreover, what are their idiosyncratic features in legal

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202 For example, in the context of the EU law, the recourse to administrative sanctions was expanded when the policy makers realized that the enforcement of *acquis* should be enhanced in order to build the internal market in 1992, see more in de Moor-van Vugt (n. 13), p. 10.

203 At least following the conception of continental administrative law which, in broad terms, perceives administrative law as substantive branches arranged by a theme. See also Bernatt (n. 16), p. 8.

204 Kelsen (n. 54), p. 274.

205 Here and elsewhere the 'police power' is not referred to in the contemporary sense as relating to the workings of the police, but as a mode of governance, i.e. the administration of the economic and social resources with a view to advancing the welfare of society, see also MN. 3.81.

206 For an overview of these different conceptualizations see E.Y. Kidron, "Understanding Administrative Sanctioning as Corrective Justice", (2018) 51 *University of Michigan Journal of Law Reform* 313, pp. 313–355 (pp. 313–319).

systems, which are becoming ever-more-complex? Can they plausibly be differentiated from criminal sanctions? And, for the sake of clarity, can an administrative sanction be, and/or – considering flexibility as the hallmark of this legal device – should it ever be, defined?

3.03 This chapter will search for answers to these questions. As noted in the introductory part, administrative law is far from being isomorphic. On the contrary, the sheer number of legal systems in Europe, and their highly differing notions of administrative law (as a product of a particular national history and culture despite the current developments towards de-nationalization of its scholarship)[207] with which the ECtHR is confronted whilst conducting its judicial review, consequently results in a heterogeneous understanding of administrative law's scope, goals,[208] and functions[209] let alone its very basic institutions, such as 'administrative authorities', which are closely knit with the constitutional traditions in a particular legal system[210] and reflect an outcome of the socio-political bargain between those holding power in the law-making and decision-making processes,[211] the conception of administrative procedures[212] or the way administrative law is operationalised as a whole (the so-called

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207 The territorial and intellectual fragmentation of the continent, along with the nationalism of the 19th century when the administrative machinery of the State started growing, resulted in substantial differences in the conception of administrative law in different European states that remain discernible until today, M. Fromont, "A Typology of Administrative Law in Europe" in von Bogdandy/Huber/Cassese (n. 4), pp. 579–600 (pp. 579–580). For a further comprehensive comparison see M. Ruffert (ed.), *Administrative Law in Europe: Between Common Principles and National Traditions* (2013); A. von Bogdandy/S. Cassese/P. M. Huber (eds.), *Handbuch Ius Publicum Europaeum – Band III: Verwaltungsrecht in Europa: Grundlagen* (2010); A. von Bogdandy/S. Cassese/P. M. Huber (eds.), *Handbuch Ius Publicum Europaeum – Band IV: Verwaltungsrecht in Europa: Wissenschaft* (2011); A. von Bogdandy/S. Cassese/P. M. Huber (eds.), *Handbuch Ius Publicum Europaeum – Band V: Verwaltungsrecht in Europa: Grundzüge* (2014). See, furthermore, M. Fromont, *Droit administratif des États européens* (2006). See also on the differing notion of administrative law in J. Bell, "Mechanisms for Cross-fertilisation of Administrative Law in Europe" in J. Beatson/T. Tridimas (eds.), *New Directions in European Public Law* (1998), pp. 147–169.

208 On the diversity of the tasks of administrative law see C. Harlow, "European Administrative Law and the Global Challenge" in P. Craig/G. de Búrca (eds.), *The Evolution of EU Law* (2011), pp. 439–464. The project on the pan-European general principles of good administration once again has confirmed the plurality of conceptions of purposes that administrative law may have, see Stelkens/Andrijauskaitė (n. 7), MN. 31.16.

209 See on the various functions of administrative law (the so-called red-light and green-light theories) in Harlow/Rawlings (n. 104), pp. 1–48. For a critique/reappraisal of these theories see L. Hancher/M. Ruete, "Forever Amber?", (1985) *The Modern Law Review*, pp. 236–243.

210 See more on the heterogeneous perception of 'administrative authorities' in Europe in A. H. Klip/J. A. E. Vervaele, "Supranational rules governing cooperation in administrative and criminal matters" in J. A. E. Vervaele/A. H. Klip (eds.), *European Cooperation between Tax, Customs and Judicial Authorities: the Netherlands, England and Wales, France and Germany* (2002), pp. 7–47 (p. 12).

211 See more on this factor O. Kahn-Freund, "On Uses and Misuses of Comparative Law", (1974) 37 *Modern Law Review* 13, pp. 1–27.

212 In most continental law systems, administrative procedures are inquisitorial, whereas common law takes a quasi-judicial approach to them, see M. Allena/F. Goisis, "'Full Jurisdiction' Under Article 6 ECHR: *Hans Kelsen v. the Principle of Separation of Powers*", (2020) 26 *European Public Law* 2, pp. 287–306

'administrative culture' as a 'collective mental programme' that may even diverge within a particular country depending on, say, a region in federal countries or a ministry).[213]

3.04 The same could be said with regard to the perception of administrative sanctions: differences are palpable (cf. MN. 3.06 et seq.) and stretch as far as to some legal systems (at least until very recently) not having considered administrative sanctions to be a separate genus of sanctions at all (cf. MN. 3.14). All of this renders the prospect of arriving at one definite answer to the questions outlined above hardly possible. This limitation aside, administrative sanctions can still be mapped out in an abstract way, as it is possible to pin down the essence of any of the open-ended (indeterminate) legal constructs that are known to operate in multiple legal systems (such as the European notion of the rule of law or good governance).[214] Extracting the essence of administrative sanctions and discovering their place is important not only for the safeguards of individual protection but also for situations in which they are conjointly imposed with criminal law sanctions and the limits thereof.

3.05 Having the said questions in mind, this chapter will be structured as follows: firstly, the diversity in perceptions of administrative sanctions will be explored by surveying the German, French and British approaches. This comparative study will be followed by the examination of their conceptual (in)determinacy and a couple of doctrinal endeavours to define an administrative sanction as well as an overview of the typology of administrative sanctions according to their aims. Furthermore, the question of the delimitation of administrative sanctions from other types of public admonition (namely, criminal sanctions) will be approached. Finally, the chapter will examine the practice of outsourcing administrative sanctioning to private parties and whether such a practice is acceptable in a contemporary legal order.

3.2. Diversity in Perception: A European *Tour d'Horizon*

3.06 Before delving into the rationale and aims of administrative sanctions, it is worth noting that no prevailing and comprehensive conception thereof exists in the legal scholarship (cf. MN.

(pp. 288–289). This is significant because it also impacts the intensity of a subsequent judicial review (cf. MN. 5.45 et seq.).

213 See, *ex multis*, M. Brans, "Comparative Public Administration: From General Theory to General Frameworks" in Peters/Pierre (n. 121), pp. 269–284; S. Kuhlmann/H. Wollmann, *Introduction to Comparative Public Administration: Administrative Systems and Reforms in Europe* (2019); See also in general P. Legrand, "European Legal Systems Are Not Converging", (1996) 45 *International & Comparative Law Quarterly*, pp. 52–81.

214 A. Andrijauskaitė, "Good Governance in the Case Law of the ECtHR: A (Patch)Work in Progress", (2019) *ICON-S conference paper*, p. 3.

3.25 et seq.). This statement is warranted by the diversity in perceptions of administrative sanctions in the European legal tradition. The said diversity can be tellingly depicted by taking a look at the German, French and English systems. They were chosen not only because of linguistic accessibility for the author of this thesis but also because they are the 'usual suspects' of European comparative law, as they can be claimed to have been the most influential legal systems in Europe.[215] Such an European *tour d'Horizon* should sufficiently demonstrate that no unanimity in this regard exists and that the genesis and perception of an administrative sanction diverges in various legal systems – be it born out of the doctrinal discussions leading to a codification and formation of a separate field of law dealing with sanctions for administrative offences (German approach), judicial developments leading to the acceptance of administrative sanctions on the domestic level triggered by supranational trends (French approach) or a societal push to introduce administrative sanctions in a system that is (over)reliant on criminal sanctions (British approach).

3.2.1. The German Approach: A Matrix of *Ordnungswidrigkeiten*

3.07 The German system is a paragon of a 'codified approach' towards administrative sanctions. Its elaborate code of administrative offences has not only received a 'conceptual blessing' on the supranational level (cf. MN. 4.18 et seq.)[216] but has also inspired other European domestic legal systems to follow suit.[217] The matrix of *Ordnungswidrigkeiten* was also successful in influencing the European framework of transnational administrative law enforcement: the international agreements concluded on this matter excluded criminal law from their scope of application but the possibility of declaring that decisions to impose an administrative fine shall fall within their scope was simultaneously furnished in congruence with the German model.[218] The German code on administrative offences did not come *ex nihilo* and took ages to mature:

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215 Fromont (2006, n. 207), p. 351.

216 This occurred after a rigorous constitutional revision of the system that took place on the domestic level. See the long line of cases of the German Constitutional Court enlisted in J. Schwarze, "Judicial Review of European Administrative Procedure", (2004) 68 *Law and Contemporary Problems*, pp. 85–106 (p. 104 [n. 107]). The comprehensive check on constitutionality has led (or, at least, significantly contributed) to the spillover of the German system in the guise of *Ordnungswidrigkeiten* on the pan-European level, due to the direct references of the ECtHR to the relevant case law of the German Constitutional Court (see *Öztürk v Germany* [8544/79] 21 February 1984 ECtHR and *Lutz v Germany* [9912/82] 25 August 1987 ECtHR).

217 Portuguese, Italian, and Romanian systems of administrative punishment use *OWiG* as a matrix see C.E. Paliero, "The Definition of Administrative Sanctions – General Reports" in Jansen (n. 8), pp. 1–35 (p. 21). Further indications also reveal that it has impacted the system of Swedish administrative sanctions, see *S. v Sweden* (11464/85) 15 May 1987 CHR (dec.) [Plenary].

218 O. Jansen, "Transnational sanctioning in EU law" (online paper), p. 11. See, e.g., Article 1 (2) of the European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters of 15 March 1978 by the Council of Europe.

early manifestations of administrative punishment can be traced back to the 16th and 17th centuries, when police ordinances (*Polizeiordnungen*) were a popular tool for enforcing public order in the then non-unified Germany.[219] However, the line between criminal law and police ordinances was not clear even back then, as is evinced by the multiple cross-references between the code of criminal law (*Constitution Criminalis Carolina*) and the latter instrument.[220] Later centuries were marked by a very lively academic discussion among German scholars[221] on the nature of administrative and criminal sanctions, which – without finding a clear division between the two – culminated in two path-breaking post-war codifications, namely, the Criminal Economic Law of 1949 (*Wirtschaftsstrafgesetz*) and the Code of Administrative Offences of 1952 (*Ordnundgswidrigkeitengesetz [OWiG]*), which went through multiple changes over the years.

3.08 The latter lays down the main principles of administrative punishment that were given shape closely following the German Criminal Code and prescribes a fine (*Geldbuße*) as the most common (but not exclusive) tool for administrative punishment.[222] However, it codifies only a small fraction of (punishable) administrative offences instead of expanding its applicability to the wide array of administrative offences.[223] Even though the *OWiG* deliberately tries to avoid using the term 'guilt' (*Schuld*), echoing the doctrinal debates regarding the different levels of blameworthiness (moral reprehensibility) attached to different types of punitive sanctions (cf. MN. 3.69 et seq.), conceiving of administrative punishment more like "means of pressure to enforce a better state of things (*ein Anruf zur Ordnung*)",[224] the whole system still requires its

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219 J. P. Goldschmidt, *Das Verwaltungsstrafrecht* (1902), p. 70.

220 D. Ohana, "Administrative Penalties in the *Rechsstaat*: On the Emergence of the *Ordnungswidrigkeit* Sanctioning System in Post-War Germany", (2014) 64 *University of Toronto Law Journal* 243, pp. 243–290 (p. 247).

221 The wide-reaching academic discussion started with the works of criminal jurists such as P.A. Feuerbach and K. Binding in the 19th century and continued to be elabourated by administrativists such as J.P. Goldschmidt, O. Mayer, E. Schmidt, and others in the 20th century, see O. Mayer, *Deutsches Verwaltungsrecht. I und II Band* (1895); E. Wolf, "Die Stellung der Verwaltungsdelikte im Strafrechtssystem" in *Festgabe für Reinhard von Frank* (1930), pp. 516–588; E. Schmidt, *Das neue westdeutsche Wirtschaftsstrafrecht. Grundsätzliches zu seiner Ausgestaltung und Anwendung* (1950). See more in M. Hildebrandt, "Justice and Police: Regulatory Offences and the Criminal Law", (2009) 12 *New Criminal Law Review: An International and Interdisciplinary Journal* 1, pp. 43–68; See also T. Weigend, "National Report: Germany" in *Les problèmes juridiques* (n. 189), pp. 67–93 (pp. 87–88); Ohana (n. 220).

222 § 17 *OWiG* (legal wording valid from 1 July 2017). An administrative fine can be accompanied by, e.g., asset seizure, see § 22 *OWiG* et seq.

223 The administrative offences punishable under this Code are laid out in its third chapter (§§ 124–128 *OWiG*).

224 *S. v Sweden* (11464/85) 15 May 1987 CHR (dec.) [Plenary]. For an example of the 'nudging' logic of administrative sanctions see also *Rosenquist v Sweden* (60619/00) 14 September 2000 ECtHR (dec.): "the

determination before an administrative sanction can be imposed.[225] Therefore, Germany could be said to have taken the parapenal path towards administrative punishment, basically conceiving administrative sanctions as punishment, although with one important caveat: administrative authorities have discretion (*Ermessen*) regarding whether to start the persecution of an administrative offence or not – a principle that is not typical to the criminal procedure and that effectually allows for circumventing dealing with transgressive yet trifling behaviour.[226] The parapenal construction of the system is also evinced by the subsidiary use of the German Code of Criminal Procedure and not the German Administrative Procedure Act (§ 46 [1] *OwiG*) as well as by conveying basically the same investigation rights to the administrative authorities, imposing fines being the one that the public prosecutors tend to have (§ 46 [2] *OwiG*).[227]

3.09 This cursory depiction of *Ordnungswidrigkeitenrecht* is far from revealing the whole picture of administrative sanctions in Germany because many more of them (if conceived broadly) are regulated in various *legi speciali* of administrative law together with other instruments such as judicial enforcement measures or withdrawal/denial of benefits, regulated in the general law on administrative procedure. Their exploration would clearly go beyond the scope of this chapter. An additional factor, that of the lack of corporate criminal liability, which is discussed below, should also be taken into consideration before drawing all-encompassing conclusions regarding the facets of the *Ordnungswidrigkeiten* system (cf. MN. 3.69 et seq.). However, at the same time it can be concluded that the *OWiG* surely forms the very backbone of administrative punishment in Germany, and consequently receives most of the academic attention and inspires other legal systems to sometimes turn to such a parapenal mode of administrative sanctioning.

3.2.2. The French Approach: 'Prosperity' Outside Codified Legislation

3.10 The French system also boasts a long history of administrative sanctions and can even claim to be the birthplace of this legal tool in Europe[228] but (quite in contrast to the German model)

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purpose of the tax surcharge is to emphasize, *inter alia*, that the individual is required to be meticulous in fulfilling the duty of filing a tax return and the related obligation to submit information".

225 § 10 *OWiG*: "Only an intentional action can be punished as an administrative offense, unless the law explicitly stipulated a negligent action with a fine".

226 See § 47 (1) *OWiG*. The so-called *Opportunitätsprinzip* is also know in disciplinary law because the contraventions therein are also deemed indifferent from an ethical point of view, see O. Fliedner, *Die Zumessung der Disziplinarmaßnahmen* (1972), p. 74.

227 B. Nowrousian, "Bußgeldtatbestand und Bußgeldverfahren - eine Kurzeinführung ins Recht der Ordnungswidrigkeiten", (2020) *Juristiche Arbeitsblätter* 4, pp. 241–320 (pp. 241–242; p. 246).

228 Goldschmidt (n. 219), pp. 1–13.

no codification on this matter ever happened here.[229] The scholarship also seemed uninterested in this topic for a long time, preferring to focus on disciplinary or fiscal measures.[230] Instead, administrative sanctions appeared to be the fruit of a "continuous dialogue between constitutional, administrative and European judges".[231] It was exactly the judiciary that paved the way for their wider use within this legal system by filling in the legislative gaps and setting out the modalities of their application, namely, the principle of proportionality, the duty to give reasons, adversarial procedure, etc. Before that administrative sanctions were used rather cautiously due to 'constitutional' doubts regarding their compatibility with the principle of separation of powers enshrined in Article 16 of The Declaration of the Rights of Man and of the Citizen of 1789, which stipulates that the 'monopoly of justice' belongs to the judge.[232] However, immediately after the already-quoted *Öztürk* and *Lutz* judgments were adopted by the ECtHR, expressing the acceptance of administrative sanctions on the supranational level (cf. MN. 4.18 et seq.), the *Conseil Constitutionnel* followed suit and dispersed the said doubts on the domestic level too.[233] This development also coincided with the proliferation of the so-called independent administrative authorities (e.g., in the competition and telecommunication domains) in the 1970s and the expansion of their 'interventionist' regulatory powers.[234]

3.11 At the same time, it was highlighted in the French constitutional case law that public authorities may only impose sanctions within the mandate of public prerogative powers (*dans le cadre de prérogatives de puissance publique*) and within the limits of what is considered necessary for the achievement of the goals set in the (relevant) legal provisions (*dans le mesure nécessaire*). Moreover, such an imposition has to be accompanied by sufficient procedural safeguards, the so-called rights of the defence (*droits de la défense*), which are considered to

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229 Even the (recently) adopted 'Code of the relations between the public and public administration' (*Le Code des relations entre le public et l'administration* approved by the *Ordonnance n° 2015-1341 du 23 octobre 2015 relative aux dispositions législatives du code des relations entre le public et l'administration*) refrains from doing so.

230 M. Delmas-Marty/C. Teitgen-Colly, *Punir sans juger?: De la répression administrative au droit administratif penal* (1992), p. 11.

231 J. M. Sauvé, *La motivation des sanctions administratives* (2012), available at: https://www.conseil-etat.fr/actualites/discours-et-interventions/la-motivation-des-sanctions-administratives (accessed on 6 November 2020).

232 See Decision of *Conseil Constitutionnel* No. 84-181 of 11 October 1984. See also Delmas-Marty/Teitgen-Colly (n. 230), p. 30.

233 See n. 216. For further information, see Decisions of *Conseil Constitutionnel* No. 88-248 of 17 January 1989 and No. 89-260 of 28 July 1989.

234 Delmas-Marty/Teitgen-Colly (n. 230), pp. 16–18.

be part of the general principles of law according to the *Conseil d'État*.[235] The gist of these defence rights can best be summarized by the following excerpt from the French constitutional case law: "no sanction can be imposed without the applicant having had the opportunity to present his observations regarding the facts in relation to the accusation made and without access to the case file".[236] In this way, an equilibrium between the parties is ensured. In general, the French case law elucidates that an administrative sanction in this legal system is conceived as a "unilateral decision adopted by a public body within its competence with an aim to punish an offender"[237] or a "secondary outcome stemming from the breach of a primary obligation or its ignorance that is backed by coercion".[238] Thus, the prevailing conception of an administrative sanction in the French system, similarly to the German system, relies on its retributive dimension, understood as an *ex post* reaction to an infringement of law (the so-called *finalité répressive*).

3.12 The said procedural guarantees are not applied uniformly but depend on a particular type of an administrative sanction within this rather heterogeneous legal framework.[239] In parallel to the punitive (repressive) type of sanctions, which are considered to be the 'true' type of administrative sanctions, the French system also makes wide use of police measures (*mesures de police*), i.e. *ex ante* legal action taken by public authorities that is aimed at preventing an offence and/or enforcing public order as well as restitutive measures aimed at pecuniary compensation (*mesures fiscales*). The boundary between them, however, remains permeable, as is evinced by the abundant case law to this effect.[240] The fullest scope of procedural guarantees in line with Article 6 ECHR applies only to the former type of administrative sanctions, whereas the latter is subject to more relaxed standards.[241] Such a categorization with a view to attributing different levels of protection bears certain risks: it goes without saying that the 'perfect prototypes' of a particular legal tool exist only in theory. In practice, they tend to intertwine and sanctions often follow multiple objectives (cf. MN. 3.36 et seq.): for example,

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235 These rights have also influenced the procedural principles of EU law H. P. Nehl, *Principles of Administrative Procedural in EC Law* (1999), p. 70.

236 See Decision of *Conseil Constitutionnel* No. 88-248 of 17 January 1989 at [29].

237 Conseil d'État (ed.), *Les pouvoirs de l'administration dans le domaine des sanctions* (1995), pp. 35–36.

238 Sauvé (n. 231).

239 E. Breen, e.g., distinguishes three types of political configurations in which administrative sanctions are usually at play: 'authoritarian' administrative sanctions, diffuse administrative sanctions, and administrative sanctions as tools for independent agencies, E. Breen, "Country Analysis – France" in Jansen (n. 8), pp. 195–211 (pp. 202–208).

240 Delmas-Marty/Teitgen-Colly (n. 230), p. 46.

241 See on the guarantees 'à la carte' in Breen (n. 239), pp. 208–210.

the seizure of a car as a consequence of driving under the influence is classified as a police measure in French law[242] but from the perspective of an individual its 'repressive nature' is inevitable. Such 'varied' application of procedural guarantees at variance thus creates a danger to the protection of individual rights.

3.2.3. The British Approach: Reformation from Within

3.13 Sanctions imposed for committing breaches of administrative rules in the British legal system seem to have gone through the biggest 'teething pains' due to a rather late emergence of administrative law as a separate field of law and the absence of a formal separation between public and private law.[243] In fact, even today there is no specific statutory regime that applies to public administration on a general level in this country: instead, the whole system resembles a 'hotchpotch' of regulations relating to administrative bodies, which are charged with their own specific responsibilities.[244] These 'constitutional' and historical considerations have implications in the field of sanctioning: the British legal system was (over)reliant on criminal sanctions in order to respond to regulatory offences for a long time. Furthermore, the imposition of these sanctions, quite in contrast to the continental approaches described above, is not necessarily dependent on the determination of fault. Instead, the British legal system is well-known for its recognition of strict liability, i.e. liability without fault, which was developed in the 19th century and seemed to be particularly well-suited for sanctioning businesses within the industrial context, be it when dealing with the possession of adulterated tobacco or selling unsound meat.[245] Since regulatory law and its attendant sanctions were subsumed under criminal law, the British system was not confronted with the 'à la *Öztürk*' problem,[246] i.e. the application of differentiated procedural guarantees that the German and French systems had to navigate through.

3.14 However, this (over)reliance on the criminal law did not sit well with the public, as was identified in the groundbreaking report by the British Section of the International Commission of Jurists (Justice) of 1980. This report, among other things, stated that "people do not see the

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242 See M. Delmas-Marty/C. Teitgen-Colly, "*Vers un droit administratif pénal*?" in European Commission (n. 8), pp. 176–235 (pp. 192–193).

243 Fromont (2017, n. 207), pp. 597–599.

244 J. McEldowney, "Country Analysis – United Kingdom" in Jansen (n. 8), pp. 585–604 (p. 589).

245 G. R. Sullivan, "Strict Liability for Criminal Offences in England and Wales Following Incorporation into English Law of the European Convention of Human Rights" in A. Simester (ed.), *Appraising Strict Liability* (2005), pp. 195–218 (pp. 196–199).

246 L.H. Leigh, "United Kingdom: The system of administrative and penal systems" in European Commission (n. 8), pp. 353–373 (p. 359).

man who sells bananas off an unlicensed street barrow, or the motorist who forgets to sign his driving license … as 'criminals'".[247] In this way, the first impetus towards decriminalisation was given. This impetus took a more concrete shape after two more reports were issued decades later: The Hampton Review of 2005 commissioned by the Treasury and the Macrory Report of 2006 commissioned by the Cabinet Office.[248] These reports favoured a wider use of civil sanctions in cases of regulatory breaches and morphed into the Regulatory Enforcement and Sanctions Act of 2008, which introduced a diversified and more flexible range of sanctions that British administrative authorities may impose.

3.15 These sanctions took the form of fixed monetary penalties, variable monetary penalties, stop notices, compliance notices, and restoration notices. It can thus be claimed that even though this system did not recognize administrative sanctions to be an integral part of it, it eventually came to a realization about their indispensability and operationalized them in order to strengthen regulatory compliance. However, unlike other systems that were purposefully moving towards the codification of this legal tool, fuelled by rich doctrinal debates or yielding to supranational developments, the British system achieved reforms relevant to administrative sanctions mostly from within when the public realized that the law can easily make criminals of everybody.[249] At this juncture, it deserves to be noticed that some very innovative proposals crystalized during the reforms of regulatory sanctions in Britain, including the so-called corporate rehabilitation orders, which allow a business to offer the regulator its own proposals for responding to a breach (the so-called 'smart sanctions').[250] Moreover, negotiated penalty settlements were introduced, allowing the regulator and the suspected violator to bargain about the nature, scope and magnitude of the penalty itself. The underlying goal of these innovative responses is to enable public bodies imposing sanctions to make a flexible choice that reflects both the circumstances of the breach and the nature of the offender instead of being fixated on 'stigmatic punishment' as the only option.[251]

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247 British Section of the International Commission of Jurists (Justice), *Breaking the Rules: The Problem of Crimes and Contraventions* (1980), pp. 6–7. For a more recent example of going to prison for evading television license fees, see *Mort v the United Kingdom* (44564/98) 6 September 2001 ECtHR (dec.).

248 See P. Hampton, *Reducing Administrative Burdens: Effective Inspection and Enforcement* (2005) and R. Macrory, *Regulatory Justice: Making Sanctions Effective Final Report* (2006).

249 Macrory report (n. 248), p. 1. Of course, this development was not completely insular, as indicated by the temporal closeness to the general decriminalization movement in Europe, and comparative insights into other European legal systems in the Macrory report.

250 R. Macrory, "Reforming Regulatory Sanctions – Designing a Systematic Approach" in D. Oliver/T. Prosser/R. Rawlings (eds.), *The Regulatory State: Constitutional Implications* (2010), pp. 229–242 (p. 233).

251 Macrory (n. 248), p. 235.

3.16 The 'added value' of these innovative sanctioning instruments together with their potential to antagonise constitutional values[252] falls outside the scope of this thesis but it should nonetheless be noted that the British case is a paragon that shows how a distinctive approach may lead to the expansion of the palette of sanctions and the ways of imposing them. This, for its part, renders a sanctionary response to contraventions even more flexible – a development that is nothing but welcome in the administrative state characterized by a regulatory largesse. At the same time, the long reliance on criminal law in lieu of administrative punishment has led to rather specific problems, such as the practice of committal to prison for 'trivial' transgressions, which required an adequate response by the ECtHR (cf. MN. 5.74; 5.104).

3.3. Positivistic and Doctrinal Endeavours to Define Administrative Sanctions and Their Limits

3.17 The previous part depicted a rather varying notion of an administrative sanction on the European plane. Thus, when it comes to putting this notion down into a single definition it is rather unsurprising that the positive law mostly fails to do so. Neither the EU *acquis*[253] nor the majority of European (national) legal systems stipulates an across-the-board definition of administrative sanctions.[254] Recommendation No. R (91) 1 seems to be a rare exception in this regard and will be discussed below. It, however, bears significant limitations and, thus, one has to turn to the legal scholarship to look for more guidance on the matter.

3.18 This 'definitional indeterminacy' may be attributed to the variegated nature of administrative sanctions. In fact, most administrative sanctions are no longer 'administrative' in the sense that they do not guard the 'administrative order' *per se* but rather a patchwork of other specific interests.[255] Moreover, the diverse perceptions of this legal tool present further difficulties in terms of it being shoehorned into a single and catch-all definition. The subsequent part will, however, disclose a couple of endeavours in the recent legal scholarship to arrive at such

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252 Such as due process, transparency, accountability, legality – to name but a few. See more on the constitutional tension that these measures generate in Yeung (n. 200), pp. 318–319.

253 No 'unional' concept of an administrative sanction can be found in EU's primary or secondary law. The Regulation No. 2988/95 of 18 December 1995 on the protection of the European Communities financial interests which establishes common horizontal rules governing the application of sanctions for the protection of EU's financial interests (henceforth 'Regulation No. 2988/95'), provides a list of such sanctions but not an exhaustive definition. For a doctrinal endeavour to deduce a definition within this normative framework see Bitter (2011, n. 13). See further de Moor-van Vugt (n. 13), pp. 12–15.

254 The Dutch legal system can be said to be an exception, in which the systematic definition of administrative sanctions is enshrined in Art. 5:2 of the General Administrative Act of the Netherlands (*Algemene wet bestuursrecht*), see more in O. Jansen, "Country Analysis – the Netherlands" in Jansen (n. 8), pp. 317–466 (pp. 319 et seq.).

255 Delmas-Marty/Teitgen-Colly (n. 230), p. 36.

definitions by using different methods and parameters as well as the limitations of such endeavours. At the same time, it should be kept in mind that the lack of a clear-cut definition may be a sign of strength rather than weakness, since it implies more flexibility in that administrative sanctions are able to capture a very broad range of responses to transgressive behaviour. This leads to the claim that such 'definitional indeterminacy' is not 'indeterminacy' at all, but rather a wilful omission.

3.3.1. Administrative Sanctions in Recommendation No. R (91) 1

3.19 The most salient and topically related normative source in the field of administrative punishment within the framework of the CoE was adopted by the Committee of Ministers (CM) on 13 February 1991, i.e. Recommendation No. R (91) 1 on administrative sanctions. A critical observer might draw attention to the fact that this Recommendation was drafted three decades ago as well as to its 'soft law' nature and express doubts about its significance. This claim can be rebutted on several accounts. Firstly, although not legally binding *stricto sensu*, this Recommendation is instrumental because not only does it reveal the European consensus on the matter but the governments of the CoE Member States may also be requested to inform the CM of the CoE of the actions taken with regard to such recommendations, implying a sort of 'comply with or justify' duty on them.[256] Secondly, even though Recommendation No. R (91) 1 is by no means novel, it is still relevant today because it has "political and moral authority by virtue of each member state's agreement to their adoption … and the extent to which they are widely applied in the law, policy and practice of member states"[257] since the adoption of these legally non-binding acts (paradoxically) requires unanimity.[258] What is more, in 1994 the gentleman's agreement was concluded that dissenting CoE Member States shall not block the adoption of CM Recommendations provided that there is a consensus among the majority of the CoE Member States on the matter. This resulted in *de facto* majority decision-making.[259]

3.20 Finally, the CM recommendations are able to serve as a tool for interpreting the ECHR provisions and rendering their meaning more concrete. The *Demír and Baykara* method

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256 As stipulated by Article 15 (b) of the Statute of the Council of Europe, see more in Andrijauskaitė (n. 19), p. 43; see also Stelkens/Andrijauskaitė (n. 7), MN. 1.07 et seq.; 31.108 et seq.

257 Council of Europe (n. 15), p. 6.

258 de Vel/Markert (n. 27), p. 347. See more in M. Wittinger, *Der Europarat: Die Entwicklung seines Rechts und der "europäischen Verfassungswerte"* (2005); H. Jung, "Die Empfehlungen des Ministerkomitees des Europarates – zugleich ein Beitrag zur europäischen Rechtsquellenlehre" in J. Bröhmer/R. Bieber/C. Callies/C. Langenfeld/S. Weber/J. Wolf (eds.), *Internationale Gemeinschaft und Menschenrecht – Festschrift für Georg Ress* (2005), pp. 519–526 (pp. 522 et seq.); N. Vogiatzis, "The Relationship Between European Consensus, the Margin of Appreciation and the Legitimacy of the Strasbourg Court", (2019) 25 *European Public Law*, pp. 445–480.

259 Stelkens/Andrijauskaitė (n. 7), MN. 31.111.

(sometimes dubbed a 'globalized' method of interpretation) described above[260] enables their transformation into hard law by allowing for taking them together with other non-binding instruments capable of denoting a consensus on the impugned matter into consideration whilst interpreting ECHR norms despite their 'soft' nature.[261] In fact, the CM recommendations, by the time of their adoption, were a 'revolutionary idea' because the administrative legal systems of the CoE Member States were mostly self-contained;[262] hence, these acts may offer a unique glimpse into the very origins of the pan-European standards of administrative sanctioning as the CoE Member States transferred their national experiences directly to the CoE level. The CM recommendations moreover refer to and build on one another, ensuring both the coherence of legal institutions already developed and their furtherance in order to be better equipped to meet the new forms of challenges in administrative law.[263] This truly reflects a common European heritage on the core matters of administrative law and (at least in part) the concretization of the values enunciated in Article 3 of the SCoE. In a similar vein to Article 53 ECHR, however, there is nothing to prevent the Member States from applying even higher standards of individual protection than those listed in this Recommendation (cf. MN. 1.12).

3.21 As hinted at in the preceding chapter, Recommendation No. R (91) 1 is one of the few normative acts in which a positivistic definition of an administrative sanction can be found (cf. MN 3.17). This definition is woven into the provision that delineates the scope of application of this recommendation before listing the range of (somewhat flexible in comparison with criminal law)[264] principles that administrative sanctioning should be subjected to:

> "This recommendation applies to administrative acts which impose a penalty on persons on account of conduct contrary to the applicable rules, be it a fine or any punitive measure, whether pecuniary or not… These penalties are hereinafter referred to as administrative sanctions"

3.22 Despite being self-referential – defining a penalty through a fine or any punitive measure, i.e. by using synonyms – and not expounding upon any of the ontological traits of administrative sanctions as such, this definition reveals that Recommendation No. R (91) 1 conceives them in a broad way. In fact, any punitive measure, provided that it is imposed on account of conduct

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260 For the acceptance of this approach see n. 19.

261 Stelkens/Andrijauskaitė (n. 7), MN. 1.53.

262 Stelkens/Andrijauskaitė (n. 7), MN. 31.19.

263 Stelkens/Andrijauskaitė (n. 7), MN. 1.75 et seq.

264 The recommendation concedes that the requirements of good and efficient administration, as well as major public interests, may modify one or more of these principles but they should nonetheless be followed to the greatest extent possible according to the general aims of this recommendation.

that is contrary to the rules applicable in an administrative act and does not fall into the category of measures explicitly taken out of its scope (namely, disciplinary measures[265] and measures that administrative authorities are obliged to take as a result of criminal proceedings), is understood as an 'administrative sanction'.

3.23 However, administrative measures impinging upon individual interests but serving the aim of preserving other public interests, such as a refusal to grant licenses if the applicant does not fulfil certain criteria, remain outside the scope of this recommendation, as its explanatory memorandum makes clear (cf. MN. 3.46).[266] The term 'administrative act' has to be read in conjunction with other recommendations of the CoE, in particular with Resolution (77) 31 on the protection of the individual in relation to acts of administrative authorities, of 28 September 1977.[267] This should be understood as covering not only acts adopted by administrative authorities but in fact any acts "taken in the exercise of public authority",[268] hence, legitimizing the practice of outsourcing administrative sanctioning to private actors (cf. MN. 3.101 et seq.).

3.24 The nature of the effect of administrative sanctions on the individual, for its part, is immaterial ("whether pecuniary or not"); furthermore, it is not restricted by any other qualitative parameters, such as the criteria of 'significant detriment', 'severity' or the like. The terms 'punitive' and 'penalties' used in the wording indicate that Recommendation No. R (91) 1 is not intended to encompass either compensatory (remedial) or preventive sanctions. These terms semantically concord with words like 'punish' and 'criminal', which are used in the relevant ECHR provisions. Furthermore, this seems to be in line with the teleological aim declared in its preamble, which can be summarized as the wish to ensure the protection of the individual in view of the marked tendency towards decriminalization by submitting administrative sanctions to additional guarantees. As will be demonstrated below, such a conception of administrative sanctions is also in consonance with the one found in the case law of the ECtHR.

3.3.2. Phenomenological and Teleological Approaches

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265 This *a fortiori* means that Recommendation No. R (91) 1 also does not apply to measures taken by an administrative authority with respect to its staff in order to penalize the behaviour of the latter, CoE (n. 8), p. 460.

266 See more in CoE (n. 8), pp. 459–460.

267 See more in CoE (n. 8), p. 459.

268 The same wording appears in other CoE documents, e.g., in Article 1 (2) a) of the Convention on Access to Official Documents of 18 June 2009 *inter alia* stipulating that "public authorities" are "natural or legal persons insofar as they exercise administrative authority".

The current scholarship offers a rather scant selection of doctrinal explorations aimed at defining administrative sanctions conceived within supranational or multiple legal frameworks, i.e. not in particular national legal systems. The first (more elaborate) one can be found in the edited collection entitled "Administrative Sanctions in the European Union" by O. Jansen of 2013, which provides an overview of the sanctioning systems in 13 EU Member States.[269] The very first chapter written by C. E. Paliero is dedicated to extracting the definition of an administrative sanction.[270] The author tries to define administrative sanctions in the said research field both phenomenologically and – what he calls – typologically (albeit the latter should not be understood as a definition crafted by subsuming the various aims of administrative sanctions, cf. MN. 3.33 et seq.). Using the first method, Paliero arrives at the following definition: an "administrative sanction is in effect any form of reaction by the public administration to the violation of a precept".[271] Elsewhere in his contribution he adds that this reaction has to relate to something which is "disadvantageous for the offender".[272] The main issue with this definition (as admitted by the author himself) is, however, the fact that it was given to the contributors of the research project beforehand in order for them to be able to identify and analyse (the many declinations of) administrative sanctions found in their national legal systems. Hence, it served a functional purpose. Logically, the broadest possible picture was most welcome for this purpose and the research question was shaped accordingly. This definition was, for lack of a better word, 'pre-cooked' and cannot be considered to be the (deductive) outcome of the surely ambitious comparative quest that this book undertook in the field of administrative sanctioning.

3.26 By being framed so broadly, this phenomenological definition bears another caveat: if an administrative sanction is described as 'any form' of reaction by the public administration then it remains unclear as to what, for example, the difference is between 'administrative sanctions' and 'disciplinary measures' that also happen to sometimes be imposed by the public bodies. Some sort of *ratione personae* qualifier would have been beneficial in this regard. In the remainder of his contribution, the author seems to be inconclusive on this point,[273] although this matter is far from trivial, as the ECtHR itself remains fuzzy and inconsistent in distinguishing between the two categories and applying Article 6 ECHR to them (cf. MN. 4.20 et seq.).

269 Jansen (n. 8).

270 Paliero (n. 217).

271 Paliero (n. 217), p. 3.

272 Paliero (n. 217), p. 2.

273 Paliero (n. 217), pp. 19–20.

Furthermore, it is not entirely clear what a violation of a precept is, to which the author refers, and whether it can be applied to preventive sanctions. More precisely, as the subsequent part of this thesis will elicit (cf. MN. 3.43 et seq.), a preventive administrative sanction can be imposed even without an actual violation of a legal rule in order to evade imminent danger. Sure enough, the imposition of such a sanction will be conducive to safeguarding vital public interests but it seems to be a logical fallacy to claim that a violation of a precept is a necessary condition for its imposition because no concrete precept[274] may have been violated at the moment when a preventive sanction was imposed. In fact, claiming otherwise may defeat the very purpose of prevention. Thus, to claim that an omission by not paying sufficient heed to the possible danger has occurred from the side of the offender in such cases and has to be visited upon by a sanction seems to be more accurate. Finally, inserting the formulation 'violation of a *precept*' into the definition of an administrative sanction produces another prickly question relating to the principle of legality – should this precept be of a statutory nature or is any type of precept, for example, the one stipulated by a public body itself, suffice to justify the triggering of a coercive reaction by the state?

3.27 The second method that Paliero invokes, comprising two sub-methods, i.e. the analysis of positive law and the teleological method, to derive the definition is way more complex, since he painstakingly reviews a series of criteria of administrative sanctions in various national legal systems and presents a synopsis of them in the form of a conceptual table. These criteria include the 'degree of differentiation' between administrative and criminal sanctions as well as other forms of reaction by public bodies to the violation of a precept, the level of codification and its relationship with the legality principle, a typology of sanctions and various indictment criteria. It transpired from this doctrinal endeavour that countries that have a high degree of differentiation of administrative sanctions from other sanctions and separate codes tend to define administrative sanctions in the strict sense, i.e. conceiving administrative sanctions predominantly as punishment.[275] The inverse trend can also be said to be true: countries with a low degree of differentiation define and conceptualize administrative sanctions more loosely.[276] However, despite systemizing crucial characteristics of the 'true' nature of an administrative sanction and mapping out their conceptual tendencies in various legal systems, this type of

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274 Except for the general obligation to refrain from putting society in danger by one's behaviour or omission.

275 *Locus classicus* in this regard is Germany, cf. MN. 3.07 et seq.

276 In some countries, such as the UK, at least up until recently, this resulted even in a complete conceptual blur, i.e. administrative sanctions which were capable of being perceived as both criminal and civil sanctions depending on the concrete aim that they are pursuing (punitive or remedial), Paliero (n. 217), p. 32.

analysis seems to resemble a 'taxological' rather than a 'definitional' exercise. This is compounded by the fact that the conceptual table (a synopsis of the said criteria) that the author provides at the end of the chapter is only comprehensible to those who are familiar with the underlying methodology of his endeavour. In other words, it is not a succinct overview of what a (European) administrative sanction really is.

3.3.3. A Typological Approach

3.28 Another doctrinal endeavour aimed at defining administrative sanctions in the European law is found in the collective book of 2013 dedicated to the exploration of the blur between criminal and administrative law.[277] One of the contributors – P. Caeiro – in his chapter entitled, "The influence of the EU on the 'blurring' between administrative and criminal law",[278] provides the reader with a definition(s) of administrative sanctions against the backdrop of his inquiry into the haziness of the boundaries between administrative and criminal law. The author, however, seems to elegantly evade the problem of arriving at one definition of an administrative sanction by presenting sub-definitions depending on the particular aim that an administrative sanction may pursue.

3.29 For instance, he defines restorative measures as those that "bring things back to the *statu quo ante*, i.e. the situation in which the concrete public interest affected was before the failure to comply or collaborate […]".[279] Preventive measures, for their part, are to be conceived as measures that "aim to prevent danger from turning into damage. The particular feature of these measures is that they are based on an unlawful act or omission which causes an [actual or potential] danger to the public interest […]."[280] Finally, punitive measures are "admonitions, pursuing general and individual deterrence, in contrast to criminal punishment, the particular feature of which lies in the purpose of reassuring society at large as to the validity and effectiveness of the norms protecting valuable legal interests […]. They also pursue a punitive purpose (*lato sensu*) in the sense that, contrary to the previous categories, they are intended as a response *caused by the act itself*, not by the damage or by the dangerous situation produced by the act".[281]

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277 Galli/Weyembergh (n. 1).

278 P. Caeiro, "The influence of the EU on the "blurring" between administrative and criminal law" in Galli/Weyembergh (n. 1), pp. 171–190.

279 Caeiro (n. 278), p. 173.

280 Caeiro (n. 278), p. 173.

281 Caeiro (n. 278), p. 174.

3.30 By enunciating the latter bit, the author has managed to grasp the condemnatory character of punitive administrative sanctions very well. Moreover, he underscores what is sometimes overlooked in other scholarly works, i.e., firstly, that administrative sanctions are not self-serving devices (punishment for punishment's sake) placed exclusively within the paradigm of retributivism but have meta-goals stemming from the general rationale of administrative law. More precisely, they facilitate the validation and preservation of goods that are vital for societal cohabitation. Secondly, Caeiro is very clear on what distinguishes punitive administrative sanctions from other types of sanctions; it is the pivot of punitive administrative sanctions towards responding to the transgression of a rule itself and not towards its detrimental by-products, such as damage (that remedial sanctions aim to repeal) or danger (that preventive sanctions aim to preclude). Moreover, these sub-definitions are valuable in that they provide a good overview of the specificities that are characteristic to administrative sanctions.

3.31 Indeed, the whole of these specificities could be said to express the very essence of an administrative sanction. At the same time they appear to be somewhat tautological ("measures are measures") and do not identify either the salient features of a sanction as a *coercive* reaction (whatever aim it is seeking to achieve) or its source (which bodies have the authority to impose sanctions, cf. MN. 3.101 et seq.). Finally, by breaking down the definition of an administrative sanction into different categories the author disregards its hybridity as a matter of fact (cf. MN. 3.12 et seq.). In other words, a sanction pursuing punitive and remedial aims is no less a sanction than a single-aimed sanction and the lines between the different categories tend to blur. This development thus deserves conceptualization in its own right. The following part will elaborate on this in a more detailed way.

3.4. (The Relative) Taxonomy of Administrative Sanctions

3.32 Having examined a couple of doctrinal endeavours aimed at defining an administrative sanction, it is worth taking a closer look at their typology. More precisely, the most prevalent typology of administrative sanctions according to the aims that they follow will be explored by giving concrete examples. This will be followed by an overview of administrative sanctions according to their 'tradition' and 'utilization' – be it historically or constitutionally determined; providing such an 'autonomous' typology became necessary in the course of the research due to the recurring pitfalls that such national idiosyncrasies bring about in the case law of the ECtHR. Alternative typologies of administrative sanctions 'by form', 'by the legal goods (values)' that they seek to protect or by other parameters (such as the primacy or

complementarity of sanctions as well as the variation in their duration) will not be a subject of the current discussion.[282]

3.4.1. Administrative Sanctions by Their Aims

3.33 As highlighted in the introduction to this thesis, administrative sanctions are variegated legal tools; hence, listing all of the varieties of forms that they can potentially take – apart from a taxonomic value – does not really reveal their *quidditas*. The same can be said with regard to attempts to differentiate sanctions according to the legal goods (values) that their imposition seeks to impact (such as property or reputation). Usually, these legal goods cannot easily (if at all) be divorced from one another, i.e. a pecuniary administrative sanction will primarily target the assets of the transgressor but at the same time it may (and most likely will) impact her reputation in society. Conversely, a sanction primarily aimed at the reputation of the transgressor (such as a 'naming and shaming') will probably have a ripple effect on her future earnings or even employment opportunities *de facto* or *de iure*, as sometimes happens in the (extreme) case of lustration-proceedings (cf. MN. 5.68), and hence her financial assets. In fact, this type of sanction has often been described as a 'loose cannon' because the extent of the damage it may cause can hardly be estimated, especially in the business context, where the trust of creditors, employees and consumers is essential.[283]

3.34 The typology 'by aim', for its part, even if it remains relative as well, is more telling in conceptual terms. More precisely, three main types of administrative sanctions can be distinguished – punitive, preventive and remedial. The 'aim', i.e. the wishful normativity of a sanction, for the purposes of this classification, will be used synonymously with the 'function' although there is a theoretical discussion going on about the need to separate the two in certain contexts.[284] The particular aim of a sanction should ideally be indicated by the legislator, i.e. transpire from *travaux préparatoires*[285] because any type of sanctioning in a modern legal system ought to be clearly devised and well-deliberated[286] but – it goes without saying – that

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282 See, e.g., R. Stankiewicz, "Administrative Sanctions as a Manifestation of State Coercion", (2017) *Wrocławskie Studia Erazmiańskie*, pp. 267–279 (pp. 272 et seq.).

283 Ransiek (n. 56), pp. 355–356.

284 See, e.g., Partly Concurring and Partly Dissenting Opinion of Judge Kūris in *Rola v Slovenia* (12096/14 and 39335/16) 4 June 2019 ECtHR at [20] – [23].

285 Heitzer (n. 13), p. 39.

286 See, e.g., on the concept of responsive regulation and parsimony in punishment I. Ayres/J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992); J. Braithwaite, "The Essence of Responsive Regulation", (2011) 44 *University of British Columbia* 3, pp. 475–520. See further L. Bonnaud, "Comment théoriser l'action répressive des services d'inspection ? Origines et critiques de la

there are many cases in which this is not possible and the judiciary is left with the task of discerning the actual nature of a sanction, interpreting its 'true meaning' and dispelling any doubts in this regard.[287] Hence, an indication of the primary nature of a sanction as indicated by the legislature is a significant, but by no means decisive, factor for the judiciary. The ECtHR itself turns to and relies on the aim of legislation in adjudicating, when this is deemed to be useful, even if somewhat cautiously.[288] It is noteworthy that the ECtHR does not search for a 'pure purpose' but rather looks at the dominant purpose and the specific circumstances of the case.[289]

3.35 Mapping out the exact type of an administrative sanction 'by aim' is furthermore important not only because it reveals the ontological traits of that particular sanction but also because it has normative implications, i.e. the classification of a sanction is very often relevant for the procedural safeguards accompanying its imposition. Moreover, it is a factor that can be relevant for the differentiation between criminal and administrative sanctions as well as the application of the *ne bis in idem* rule as the determination of a sanction's aim is one of the criteria that the ECtHR uses to verify whether parallel punitive proceedings are allowed (cf. MN. 6.29). The ECtHR, for its part, places an emphasis on the 'punitive and deterrent' purpose of administrative sanctions when it comes to placing them within the scope of ECHR guarantees (cf. MN. 4.31 et seq.). At the same, this typology should be treated with considerable caution because its value is relative. It is rather usual for administrative sanctions to serve multiple functions at the same time.

3.36 Hence, very often sanctions are in fact 'hybrid', i.e. capable of encompassing and pursuing different aims, e.g. having punitive and remedial purposes or having punitive and preventive purposes or having remedial and preventive purposes or even having all of these purposes at the same time. An example belonging to the first category would be custom fines,[290] whereas

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notion de responsive regulation", (2019) *Revue de science criminelle et de droit pénal comparé*, pp. 65–74. See also on penal minimalism in Hayes (n. 151).

287 The ECtHR, for its part, also includes the function attributed to a particular sanction by domestic judiciary into its assessment, see, e.g., *G.I.E.M. S.r.l. and Others v Italy* (1828/06 et al.) 28 June 2018 ECtHR [GC] at [223].

288 For the need to enunciate the aim of a sanction in preparatory works see, e.g., *Petersen v Denmark* (24989/94) 14 September 1998 CHR (dec.) [Plenary]; See further, e.g., *Guisset v France* (33933/96) 9 March 1998 CHR (dec.) [Plenary].

289 B. Bahçeci, "Redefining the Concept of Penalty in the Case-law of the European Court of Human Rights", (2020) 26 *European Public Law* 4, pp. 867–888 (p. 879).

290 See, *mutatis mutandis*, *Jamil v France* (15917/89) 8 June 1995 ECtHR at [14] stating that "custom fines have always been regarded as hybrid measures, with elements of both compensation and punishment". See further *Göktan v France* (33402/96) 2 July 2002 ECtHR at [58]. See also *Salabiaku v France* (10519/83) 7 October 1988 ECtHR.

an example belonging to the second category would be the confiscation of a car after the establishment of driving under the influence or the suspension of a driver's license for other offences – both serve preventive and punitive aims.[291] In fact, a strong indication of which aim is dominating with regard to suspending a driver's license is the amount of time that elapses between the offence and the sanction. The more time that passes before the sanction is imposed, the more probable it is that the suspension of the driver's license will serve as a penalty.[292] Fines, which predominantly aim to repair the damage caused, and prevent the continuation of the damage typical to environmental or spatial planning law domains could be further indicated as belonging to the third category.[293] Finally, as explicated by the ECtHR, sometimes the aims of prevention and reparation are consistent with a punitive purpose and may be perceived as constituent elements of the very notion of punishment.[294] Hence, the coexistence of all three aims is also possible in the sanctioning context.

3.37 There seems to be no credible way to somehow quantify and 'extract' the dominant aim of 'hybrid' sanctions in a cross-cutting manner; hence, their binary or even triple nature should be acknowledged and assessed within a particular legal framework. This means that the legislative intent is extremely important here – the imposition of a sanction should not happen without dissecting the 'real' aim(s) of the lawmaker, which can only be construed in a systemic and contextualized manner, i.e. duly acknowledging the 'teleological whole' behind a sanction. Furthermore, for the individual on whom an administrative sanction has been inflicted it is of little importance how a particular sanction is classified as the 'grey zones' of this typology demonstrate.[295] What appears to be more significant in this regard is the severity of a sanction,

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291 See *Atyukov v Russia* (74467/10) 9 July 2019 ECtHR in which the applicant's driving license was suspended after he failed to take a breath test. See further *Starkov and Tishchenko v Russia* (54424/14 and 43797/16) 17 December 2019 ECtHR; *Belikova v Russia* (66812/17) 17 December 2019 ECtHR.

292 Bahçeci (n. 289); See *Escoubet v Belgium* (26780/95) 28 October 1999 ECtHR for an immediate and temporary withdrawal of the driver's license that was deemed to be a preventive sanction. See for a contrary conclusion, when there was a time gap between the offence and the withdrawal of a driving license, which was perceived as a retribution by the ECtHR in *Nilsson v Sweden* (73661/01) 13 December 2005 ECtHR (dec.).

293 See, e.g., *Valico S.r.l. v Italy* (70074/01) 21 March 2006 ECtHR (dec.) in which pecuniary indemnities stipulated for breaches of building regulations corresponded to the damage caused but at the same time were intended to deter people from constructing buildings in breach of laws protecting the landscape and the environment.

294 See, e.g., *Welch v the United Kingdom* (17440/90) 9 February 1995 ECtHR at [30].

295 A good example in this regard are anti-terrorism measures, such as freezing of funds, which was adopted by the Security Council of United Nations (UN). Technically, they are not even classified as 'sanctions' by the UN but are perceived as "preventive in nature" or "temporary precautionary measures". However, it goes without saying that these sanctions are derivatives from very serious crimes and the freezing of funds causes an obvious detriment to the individual concerned, see more in G. della Cananea, "Global Security and Procedural Due Process of Law Between the United Nations and the European Union: *Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council*", (2009) 15 *The Columbia Journal of*

i.e. a particular detriment (adverse effect) that an individual has to bear as a consequence of her contravention, which can be appreciated by its duration, harshness to particular interests, what procedural safeguards the individual may expect and other intrinsic considerations.

3.4.1.1. Punitive Administrative Sanctions

3.38 Punitive administrative sanctions are the bluntest and most straightforward manifestation of administrative repression. They act retrospectively in that they seek to retaliate for administrative wrongs that have already been committed by imposing an adverse measure as well as expressing condemnation of the wrong. The emphasis here lies more (but not exclusively) on the transgression – as an act of breaching legal provisions calling for reprobation – itself rather than on its by-products, such as the damage actually caused or a further danger that a particular administrative offence may cause (cf. MN. 3.26). These sanctions are, thus, based on the idea of retributive justice[296] and are associated with the criminal law paradigm of liability. Hence, a connection between an administrative offence and a sanction is indispensable – a maxim (already) rudimentarily conceived by Thomas Hobbes and above all highlighted by one of the greatest 'sanctionists', Hans Kelsen (cf. MN. 2.17). Moreover, the procedural safeguards accompanying these types of sanctions are also more stringent. This is meant to counterbalance bigger detriment which is typically placed on the individual by imposing these types of sanctions. Above all the establishment of personal liability (cf. MN. 7.29 et seq.) before imposing such a sanction is essential. This can be succinctly explained by the fact that punishment "makes little sense unless those who are punished are indeed responsible for the wrongs that trigger a punitive response".[297]

3.39 Personal liability, however, should not be equated with the requirement to determine the guilt or negligence of the offender in all events: in fact, historically removing the guilt from *corpus delicti* was one of the hallmarks of the then 'new' system of administrative punishment (cf. MN. 4.06). Alongside retribution, punitive administrative sanctions may also subsume and pursue remedial aims but this is not always the case. They should, however, in accordance with the rule-of-law ideals, embrace the objective of deterrence at all times,[298] i.e. general and

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European Law 3, pp. 511–530 (p. 514). Also see F. Galli, "The freezing of terrorists' assets: preventive purposes with a punitive effect" in Galli/Weyembergh (n. 1), pp. 43–68.

296 Kidron (n. 206), p. 328.

297 G. F. Fletcher, "Punishment and Responsibility" in Patterson (n. 197), pp. 504–512 (p. 509).

298 A good example thereof is the approach taken by the European Commission in setting fines for antitrust breaches: "The fines that we impose also send a message that deters future offences and forces executive culture change. In this way, fines are also an effective signal to the dozens of other would-be cartelists and rule-breakers.... It is therefore essential that we send the strongest possible signals about the value of the single market and competition. Fines are that signal", Opening speech of Competition Commissioner

individual prevention aimed at protecting society from future offences – both of which are typical qualities of criminal penalties.[299] Some scholars even claim that (the contemporary understanding of) punishment equates to deterrence[300] – an idea that can also be affirmed in the context of this analysis, since the ECtHR requires that sanctions are both 'punitive and deterrent' in order for them to make the cut and fall within its ambit (cf. MN. 4.31 et seq.).

3.40 Administrative fines, for their part, can be claimed to be a punitive administrative sanction *par excellence* due to their well-pronounced retributive element regarding the wrongdoer as well as their proliferation in various legal systems. Namely, by placing an additional financial burden on the offender and depriving him of certain assets, a public authority 'monetizes' such retribution. Beside administrative fines, the confiscation of money or goods also represents a punitive measure with clear pecuniary effects.[301] The European courts, however, do not view the latter measure favourably if it is imposed together with fines.[302] In any event, punitive administrative sanctions can be exclusively non-pecuniary or embrace certain non-pecuniary elements and impinge upon other interests of an individual such as freedom in its broadest sense (except for imprisonment, which is usually reserved for the criminal law domain).[303]

3.41 An administrative reprimand can be said to fall into the first category, since it affects only the 'dignitarian' interests of a person such as their reputation (cf. MN. 4.39). Another example

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Neelie Kroes at the International Bar Association conference: 'Private and public enforcement of EU competition law – 5 years on' of 12 March 2009.

299 Schwarze (n. 216), p. 101.

300 This idea has been reverberating already since the days of the natural law theory (cf. MN. 2.06) and Thomas Hobbes (cf. MN. 2.07). See also *ex multis* D. S. Nagin, "Deterrence in the Twenty-First Century", (2013) 42 *Crime and Justice* 1, pp. 199–263.

301 See, e.g., *Balsytė-Lideikienė v Lithuania* (72596/01) 4 November 2008 ECtHR in which a number of undistributed copies of the calendar published by the applicant was confiscated as posing a danger to the society. See more n. 331.

302 See in this regard, e.g., *Ismayilov v Russia* (30352/03) 6 November 2008 ECtHR at [45], *Tanasov v Romania* (65910/09) 31 October 2017 ECtHR at [28] and *El Ozair v Romania* (41845/12) 22 October 2019 ECtHR at [26], in which such measures were deemed to constitute a disproportionate reaction of the State to the infringed customs regulations. See further preliminary ruling in the joined cases of *AK* and *EP* (C-335/18 and C-336/18) 30 January 2019 CJEU in which it was considered that an overall penalty consisting of a fine and a confiscation of the entire sum of undeclared cash was not proportionate to the aims sought. Cf. also constitutional tensions that the confiscations of property creates on the domestic level in Delmas-Marty/Teitgen-Colly (n. 230), p. 52.

303 Or at least it should be. The possibility of imprisonment provided by relevant legal provisions prescribing a liability for the offence, regardless of how small the imposed sanction actually is, always triggers the determination of the the 'criminal charge' by the ECtHR. In the case of *Grecu*, e.g., it was the equivalent of "[the price of] ten kilograms of meat", *Grecu v Romania* [75101/01] 30 November 2006 ECtHR at [48]. The same goes for a possibility of converting unpaid pecuniary fines into a prison sentence at the enforcement stage (see to this effect *Anghel v Romania* [28183/03] 4 October 2007 ECtHR at [43], [52] and [61]; *Bendenoun v France* [12547/86] 24 February 1994 ECtHR at [47]). See more on this presumption in *Sergey Zolotukhin v Russia* (14939/03) 10 February 2009 ECtHR [GC] at [56].

of this is publishing a statement that a company has been engaged in an unfair practice, such as market abuse (so-called 'naming and shaming', which also serves the function of informing and dissuading the public at large from committing administrative offences).[304] Finally, orders to stay away from certain places, so-called area-based restrictions, ordered by the executive, could also be mentioned in this regard, if they are imposed as a *post hoc* reaction to an offence already committed.[305] If they are imposed *ex ante*, i.e. as a preventive measure, this shall not constitute a penalty but (potentially) represent a permissible restriction of movement as stipulated by Article 5 ECHR. As will be shown below, these non-pecuniary elements and the subjective ramifications that such sanctions might cause are sometimes unduly dismissed in the case law of the ECtHR (cf. MN. 4.50).

3.42 When it comes to punitive sanctions embracing 'mixed' elements, so-called professional bans, by which a person's right to carry out their professional activities is suspended, can be distinguished. Such a ban not only diminishes or eliminates their future earnings altogether but also affects the non-pecuniary interests of the individual, i.e. professional honour and reputation, to name but a few.[306] The subsequent analysis will, however, show that professional bans, despite their dense retributory content and tremendous effects on the individual, are not always consistently interpreted in the case law of the ECtHR, as they can also be perceived as 'disciplinary sanctions' that fall outside the criminal scope of the ECHR (cf. MN. 7.16). Finally, a further range of other punitive administrative sanctions belong to this in-between category, i.e. they are able to potentially hurt both pecuniary and non-pecuniary interests. For example, so-called 'corrective work' (if not regulated within the penal framework), whereby a transgressor is required to perform a prescribed number of hours of community work, indirectly implies a pecuniary element, since a certain amount of time is taken away from the transgressor together with her free will in an abstract sense. That same logic goes for bans on driving or the

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304 See more in B. Harris/A. Carnes/G. Byrne, *Disciplinary and Regulatory Proceedings* (2002), pp. 428–430. Such type of sanction is stipulated, e.g., by Article 34 of Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse ('Market Abuse Regulation') as well as Article 68 of the Directive (EU) No. 2013/36/EU of 2014 of the European Parliament and of the Council on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC of 26 June 2013 ('Capital Requirements Directive').

305 The said area-based restrictions may as well be issued pre-emptively and be directed towards the "maintenance of the public order and the prevention of crime", see for a discussion in L. Todts, "The Legitimacy of Area-Based Restrictions to Maintain Public Order: Giving Content to the Proportionality Principle from a European Legal Perspective", (2017) *Rocznik Administracji Publicznej*, pp. 128–155.

306 As enunciated by the ECtHR in the case of *Grande Stevens and Others v Italy* (18640/10) 4 March 2014 ECtHR [GC] at [122].

docking of driving license points that may lead thereto, i.e. the deprivation of the right to drive a motor vehicle is capable of impeding both pecuniary and non-pecuniary interests.[307]

3.4.1.2. Preventive Administrative Sanctions

3.43 In contrast to punitive administrative sanctions, preventive administrative sanctions are *ex ante* measures aimed at precluding a certain danger or ensuring other public interests that administrative law strives to protect pre-emptively. They sit in close connection with the 'police power', which uses prevention and remedy as a primary type of interference.[308] The distinctive feature of these sanctions is the fact that their imposition may be detached from an actual offence altogether except for cases where they are a subsequent and additional reaction to an offence that has already been penalized. Hence, the 'Kelsenian link' described above is broken (cf. MN. 2.17). As will be demonstrated below, sanctions of the former type fall outside the pan-European conception of an administrative sanction (cf. MN. 4.35 et seq.), although they may come within the ECHR's ambit by means of the 'civil' limb of Article 6 ECHR or substantive rights in other ECHR articles.[309]

3.44 Another distinguishing feature of preventive administrative sanctions is the fact that their duration is sometimes indeterminate, whereas the effect of punitive sanctions should be determined *a priori*. This is due to the fact that it is not always possible to tell when, for example, the specific legal situation will be restored. The duration, however, should at all times be kept to what is 'proportionate' given the particular circumstances.[310] In fact, 'pure' preventive administrative sanctions are provisional at their core and ought to be lifted once the danger whose eradication they target is gone or a particular legal duty has been responded to, whereas punitive *post hoc* sanctions should, as a matter of principle, remain imposed for a specified amount of time. However, according to the ECtHR, sometimes there is in fact no contradiction between the two goals mentioned above – a sanction can seek to punish as well

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307 See on the docking of points from driving licenses and the implications stemming therefrom *Malige v France* (27812/95) 23 September 1998 ECtHR at [39].

308 M. D. Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (2005), p. 158.

309 See, e.g., *Fischer v Austria* (16922/90) 26 April 1995 ECtHR concerning a revocation of a license due to a dangerously high level of toxins affecting a reservoir of drinking water (the case was admitted under the 'civil limb' of Article 6 ECHR); see also *Megadat.com SRL v Moldova* (21151/04) 8 April 2008 ECtHR, in which a license to run a business was termined by the Moldovian National Regulatory Agency for Telecommunications and Informatics due to the applicant company failing to notify the change of her address (the case was dealt under Article 1 of Protocol No. 1. ECHR).

310 See, e.g., *Korneyeva v Russia* (72051/17) 8 October 2019 ECtHR, in which the continued detention of the applicant once the proclaimed purpose of compiling an administrative offence report was fulfilled, was deemed to breach the Convention.

as to protect certain public goods by preventing breaches (such as in the domain of road safety).[311] For example, if the danger of an unsafe factory has already manifested itself through certain breaches that have been responded to by imposing punitive administrative sanctions, an additional preventive measure may be applied in order to prevent such danger from escalating further.[312]

3.45 Another instance of a preventive administrative sanction is the issuing of a warning (public order) by a public authority by which an individual is required to refrain from committing unlawful actions at a public gathering or from entering certain areas of a town, in the case that this authority has become aware of the concerned individual posing a concrete threat to public security.[313] Such a prospective warning – in contrast to an administrative reprimand issued *post hoc* (cf. MN. 3.41) – does not possess any retributory content but is ostensibly an intrusive (enough) measure to be able to affect individual rights and interests in an adverse manner. Due to the increased threat of terrorism and safety concerns in this day and age, it is unlikely that the scale and scope of these public order powers will diminish any time soon.[314] Other paradigmatic examples of preventive administrative sanctions include the suspension of a license to practice a certain activity or a ban on occupying certain positions at the management level,[315] the appointment of a temporary agent to monitor certain activity or a stop notice on selling goods or services that are deemed to be dangerous, if a reasonable suspicion arises that not taking action may lead to a public calamity or any other hazard. The latter category presents a specific challenge because, paradoxically, the procedural safeguards for a relatively minor criminal offence are higher than those for the suspension of a license that falls within the administrative law framework but may cause much more damage since it touches upon business interests.[316]

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311 See, e.g., *Öztürk v Germany* [8544/79] 21 February 1984 ECtHR at [53].

312 Heitzer (n. 13), p. 38.

313 See in this regard, e.g., *Landvreugd v the Netherlands* (37331/97) 4 June 2002 ECtHR.

314 Todts (n. 305), p. 129.

315 See, e.g., *Storbråten v Norway* (12277/04) 1 February 2007 ECtHR (dec.), in which a disqualification order prohibiting the applicant from forming or managing new limited liability companies for a period of two years due to his behaviour during the bankruptcy proceedings, was deemed to be an exclusively preventive measure. The ECtHR enunciated the following reasoning in this regard: "To protect shareholders and creditors and society as a whole against exposure to undue risks of losses and mismanagement of resources that were likely to arise if an irresponsible and dishonest person were to be allowed to continue to operate under the umbrella of a limited liability company."

316 A. Ogus, "Enforcing regulation: do we need the criminal law?" in H. Sjörgen/G. Skogh (eds.), *New Perspectives on Economic Crime* (2004), pp. 42–56 (p. 53).

A ‘fuzzier’ case of prevention by administrative sanctions is the situation in which adverse measures are imposed by public authorities for past offences in order to safeguard vital public interests, such as ‘public safety’ in gun control law. Put otherwise, this happens when an administrative authority takes criminal antecedents into account and does not satisfy the submission of the applicant to gain a certain benefit. For instance, when they refuse to issue a license to an applicant to carry a gun on the grounds that she has committed breaches of the firearms regulations in the past, i.e. due to not meeting the required standards of probity. Another example is the refusal to issue or renew various licenses because the applicants are deemed unfit to carry on businesses due to their past behaviour. [317] One may argue that it is not a sanction at all but rather a fall-out from the non-fulfilment of regulatory conditions. Put otherwise, it resembles a nullity geared towards achieving certain legal effects due to non-compliance with the law (cf. MN. 2.15.). These sorts of sanctions usually aim to safeguard legality and are not concerned with punishment at their core.[318] However, at least seen from the intrinsic point of view, this type of measure has prospective negative implications for the individual with clear penalizing undertones. The said limitation of a gun owner’s rights also reflects the response towards an excessive risk to the public right, discussed below (cf. MN. 3.97 et seq.). The indications stemming from the case law show that the ECtHR is ready to acknowledge them under the ‘civil limb’ and, hence, grant somewhat diminished protection under Article 6 ECHR.[319]

3.47 There are a couple of issues that are immanent to (the use of) preventive administrative sanctions. Firstly, the notion of ‘public interest’ that these sanctions purportedly aim to protect

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317 See, e.g., *Tre Traktörer Aktiebolag* (10873/84) 7 July 1989 ECtHR in which the license to sell alcoholic beverages could be revoked either because it caused annoyance relating to public order, drunkenness, or disturbance of the peace; or instances where the conditions of the licence or the relevant statutory provisions were not complied with. The applicability of Article 6 ECHR was granted under ‘civil limb’ here. See further *Manasson v Sweden* (41265/98) 8 April 2003 ECtHR (dec.) for a revocation of a taxi license due to tax irregularities and *Bingol v the Netherlands* (18450/07) 20 March 2012 ECtHR (dec.) for a refusal of an operating license for a bakery business due to having employed illegal aliens in the past.

318 See to this effect, *Blokker v the Netherlands* (45282/99) 7 November 2000 ECtHR (dec.) in which the ECtHR compared an obligation to attend educational courses on driving after driving under the influence was established to the situation of persons seeking to obtain a driving license.

319 See to this effect *Pocius v Lithuania* (35601/04) 6 July 2010 ECtHR.

has been described as elusive,[320] broad,[321] transient[322] and vulnerable to capture by interest groups that may dominate the organs of the state. In fact, despite the fact that this term is so commonly used and historically persistent, there are actually very few domains in which interests are genuinely common to all members of society and they are mostly confined to the realm of public goods.[323] Hence, its juxtaposition against 'private interests' should at all times be undertaken with the utmost care and a strong democratic justification.

3.48 Furthermore, the said detachment of a sanction from the actual offence, for its part, implies some 'room for manoeuvre' for an administrative authority; thus, it is important that the handling of a potentially disruptive situation by means of preventive administrative sanctions does not morph into arbitrariness, i.e. 'prevention on steroids' that is excessive. For this reason, not only must the proclaimed danger be justifiable, i.e. correlate with the risk of this danger manifesting in a probable way, but also the imposition of a preventive sanction should not exceed the scope and duration that the said danger presents, i.e. it should be proportional.[324] The justifiability of this danger is, quite understandably, challenging at times when the public authorities have to react in a speedy manner, and miscalculations are inevitable; however, the (supposed) danger should be made sufficiently credible by the public authorities. The general rule to that effect can be summarized as follows: the more knowledge public authorities have about the dangerousness of concrete products, substances or the ways to make them, the bigger the responsibility and, hence, the 'elasticity' of preventive sanctioning that they have to contain these risks.[325] Ideally, this should happen by means of empiric proof, if the situation allows, e.g. by carrying out scientific tests on, say, the level of toxins in dairy products that are deemed

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320 "Public interest will often appear to be an empty vessel, to be filled at different times with different content", see M. Feintuck, *'The Public Interest' in Regulation* (2004), p. 3.

321 As regarded by the ECtHR itself: "the notion of 'public interest' is necessarily extensive", see, e.g., *Broniowski v Poland* (31443/96) 22 June 2004 ECtHR [GC] at [149]; *Moskal v Poland* (10373/05) 15 September 2009 ECtHR at [61].

322 Whereas back in the day the public interest was based on patriotism, morals, social welfare and conformity. Currently it is nestled within the economic paradigm and only time will tell where it is headed next, see M. Aronson, "A Public Lawyer's Responses to Privatisation and Outsourcing" in M. Taggart (ed.), *The Province of Administrative Law* (1997), pp. 40–71 (p. 69).

323 Feintuck (n. 320) p. 35; B. M. Barry, "The Use and Abuse of the Public Interest" in C. J. Friedrich (ed.), *The Public Interest: Nomos 5* (1962), pp. 191–204. This is not to say the notion is not valid as an analytical concept – in fact, it permeates the whole edifice of public law and empowers us to distinguish and criticize the usurpation of public sphere by private interests, N. Verheij, "From Public Law to Private Law. Recent Developments in the Netherlands", (2000) 53 *La Revue administrative* 53 2, pp. 57–65 (p. 59).

324 Caeiro (n. 278), p. 174.

325 Ransiek (n. 56), p. 9.

to be unsafe to consume after new information about the danger of these products has been revealed to the supervisory public body in charge.

3.4.1.3. Remedial Administrative Sanctions

3.49 Remedial (also known as compensatory or restorative) administrative sanctions unlike punitive administrative sanctions are embedded in the idea of commutative justice – a form of justice that governs interpersonal relationships – in contrast to distributive justice, which is typical for public law and aims to distribute the benefits and burdens in a just manner.[326] Their main goal is not desert-based retribution for a breach of law, which is usually deemed to be morally blameworthy but the vindication emanating from the general obligation of reparation connected thereto.[327] More precisely, the roots of these sanctions may be traced back to tort law based on the idea that people are under an obligation to exercise due care towards those around them and the failure to do so renders them liable to pay damages.[328] The same logic can be applied to the relationships between individuals and the State: for example, if the conditions for receiving a benefit are not fulfilled, then the general interest is to retrieve the damage made to the 'public purse'. The administrative authority, for its part, is regarded as a mere creditor.[329] The latter hallmark is especially enticing for offenders, who at times endeavour to 'negotiate their way of out of punishment', by invoking a 'business only' logic and lobbying the administration to impose compensatory measures. Clearly, this logic is convenient for the transgressors as not only does it lessen the actual pecuniary detriment of a penalty, it also 'neutralizes' the harm caused and the associated blameworthiness in the eyes of the public.[330]

3.50 Needless to say, there should be concrete (quantifiable) damage done in the first place.[331] Sometimes the computation of the fine as compensation for the damage done may be tricky

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326 A term coined already by Thomas Aquinas. See more in D. Priel, "Private Law: Commutative or Distributive?", (2013) Research Paper No. 56/2013, *Comparative Research in Law & Political Economy* (Osgoode Hall Law School).

327 Kelsen (n. 54), p. 51.

328 Shapiro (n. 124), p. 60.

329 This idea is conceptualized by some legal systems, cf. "The Imposition of Administrative Penalties and the Right to Trial by Jury An Unheralded Expansion of Criminal Law?", (1974) 65 *The Journal of Criminal Law and Criminology* 345, pp. 345–360 (p. 351).

330 This remark was inspired by the recent developments happening in Lithuania, where a major paper and wood industry group, which has caused environmental damage, was lobbying regulators to change the sentencing guidelines of environmental fines by claiming that they should orientate themselves around the damage inflicted.

331 What is most interesting in this regard is the case of *Ismayilov v Russia* (30352/03) 6 November 2008 ECtHR in which Russian authorities confiscated a sum of money that the applicant has brought into the country without declaring it. The ECtHR emphasized that such confiscation is "not a pecuniary sanction because the State did not suffer any loss as a result of the applicant's failure to declare the money", at

because the full scope of the latter is not precisely known at the relevant moment. In such cases, the equitable amount thereof should be sought by the administration, preferably by invoking objective (verifiable) criteria as a yardstick, such as square meters of a factory that has been contaminating the environment. At the same time, there might be no pressing need to retaliate for such an undue use of public funds by placing an administrative sanction because the wrongdoing is not deemed to be reproachable, but rather morally ambiguous, or it is too petty, or there are other 'valid' justifications as to why it has been committed, such as the abundancy of complex rules that might confuse *bona fides* individuals, the legal 'grey zones' connected thereto, administrative consultations that turned out to be misleading, etc.

3.51 Thus, the exclusive purpose of remedial administrative sanctions is to bring back the *status quo ante*, i.e. to restore or rectify a situation that was brought about by the infringement of an administrative rule. This means that a remedial sanction works only in retrospect; hence, situations in which prospective benefits are withdrawn cannot be equated thereto although they might create tension with the principle of protection of legitimate expectations.[332] Importantly, no further (punitive) burdens should be imposed on the individual in the purest form of remedial administrative sanctions. At times, however, the application of this simple rule becomes challenging: for example, interest imposed for a late tax payment is a compensatory measure but it should be commensurate with the real market value, otherwise it will entail a 'hidden layer' of detriment. However, as noted above, in practice such sanctions are often subsumed under punitive administrative measures (cf. MN. 3.38 et seq.).

3.52 Remedial administrative sanctions are, for example, prevalent in customs law, in which they are imposed solely for fiscal reasons with no element of punishment or goal of deterring reoffending.[333] They also abound in domains where the 'giving hand' of the state is at work: e.g., a panoply of such sanctions can be found in the so-called public 'welfare services' directed at the individual, such as healthcare, education and pensions.[334] For example, in healthcare law the state may ask an individual to repay for a reimbursable pharmaceutical product that was

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[38]. In fact, the only detriment caused to the State was the applicant's failure to inform them that the money, which was lawfully obtained, had entered the country from abroad. See also *Tanasov v Romania* (65910/09) 31 October 2017 ECtHR at [39]; *Gyrlyan v Russia* (35943/15) 9 October 2018 ECtHR at [29]; *Sadocha v Ukraine* (77508/11) 11 July 2019 ECtHR at [32]; *Boljević v Croatia* (43492/11) 31 January 2017 ECtHR at [45].

332 See, e.g., *Moskal v Poland* (10373/05) 15 September 2009 ECtHR; *Letinčić v Croatia* (7183/11) 3 May 2016 ECtHR.

333 See examples of customs duties recognized as falling outside the notion of 'criminal charge' in *VP-Kuljetus Oy and Others v Finland* (15396/12) 6 January 2015 ECtHR (dec.) at [35], [40].

334 W. Sauter, *Public Services in EU law* (2015), p. 2.

acquired in breach of a rule stipulating who has the right to receive such pharmaceuticals. Another *locus classicus* of such a measure is the recovery of unduly received benefits – a widely used instrument in certain EU sectorial policies, such as agriculture. In fact, in this domain remedial administrative sanctions are very often imposed on those who have decided to take advantage of certain aid or trade schemes granting payments and have thereby submitted themselves to the (specific) requirements embedded in these schemes.

3.53 Hence, like in private law, where signing a contract implies that its parties agree to execute it, follow the clauses stipulated therein and establish a legal relationship binding *inter partes* – benefits received under the said schemes may be requested to be returned in the case of a breach in a sort of expedited and particularized way, by public authorities plainly referring to the very concrete duties or requirements agreed upon in advance. In other words, the parties concerned rely on an additional normative field created on a 'horizontal' level. Considering the continual rise of consumerism as a societal trend and the potential of administrative power of restitution to be an efficient instrument to avoid further litigation, it is safe to claim that the use of remedial administrative sanctions will intensify in the future.

3.54 Because such sanctions, in contrast with punitive administrative sanctions, follow a rather different logic nestled within the private law paradigm of liability, i.e. they do not have the desert-based retributive aim, not all principles typical for criminal procedures apply for their imposition. For one thing, due to their non-punitive character, they can be cumulated with criminal sanctions and no particular issue of *ne bis in idem* arises (cf. MN. 6.22).[335] Moreover, the culpability principle (*nulla poena sine culpa*) is very lax[336] when it comes to remedial administrative sanctions, i.e. their imposition may not be contingent upon the determination of guilt of a sanctioned person.[337] It is safe to claim that in this category the probability of

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335 See, e.g., in the context of EU law, the case of *Lukasz Marcin Bonda* (C-489/10) 5 June 2012 CJEU.

336 It is important to note upfront that the ECtHR (having to accomodate different constitutional traditions of the Member States) does not explicitly recognize the principle of culpability as such. It does acknowledge certain aspects of 'guilty mind', however, see more in G. Panebianco, "The *Nulla Poena Sine Culpa* Principle in European Courts Case Law: The Perspective of the Italian Criminal Law" in S. Ruggeri (ed.), *Human Rights in European Criminal Law: New Developments in European Legislation and Case Law after the Lisbon Treaty* (2015), pp. 47–80 (pp. 53–56). See for further information, Van Kempen/Bemelmans (n. 16), pp. 254–256.

337 See Yeung (n. 200), p. 320. This tendency is also recognized within the framework of EU law. For example, Article 4 of Regulation 2988/1995 does not require any culpability and also uses a special terminology ('measures') to distinguish compensatory sanctions from administrative penalties. See to this effect the cases of *Maizena Gesellschaft GmbH and others v Bundesanstalt für landwirtschaftliche Marktordnung (BALM)* (C-137/85) 18 November 1987 CJEU and *Käserei Champignon Hofmeister GmbH & Co. KG v Hauptzollamt Hamburg-Jonas* (C-210/00) 11 July 2002 CJEU.

encountering strict liability is the highest although by no means exclusive.[338] At the same time it should be underscored that the application of the culpability principle varies a great deal: whereas in fields of activity that are loaded with (economic) risk and unpredictability (such as business or trade) it shrinks to the minimum, in other domains, such as social security, a modicum thereof should be upheld, otherwise *bona fides* individuals may be left in a very volatile position.

3.55 Another good example is the principle of *in dubio pro reo*, which also seems redundant with regard to remedial administrative sanctions.[339] This seems to resonate with the private law rationale underlying these sanctions, namely, the idea that responsibility arises from objectively negligent behaviour without any need for willingness by a particular subject.[340] Following this logic, it can further be claimed that evidentiary standards with regard to remedial administrative sanctions also tend to be less stringent: as noted above, the high standard of proof is geared towards minimizing the hazard of a wrongful conviction and its pernicious consequences for the individual and society as a whole.[341] In the case of remedial administrative sanctions, such a danger does not exist and, hence, the prosecutorial burden tends to shrink. The evidentiary process, in turn, becomes more adversarial and providing clear and convincing proof should suffice in order to establish that an administrative offence has been committed and that liability should consequently be invoked. This means that a particular fact should be substantially more likely than not to be true – a somewhat higher standard than the 'balance of probability' typical of civil law. Hence, the need to follow the 'beyond reasonable doubt' standards of proof associated with the criminal law paradigm of liability is alleviated (cf. MN. 5.86).

3.4.2. Administrative Sanctions by Their Tradition and Utilization

3.56 As noted earlier, in the course of the research, it became apparent that the previous typology of administrative sanctions according to their functions is inconclusive for the purposes of this thesis. This is because there exist other clearly distinct groups of sanctions based on national idiosyncrasies stemming either from historical reasons or other complexities and different perceptions of the ways that (the potential of) administrative sanctions are used. These divergent

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338 See, e.g., *Duhs v Sweden* (12995/87) 7 December 1990 ECtHR (dec.), in which the ECtHR found no issue with the respondent state placing a strict liability for non-payment of parking fees on the owner of the car. See also with regard to custom fines in *Salabiaku v France* (10519/83) 7 October 1988 ECtHR.

339 Cf. *Maizena Gesellschaft GmbH and others v Bundesanstalt für landwirtschaftliche Marktordnung (BALM)* (C-137/85) 18 November 1987 CJEU. See for the application of this principle with regard to administrative proceedings in *Frumkin v Russia* (74568/12) 5 January 2016 ECtHR at [166].

340 Kidron (n. 206), p. 332.

341 Svatikova (n. 2), p. 151.

pathways also supplement the data gathered on the genesis of administrative sanctions because not everything in this regard can be reduced to decriminalization processes or the rise of automobilism as a paragon of a domain in which large-scale offences occur, as discussed below (cf. MN. 4.05). As will be demonstrated, the Member States under litigation do not shy away from using these idiosyncrasies of their respective systems as defences in regard to possible ECHR violations. This means that they are convinced that their 'national solutions' are valid (at least until proven otherwise), which is understandable, as their own legal traditions compete with the emerging supranational legal thinking.[342] Hence, the previous taxonomy of administrative sanctions will be supplemented by exploring three major recurring 'national solutions' to that end: the so-called post-communist punitive legacy, the dual-track enforcement and administrative sanctions as surrogates for the lack of corporate criminal liability. Regarding the last category, an *excursus* to the EU law, in which a general lack of criminal law competence for a long time has nothing but increased the reliance on punitive administrative sanctions to efficiently implement EU policies, will be made.

3.57 Whilst the first category was shaped by the (remnants of the) legal culture and collective memory of a post-communist punitive legacy, the second and third categories may be attributed to the legal arrangements discernible within some national traditions as well as to the (previous) dearth of criminal law competence on the EU level. More precisely, it is either the division of 'institutional labour' in sanctioning matters or constitutional peculiarities (such as resistance towards corporate criminal responsibility) that are capable of evidently steering and moulding the imposition of administrative sanctions. All of these points will be addressed and ample 'background information' will be provided to shed light on how these divergent traditions in utilizing the potential of administrative sanctions came to pass. The discussion of such various perceptions, for its part, will later on serve to deepen the understanding of how sanctioning 'pathologies' or 'curiosities' were formed and why they were seen as problematic by the ECtHR.

3.4.2.1. Post-Communist Punitive Tradition

3.58 The first category, broadly termed the post-communist punitive tradition, for lack of a better word, inevitably stems from the administrative repression once employed in the USSR or its

342 Even though the ECHR does not have an equivalent to Article 4 (2) TEU explicitly validating national identities of its Member States, the latter has been reaffirmed by the principle of subsidiarity and the margin of appreciation doctrine. See more on the need of both – common and particular – legal thinking in a multinational community in R. Arnold, "Common Legal Thinking in European Constitutionalism: Some Reflections" in H.J. Blanke/P. Cruz Villalón/T. Klein/J. Ziller (eds.), *Common European Legal Thinking: Essays in Honour of Albrecht Weber* (2015), pp. 41–56 (p. 53).

'satellite' States, which up to now have been very tenacious of life.[343] Notwithstanding the differences that became especially apparent once these countries were liberated from the Soviet yoke, communism evidently had a homogenizing effect on the societies that were under its rule.[344] In fact, many of the newly formed democracies in South-Eastern European countries have adopted the socialist law terminology as well as its basic structure and content over the years.[345] Previous studies have disclosed that countries such as Lithuania, Latvia, Estonia, Poland, Czechia, Slovakia, Russia, and Ukraine have been impacted by the USSR and its legislation in regard to administrative punishment.[346] Such a legacy has allegedly contributed to flagrant ECHR violations, as will be demonstrated by numerous examples in this thesis.

3.59 The natural question that one is confronted with while dealing with this group of sanctions then is: what is so inherently wrong about this repressive tradition from the standpoint of the ECHR? The answer can only be found taking the bigger picture of the Soviet governance and its (totalitarian) meta-aims into consideration. It should be noted that the Soviet administrative law in general was marked by its submission towards the structural aims of totalitarianism and its dense 'ideological' base, proclaimedly serving the broad proletarian masses,[347] extensive authority granted to the *militsiia*,[348] an almost complete absence of reliance upon the courts in controlling administrative authorities, often turning to the Soviet Procuracy for the general supervision instead,[349] which itself was riddled with structural flaws (cf. MN. 5.21),[350] as well

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343 For example, in Lithuania the 'Soviet influence' in this domain lasted until 2017 when the new Code on Administrative Offences was finally adopted. Before that, a code dating back to 1984 was in force even if it went through many 'legal amputations' over time. See more in Stelkens/Andrijauskaitė (n. 7), MN. 21.31.

344 S. Liebert/S. E. Condrey/D. Goncharov (eds.), *Public Administration in Post-Communist Countries*: *Former Soviet Union, Central and Eastern Europe, and Mongolia* (2013), p. 5.

345 V. G. Tataryan/I. N. Mishurov/S. A. Kokotov/E. E. Tataryan, "Reflections on the Need of Administrative and Tort Legislation Separate Codification in Cis States", (2015) 6 *Mediterranean Journal of Social Sciences* 5, pp. 454–460 (p. 455).

346 Of course, bearing the caveat that not all these countries were formally incorporated into the USSR in mind. See V. N. Zakopyrin/T. N. Dazmarova/A. N. Zverev/V. P. Timokhov/I. V. Vassilyeva, "Administrative Offences Legislation in Russia and Abroad: Historical and Legal Genesis", (2021) *The European Proceedings of Social and Behavioural Sciences*, pp. 1186–1194 (p. 1188).

347 S. S. Studenikin/W.A. Wlassow/I. I. Jewtichijew, *Sowjetisches Verwaltungsrecht* (1954), p. 114.

348 See more in L. I. Shelley, "Administrative Law and the Improving of Social Control: The *Militsiia* and the Maintenance of Social Order" in G. Ginsburgs (ed.), *Soviet Administrative Law: Theory and Policy* (1989), pp. 131–161.

349 Judicial review being an exceptional procedure rather than the rule is found in D. D. Barry, "Administrative Justice: The Role of Soviet Courts in Controlling Administrative Acts" in Ginsburgs (n. 348), pp. 63–79.

350 The main one being that it belonged to the executive arm: "In the absence of freedom, the Party and government preferred to rely on a branch of the governmental apparatus itself to watch over the legality

as turning to other extrajudicial agencies, which had the power to apply administrative sanctions to a vaguely defined groups of persons,[351] suppression and fear of public demonstrations,[352] low respect for individual rights vis-à-vis 'collective' interests and their procedural safeguards as well as the imposition of administrative penalties of high intrusiveness, such as the deprivation of liberty or compulsory labour. In fact, a distinct feature of the Soviet-type sanctioning was that there was no (or little) correlation between the harshness of the sanctions and the 'pettiness' of administrative infractions.[353] Another striking hallmark of the socialist legality was the fact that 'laws' were mostly instructions to be followed uniformly and any initiative from administrators was suppressed due to fear of reprisals.[354] Eventually, these 'perversions' of the system themselves led to the augmentation of the need for administrative sanctioning as, for example, a suppressive campaign against alcoholism, which was very widespread in the late period of the USSR, demonstrates.[355]

3.60 The 'lofty' goals of communism necessitated that the will of thousands had to be subordinated to the will of one, i.e. a single administrative will. Social order, for its part, was interpreted broadly as not only restricted to the preservation of crimes but also as requiring the regulation of daily life and facilitating citizens' adherence to the State's and Party's objectives.[356] Administrative repression was used to manipulate the statistics because it replaced criminal law measures in order to convince outsiders that crime was withering away in a mature socialist society in line with the propaganda.[357] It intruded very deeply into the private sphere of individuals with the purported aim of achieving societal progress and economic abundance.[358] In fact, any kind of socio-political deviations from the acceptable

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of the operations of the rest of the apparatus", see more in G. G. Morgan, *Soviet Administrative Legality: The Role of the Attorney General's Office* (1962), p. 248.

351 See more in G. P. van den Berg, *The Soviet System of Justice: Figures and Policy* (1985), pp. 9–26.

352 Shelley (n. 348), p. 151.

353 For example, the so-called 'parasites' could be exiled up to five years under an administrative order, van den Berg (n. 351), p. 45.

354 Stelkens/Andrijauskaitė (n. 7), MN. 31.54.

355 *Ukaz O vnesenii izmenenij i dopolnenij v nekotorye zakonodatel'nye akty RSFCR, ot 1 oktyabria 1985, Prezidiumverhovnogo soveta RSFSR* (Soviet Anti-Alcoholism Law of 1 October 1985). In addition, the growth of the number of parasitism and vagrancy offences was also 'impressive' in the late years of Soviet Union, see van den Berg (n. 351), pp. 75–76.

356 Shelley (n. 348), p. 158.

357 van den Berg (n. 351), p. 3.

358 See more for such justifications in J. N. Hazard, "What Kind of Propaganda in Administrative Law?" in Ginsburgs (n. 348), pp. 25–45.

norms were punished as the infamous 'Anti-Parasite' Laws tellingly show.[359] Not only were alcoholics and anti-social individuals persecuted and forcibly employed but also poets and church musicians were deemed to be a 'social waste'.[360] As banal as it sounds, such people and their free-spirited pursuits were treated as 'deviations' from the 'productive' activities, representing a threat to the regime (at least ideologically). In addition, anyone belonging to the 'sub-cultures' or even wearing Western garb could be sanctioned.[361]

3.61 The first differentiation between ordinary crimes and administrative infractions was made in the 1920s for the home distilling and illegal woodcutting offences in the Soviet Union.[362] Three main types of sanctions were set forth back then: deprivation of liberty for two weeks; compulsory labor without deprivation of liberty for one month, and a fine. Eventually, the variety of administrative sanctions expanded and the system of administrative punishment was codified by the "Fundamentals of Legislation on administrative offences of the USSR and the Union Republics" of 23 October 1980 (henceforth 'Fundamentals'), entailing general principles and an institutional structure of administrative sanctioning that was applicable throughout the whole territory of the USSR (Articles 2 and 3 of the Fundamentals).[363] Its main aim was to protect the functioning of the social system and public order of the USSR as well as to strengthen the socialist legality by educating citizens in the spirit of high consciousness and unswerving observance of the Constitution of the USSR and Soviet laws (Articles 1, 4 and 5 of the Fundamentals). Such a pompous rhetoric was in line with the general aspirations of the Soviet State to be a "political tutor of the nation".[364]

3.62 The administrative offence, for its part, was defined as an illegal, guilty (deliberate or negligent) action or failure to act that infringed upon the state or public order, socialist property, the rights and freedoms of citizens, and the established order of administration, for which the legislation provided for administrative responsibility (Article 7 of the Fundamentals). For the sake of precision, it should also be stated that an applicant accused of having committed an

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359 The decree issued by the Supreme Soviet of the Russian Soviet Federative Socialist Republic on 4 May 1961 entitled "On Strengthening the Struggle with Persons Avoiding Socially Useful Work and Leading an Anti-Social, Parasitic Way of Life" is meant here.

360 Examples taken from a study on vagrancy and work evasion as a wide-spread phenomenon during Soviet times, see T. Vaiseta, "Sovietinio veltėdžiavimo fenomenas kasdienybės praktikų ir jų trajektorijų požiūriu", (2012) *Lietuvos istorijos studijos* 29, pp. 111–126.

361 Shelley (n. 348), p. 146.

362 van den Berg (n. 351), p. 33.

363 *Osnovy zakonodatel'stva sojuza SSR i sojuznyh respublyk ob administrativnyh pravonarushenijach priniaty verchovnym sovetom SSSR 23 oktzyabrya 1980 goda* (the 'Fundamentals').

364 Studenikin/Wlassow/Jewtichijew (n. 347), p. 210.

administrative offence had a range of procedural rights, such as access to the case file, and the right to give explanations and present evidence, file petitions and the like (Article 36 of the Fundamentals). Other safeguards were also prescribed (at least on paper) – be they substantive sentencing principles, terms for imposing an administrative penalty or the statute of limitations from prosecution (Articles 21, 22, 35 and 42 of the Fundamentals). However, it goes without saying that the 'law in books' was quite far away from the 'law in action' during Soviet times because law was inextricably mixed with politics and the particular goals that the repressive regime was trying to attain.

3.63 The two specific sanctions apart from fines, reprimands, seizure or confiscation of objects and deprivation of a special right stipulated by the Fundamentals were correctional labor and administrative arrest (Article 12 of the Fundamentals). The former could be ordered for up to two months with a possibility of withholding up to twenty percent of the person's earnings in favour of the State (Article 18 of the Fundamentals), while the latter was an exceptional measure that could last for up to fifteen days (Article 19 of the Fundamentals). Administrative arrest was also different from administrative detention, which was conceived as an operational measure and could be carried out for up to three hours (Article 33 of the Fundamentals). Despite the declaration that an administrative arrest was meant to be a measure of an exceptional nature, in reality it was very widespread in the Soviet Union. The reason for that was not only the hyper-repressive nature of the system and the low respect for individual rights but also the fact that many people were living in poverty, which, in turn, resulted in difficulties in collecting administrative fines and the proliferation of administrative arrest as a surrogate therefor.[365] The proliferation of administrative arrest did not dissipate with the fall of the Soviet Union. In fact, it was a remnant practice that was applied by many 'new' CoE Member States, causing various tensions with the ECHR (cf. MN. 4.58; 5.58; 7.26).

3.64 A few other specificities of the Fundamentals should be highlighted in order to deepen the understanding of the subsequent issues that arose on the CoE level. The first one was the possibility of abdicating liability for administrative offences and instead transferring the relevant materials for consideration to a comrades' court, a public organization or a labor collective, taking into account the nature of the offence and the personality of the offender. In place of a formal sanction the so-called measure of public influence could be imposed on the applicant (Article 10 of the Fundamentals). This once again shows the pivot to extrajudicial actors, as discussed above, and the tendency to include one's social environment in the

365 Zakopyrin/Dazmarova/Zverev/Timokhov/Vassilyeva (n. 346), p. 1190.

functioning of the repressive apparatus. Apart from that, the appeal system against the decisions on administrative offences was also limited: applicants could turn to the higher administrative authority or officials or the people's courts, which operated on a first-instance basis and adopted final decisions subject to no further appeal with rare exceptions explicitly provided for by law (Article 39 of the Fundamentals). However, applicants could forward their grievances to the procurator, i.e. an actor that was part of the executive arm. Later on, such logic reverberated in a string of cases, in which a right to a tribunal in administrative sanctioning matters was predominantly excluded by the 'new' CoE Member States, which found surrogate actors to consider these matters instead (cf. MN. 5.23 et seq.).

3.4.2.2. Dual-Track Enforcement

3.65 Another distinctive category in regard to how administrative sanctions are used is the concept of so-called dual-track enforcement. The adjective 'dual' implies that punition is implemented by means of both - administrative and criminal – sanctions in parallel. The State, thus, divides this process into a few less complex and more manageable sub-processes that are conducted by multiple actors situated within different arms of the State. For the concerned individual, however, such duplication not only brings procedural uncertainty and additional burdening but also, if a prosecution is successful, a cumulation of sanctions that may cause friction with *ne bis in idem* and the proportionality principles as well as the possibility of overpunishment. Dual-track enforcement is primarily associated with the Nordic legal systems because the most prominent cases in this regard stem from this region (cf. MN. 6.16 et seq.; 6.24 et seq.; 6.27 et seq.). The main bone of contention between these systems and the ECtHR is the fact that *ne bis in idem* is simply not considered to be applicable to the relationship between administrative and criminal sanctions in these systems.[366] The ECtHR, on the other hand, using its autonomous means of interpretation, inevitably attributes a 'criminal charge' to some administrative sanctions. Thus, it perceives a duplication of 'criminal' sanctions in such cases as a result. This issue is also prevalent elsewhere: in fact, research undertaken by the EU in 2017 revealed that (apart from the Nordics) the possibility of accumulation of administrative and criminal sanctions is also discernible within the German, French, British, Hungarian, Italian, Polish and

366 M. Koillinen, "Country Analysis – Finland" in Jansen (n. 8), pp. 159–194 (pp. 161–162). See also for the Swedish practice to use tax surcharges in combination with criminal law measures as well as such practice in environmental law in P. Blanc-Gonnet Jonason, "Country Analysis – Sweden" in Jansen (n. 8), pp. 553–583 (pp. 559 et seq.).

Spanish legal systems.[367] This is, however, by no means 'an EU only' phenomenon and there are indications of other CoE Member States turning to this practice as well.[368]

3.66 This rather widespread tendency to combine administrative and criminal punishment has resulted in various reservations regarding the binding nature of *ne bis in idem* on the CoE level being put forward by the concerned legal systems, cf. MN. 6.27 et seq.[369] The wish to keep a dual-track enforcement was so strong that even the early case law of the ECtHR condemning this practice (cf. MN. 6.16 et seq.) was disregarded by some national courts, which claimed that sufficient support was still lacking on the European level.[370] At the same time, these legal systems, even if they are clinging to this practice and following the standards of the rule of law, find their own ways to ameliorate the tension caused by the duplication of sanctions on the national level, such as by applying the principle of proportionality to penalties or staying the administrative proceedings pending the final outcome of a criminal case.[371] In addition, a growing awareness and deference towards the criteria developed by the ECtHR regarding this matter can also be discernible.[372]

3.67 The benefits of this division of institutional labour are plentiful and have been endorsed by the ECtHR after its prior reluctance to do so (cf. MN. 6.27 et seq.): for one, imposing administrative sanctions first before waiting for a time-consuming and stringent criminal process to be finalized is a much swifter response to a transgression, which, in turn, is capable of boosting the general deterrence. In addition, administrative authorities possess specialized knowledge (e.g. tax expertise, an in-depth understanding of environmental harm caused by a transgression or the skills necessary to extract information from various databases), which is

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367 See Research Note on "Cumulation of administrative and criminal sanctions and the *ne bis in idem* principle" by the Directorate-General for Library, Research and Documentation of March 2017, which explored this question in eight selected EU jurisdictions (available online).

368 See for a Serbian example invoking this practice in taxation proceedings in M. Matić Bošković/J. Kostić, "The Application of The Ne Bis in Idem Related to Financial Offences in the Jurisprudence of the European Courts", (2020) 25 *Journal of Criminalistics and Law* 2, pp. 67–77.

369 X. Groussot/A. Ericsson, "Ne Bis in Idem in the EU and ECHR Legal Orders: A Matter of Uniform Interpretation?" in B. van Bockel (ed.), *Ne Bis In Idem in EU Law* (2016), pp. 53–102 (pp. 61–62).

370 See for Swedish case law developments after landmark *Fransson* and *Fischer* judgments in Groussot/Ericsson (n. 369), pp. 90 et seq. See further Blanc-Gonnet Jonason (n. 366366), p. 582; J. Reichel, "The Pan-European General Principles of Good Administration in Sweden: Undeniable but Partial Vehicles of Change" in Stelkens/Andrijauskaitė (n. 7), pp. 256–274 (MN. 9.34 et seq.)

371 See for a good overview of these solutions Opinion of AG Cruz Villalón given in the case of *Åklagaren v Hans Åkerberg Fransson* (C- 617/10) 7 May 2013 CJEU at [83]. See also Article 6 of the Regulation No. 2988/95 for an 'EU solution' to this matter stipulating that administrative proceedings should be suspended if criminal proceedings have already been initiated and prior penalties are also taken into account.

372 Research Note (n. 367).

crucial in applying administrative liability in a timely and correct manner. Furthermore, such a split arrangement allows for addressing different elements of *actus reus*, especially the additional element of culpability, which not only usually makes the transgression more reprehensible to the public eye but also calls for an enhanced response, which is typically left for the criminal enforcement. Finally, the criminal authorities on their part are better trained in formulating an accusation and adhering to strict procedural safeguards. This may not only incentivize these actors to use their resources more rationally but also increase the chances that a prosecution is successful and the transgressors do get punished – something which administrative authorities, due to their lack of competence or the discretionary nature of prosecution (cf. MN. 3.08), may be willing to evade.

3.68 Dual-track enforcement is far from being an exclusively national phenomenon, albeit its precise mode of application supranationally may occur differently than on a national basis, i.e. different sanctions may be imposed in different jurisdictions by those tasked with enforcement either in parallel or in a successive order.[373] Sometimes 'supranational' solutions to that effect need to be transplanted to the national level and are hard to reconcile with the local approach, which, in turn, creates the potential for ECHR violations.[374] In fact, the dual-track enforcement used on the EU level brings a host of challenges, including the risk of double jeopardy, divergent levels of transnational cooperation in administrative and criminal investigations as well as questions about the evidentiary value of data gathered during these investigations in its wake.[375] Such a multi-layered and complex enforcement was formed due to two primary reasons: the 'bumpy' road of the EU towards establishing criminal law competence, which shifted the role of administrative sanctions from ancillary to primary means of enforcement (cf. MN. 3.77 et seq.) and the fact that the nature of certain legal domains simply calls for a mixed application of these two punitive tools. For example, in environmental law, both punitive tools make sense: for some offences where no great harm is caused to the environment the imposition of an administrative fine is the preferred option as its procedural costs are low and the budgetary gains quite high, whereas for other offences with a low rate of detection and big gains for the

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373 See for an overview of a shared EU law enforcement in M. Scholten, "EU (Shared) Law Enforcement: Who Does What and How?" in Montaldo/Costamagna/Miglio (n. 13), pp. 7–22.

374 See *Georgouleas and Nestoras v Greece* (44612/13 and 45831/13) 28 May 2020 ECtHR for such an example.

375 See on the underdeveloped level of cooperation in transnational administrative law enforcement in comparison with criminal law in Jansen (n. 218).

offender, the imposition of a criminal sanction is the only option to optimally deter pollution.[376] Dual-track enforcement is also routinely employed within the domain of EU competition law, where such enforcement is split by design between the EU Commission and national agencies and where there is no precise norm regulating conflicts due to the application of national and EU law simultaneously (and the potential of such conflicts is vast as markets become more and more interconnected).[377] In addition, this type of enforcement is prevalent in market abuse law[378] and the protection of the EU's financial interests.[379]

3.4.2.3. Lack of Corporate Criminal Liability

3.69 The final distinct category of the use of administrative sanctioning was formed due to the partial or full refusal to introduce corporate criminal liability into their systems by certain CoE Member States. The lack of criminal liability applicable to corporations forced such Member States to use administrative sanctions as a surrogate means for punishment and *in extremis* introduce extremely severe measures that are applicable to legal entities through the backdoor (since public pressure required these entities, which are capable of wielding enormous economic power, to be punished somehow). This, in turn, reverberated on the CoE level as the saga of (the legality of) non-conviction based punishment of legal entities tellingly shows (cf. MN. 7.30). An additional reason for such substitute reliance on administrative sanctions can be found within the normative framework of EU law; namely, in its lack of competence to adopt criminal law measures for a long time despite the penological need in this regard. Even though the EU law is not part of the subject matter of this thesis, the specific situation therein merits a cursory glance because many CoE Member States are also EU Member States and the developments found on the EU level have permeated their national legal systems through the

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376 See more in M. Fauré/A. Gouritin, "Blurring boundaries between administrative and criminal enforcement of environmental law" in Galli/Weyembergh (n. 1), pp. 109–135 (pp. 104 et seq.).

377 The general attitude is, however, that concurrent sanctions are allowed as long as they target different objects of legal protection. See for the challenges it brings to the concerned undertakings in A. Yomere, *Die Problematik der Mehrfachsanktionierung im EG-Kartellrecht* (2010).

378 See for legislative acts based on both internal market (Article 114 TFEU) and criminal law (Article 83 [2] TFEU) provisions in Kert (n. 9). See further Mateo (n. 17).

379 See for a general, cross-sectoral framework Regulation No. 2988/95. See further K. Ligeti/M. Simonato, "Multidisciplinary investigations into offences against the financial interests of the EU: a quest for an integrated enforcement concept" in Galli/Weyembergh (n. 1), pp. 81–94. See also for calls on an integrated approach to enforcement in this area Communication of the European Commission 'On the protection of the financial interests of the European Union by criminal law and by administrative investigations: An integrated policy to safeguard taxpayers' money' of 26 May 2011 No. COM(2011) 293 final.

direct effect and supremacy of EU law. Thus, sometimes issues determined by EU law are inextricably linked to issues that later appear on the CoE level.

3.70 One of the most notable examples of legal systems resisting the introduction of full-scale corporate criminal liability is the German one.[380] Such resistance goes back to 1870 when the German legislator limited criminal liability to natural persons following the notion of personal guilt and a special character of criminal law in line with the idealistic philosophy (*societas delinquere non potest*).[381] The doctrinal aversion towards corporate criminal liability managed to persist throughout the years despite various initiatives to the contrary both on the federal and regional level.[382] The German legal system furthermore did not succumb to the mounting pressure stemming from EU law to introduce corporate criminal liability because "all the rest of the Member States either had it or were introducing it" or from various international documents on human rights. The notion of personal guilt, for its part, is predicated upon the conviction that legal persons have no moral agency and, thus, can neither be blameworthy nor realize the moral implications of punishment. This was confirmed not only by a vivid scholarly discussion but also by the German courts.[383] The principle of personal guilt, however, in contrast with the Italian legal system (cf. MN. 3.74), can only indirectly be derived from the German Constitution, i.e. from the imperatives of human dignity and the rule of law (Articles 1 and 20 of the *Grundgesetz*).[384] The claim about the lack of moral agency of legal entities is indisputable; however, the proponents of corporate criminal liability have found ways to circumvent this issue by offering various models regarding how liability can be imputed to them. For one, they proposed the transfer of blame by which the organization is punished for the actions of its agents. As an alternate model, direct criminal responsibility was suggested, not for the actions of the agents of a corporation but for its very own malfeasance and faulty organization. Both models have been refuted by German scholars, citing lack of precision,

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380 In a similar vein, the Swedish legal system has also used administrative sanctions as a justification to introduce criminal corporate liability, see Blanc-Gonnet Jonason (n. 366), p. 558.

381 M. Böse, "Corporate Criminal Liability" in M. Pieth/R. Ivory (eds.), *Corporate Criminal Liability: Emergence, Convergence and Risk* (2011), pp. 227–254 (p. 228).

382 Revamped efforts became especially intense after the Second World War and have continued until recent decades. See for an unsuccessful attempt to introduce corporate criminal liability by installing a commission of experts by the Federal Ministry of Justice in 1999 in Böse (n. 381381), p. 230 and T. Weigend "Societas delinquere non potest?: A German Perspective", (2008) 6 *Journal of International Criminal Justice* 5, pp. 927–945 (p. 931); see also a comment on a (failed) attempt by North Rhine-Westphalia of 2013 in M. Heger, "*Societas delinquere non potest*? Unternehmen als Adressat staatlicher Strafsanktionen in Deutschland" in S. Baer/O. Lepsius et al. (eds.), *Jahrbuch des öffentlichen Rechts der Gegenwart* (2017), pp. 213–245 (pp. 236 et seq.).

383 See, *ex multis*, Decision No. GSSt 2/51 of the *Bundesgerichtshof* of 18 March 1952.

384 Heger (n. 382), p. 241.

identification (who exactly committed what?) or ‘prosecutorial hindsight’ as potential problems.[385]

3.71 However, since legal persons are fictitious themselves it is impossible to impute any kind of a moral concept to them without relying on fictions. Thus, it appears inconsistent that fictitiousness causes no idealogical friction in one category (and is instead clothed with comprehensive *Organtheorie* or *Vertretertheorie*) but raises so many objections in the other. It is true that the requirement to establish personal guilt is geared towards precluding wrongful convictions (cf. MN. 1.2). The danger of convicting the innocent is especially pressing in the corporate domain because *actus reus* here tends to be diffused due to the complex legal and organizational arrangements of corporations. At the same time, there are other viable safeguards to maximize the achievement of this objective (the imperative of a fair trial being the most prominent one). All in all, the introduction of corporate criminal liability is a matter of choice, i.e. it belongs to the realm of legal policy, and the claim of its impossibility on purely moral grounds and a special character of criminal law is not convincing. Corporations can neither be sentenced to death nor go to prison and this fact alone assuages the primary moral tensions of the argument. Furthermore, if this logic were to be followed, then it could likewise be claimed that the very own existence of legal entities, with all of their regulatory and contractual obligations (also a fiction), would be impossible as they principally “cannot act and be held responsible for their actions”. Besides, conceiving criminal punishment only in moral terms and simultaneously understating its expressive function (cf. MN. 4.46) is one-dimensional as it also inflicts other types of pain, above all, reputational and financial detriment, the latter of which legal entities as (mostly) profit-driven organizations appear to be most concerned about.

3.72 The basic tool for penalizing legal entities together with the concepts embedded in tort law, product liability and some specialized domains of administrative law (e.g., competition and environmental law) as well as a couple of quasi-criminal measures such as forfeiture and confiscation can be found in the already cursorily discussed OWiG (cf. MN. 3.07). § 30 OWiG is the key provision here, stipulating corporate liability by means of attributing the commission of administrative offences or crimes to a legal entity under private or public law through the actions of its agents. Together with officers of a legal entity, who *de facto* are able to exercise control over its activities, such as its authorized representatives, board members, general agents, commercial attorneys, etc., even an ordinary employee can cause a corporation to be liable, provided that a lack of supervision required by law is established and the proper supervision

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385 See more in Weigend (n. 382), pp. 933–936.

could have prevented the commission of the offences (§ 130 sect. 1 OWiG). For a liability to arise either a breach of legal obligations or (a possibility of) enrichment of the legal entity should be established (§ 30 sect. 1 OWiG). However, no formal conviction of natural persons to that end is required because corporate fines can be imposed even without the possibility of identifying the actual transgressor, if it is proven that a legal entity in its whole has committed an offence. In this case, the so-called 'anonymous corporate sanctions' are at issue, even though their overall practical relevance is doubtful, as it becomes extremely difficult to impute and prove that an offence has been committed without naming the concrete offenders.[386]

3.73 When it comes to the size of the potential administrative sanctions they come in either absolute or relative numbers. OWiG prescribes sanctions for up to 10 Million euro for intentional crimes and up to 5 Million for negligent crimes (§ 30 sect. 2 sentence 1 OWiG). For administrative offences, the relevant size of a sanction is usually indicated by *legi speciali* (sometimes also relating to the annual turnover of a corporation, as in competition law) but can be increased tenfold, if the legislator provides an explicit reference thereto (§ 30 OWiG sect. 2 sentences 2 and 3). This *de facto* allows for equating the size of the administrative sanctions to the criminal ones as the usual maximum size for the former in Germany is 1 Million euro and prevents corporations from getting away with committing 'just' administrative offences.[387] Another key principle in the OWiG sanctioning design is the so-called 'economic calculus' of punishment, touched upon above (cf. MN. 2.09), which ensures that the size of the penalty surpasses any illicit profit gained from the commission of the offence, even if it implies overstepping the statutory ceiling of penalties (§ 30 OWiG sect. 3 and § 17 OWiG sect. 4). This is especially relevant in competition law, in which, e.g., consumer organizations, can retrieve compensation for their losses caused by anticompetitive behaviour and makes administrative sanctions even more attuned to the economic impact of various corporations nowadays.[388]

3.74 This overview goes to show that even if Germany did not completely get past the dogma of *societas delinquere non potest*, it managed to create its viable functional equivalent, although with one significant caveat of *Ermessen*, as discussed above, which cannot be applied within the paradigm of criminal law (cf. MN. 3.08). Another system that resisted the introduction of corporate criminal liability for an even longer time than Germany but eventually also

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386 See more in W. Mitsch, *Karlsruher Kommentar zum Gesetz über Ordnungswidrigkeiten* (5th edn, 2018), MN. 119–121.

387 Mitsch (n. 386), MN. 132.

388 § 10 of the German Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) of 3 July 2004.

supplanted it with (ideational) reliance on administrative violations is the Italian one. As hinted at above, here the main hurdle lay in Article 27 of the Constitution, stipulating that criminal liability is personal as well as having a re-educational purpose towards the persons convicted, which becomes hard to conceptualize when the latter are not moral agents.[389] Although these two systems share a lot of commonalities, the main difference is that, unlike Germany, Italy chose not to integrate a newly-devised corporate liability within the already existing tools for administrative sanctioning but instead adopted a special legislation, i.e. the Legislative Decree No. 231 of 8 June 2001 (henceforth 'Decree No. 231').[390] What is more, this special legislation is preventive in its very nature and makes the instalment of *ante delictum* compliance programs a means for corporations to exonerate themselves from liability altogether – something which was inspired by the American model and the proliferation of these programs there.[391] At the same time, it is also capable of fulfilling the constitutional requirement that a sentence must re-educate by bringing legal entities back into compliance with law. These programs should pierce the mere façade and express a company's resolution to implement suitable mechanisms to prevent the risk of crime through establishing effective control mechanisms in targeted areas of its business activity.[392]

3.75 It should be stated upfront that Decree No. 231 uses a 'nebulous' legislative terminology, as if it still wishes to retain (at least rhetorical) a distance from the fact that corporations could indeed nowadays be liable in criminal terms. More precisely, it stipulates a "liability for administrative infringements depending on a crime". There is also a scholarly discussion going on about the 'true' nature of this liability, i.e. whether it is administrative, criminal or *tertium genus*.[393] In a similar vein to the German model, Decree No. 231 imputes liability to corporations through the unlawful behaviour of their top managers, representatives, administrators and other persons holding power and control over their activities. In addition, the behaviour of the persons subject to the management or supervision of one of the subjects having the management or control functions may also be imputed in line with the overarching logic of compliance programs of this Decree (Articles 5 – 7 of Decree No. 231). Likewise, two

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389 Article 27 of the Constitution of the Italian Republic of 22 December 1947.

390 Legislative Decree No. 231 of 8 June 2001 of the President of the Italian Republic.

391 US Sarbanes-Oxley Act of 2002 of the US Congress is meant here. For a comment on its influence on the Italian model see F. Cugia di Sant'Orsola/S. Giampaolo, "Liability of Entities in Italy: Was It Not *Societas Delinquere Non Potest*?", (2011) 2 *New Journal of European Criminal Law* 1, pp. 59–74 (pp. 60–61).

392 See more in A. Ruggiero, "Cracking Down on Corporate Crime in Italy", (2016) 15 *Washington University Global Studies Law Review* 3, pp. 403–445 (pp. 415–418).

393 See more in Ruggiero (n. 392), p. 407.

'qualifiers' of this behaviour are essential for liability to arise: it should have occurred either in the interest or to the advantage of a corporation (Article 5 [1] of Decree No. 231). If, on the other hand, the illicit behaviour falls within the exclusive interest of an employee or third parties, then no liability ought to arise. The 'interest' and 'advantage' tests are also subject to a scholarly discussion because they cannot be interpreted in harmony with unintentional crimes, such as (certain) environmental crimes or corporate manslaughter, the latter of which was introduced later than when Decree No. 231 was originally passed.[394] In addition, the possibility of imposing so-called 'anonymous sanctions' is also in place (cf. MN. 3.72) and corporations may be sanctioned even when the offender has not been identified or the crime is extinguished for a cause other than amnesty (Article 8 [1] of Decree No. 231).

3.76 In contrast to the German system, which refers to any kind of (codified) crime or administrative infringement, the Italian Decree provides a *numerus clausus* of offences for which corporate liability may arise, which has been broadened over the years. They mainly consist of committing bribery, fraud or counterfeiting, breaching health and safety at work, violating copyright laws, crimes against industry and trade, environmental crimes, etc. (Article 24 et seq. of Decree No. 231). The list of sanctions for these offences, for its part, is broader than the one embedded in the German OWiG: not only are confiscation or pecuniary sanctions, whose imposition is based on the quota system and may reach a maximum sum of around 1,5 million of euro listed, but also interdictory sanctions and the publication of the sentence (Article 9 of Decree No. 231). The interdictory sanctions may be even more pernicious for corporations than the pecuniary ones as they may impair their very profit-making function, i.e. corporations may be disqualified from doing business, banned from entering into contracts with public authorities, deprived of authorizations, permits and the like, excluded from benefits, loans, contributions or subsidies and banned from advertising goods and services (Art. 9 [2], Article 13 et seq. of Decree No. 231). Similar to the logic found within the German OWiG, an 'economic calculus' is also integrated into the Italian design of corporate sanctioning: for example, a confiscation is always ordered of the price or the profit of the crime, except for the part that may be returned to the damaged party (Article 19 [1] of Decree No. 231).

3.77 Apart from these two national models that draw on administrative sanctions, a specific situation regarding the same topic also arose within the framework of EU law. Here, before the entry into force of the Lisbon Treaty, administrative sanctions used to be perceived as

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394 See for calls to redefine these criteria to suit unintentional crimes in C. Cravetto/E. Zanalda, "Corporate Criminal Liability in Italy: Criteria for Ascribing "Actus Reus" and Unintentional Crime" in D. Brodowski/M. Espinoza de los Monteros de la Parra/K. Tiedemann/J. Vogel (eds.), *Regulating Corporate Criminal Liability* (2014), pp. 109–121.

surrogates due to the lack of criminal law competence as well as in pursuance of specific policy goals of the EU. Criminal law competence was not an easy thing to achieve, as it was reflective of the (hurdles of the) legal integration of the Union and the various visions thereof advocated by multiple stakeholders. Eventually, the EU managed to establish a fully-fledged criminal law competence driven by both the pan-European wish for security, which has expanded due to external and internal terrorism threats, and the need to ensure the effectiveness of EU sectoral policies (the so-called 'functional criminalization').[395] This current criminal law competence, however, is subject to various conditions, i.e. it can be legislated only by means of directives and only stipulating minimal rules, only to the extent necessary and with an 'emergency brake' option capable of blocking EU legislative procedure on this matter (Article 82 [2] TFEU; Article 83 TFEU). On the road to gaining criminal law competence, however, many other punitive measures that were formally not classified as criminal came to pass because the EU, like any other legal system, needed functional deterrents to fend off infringements in a range of policies.[396] Even after Lisbon, they continue to be used as a more efficient enforcement tool in concurrence with criminal law measures.[397]

3.78 The proverbial cradle of these punitive (but not formally criminal, as any hint at that had to be avoided in parlance of the EU) measures was competition law, where the need for effective penalties and fines first became acute. It had already been recognized in Articles 85–87 of the Treaty establishing the European Economic Community of 1957 (currently Articles 101 and 102 TFEU) by empowering the Council to adopt any appropriate regulations or directives necessary to give effect to provisions prohibiting anticompetitive behaviour. The main enforcement back then was, however, delegated to the Member States and it took some time for the enforcement system to become centralized, from 1962 onwards, simultaneously increasing the role of the Commission.[398] Administrative sanctions proved themselves to be especially well suited for this legal field: not only could they efficiently and without unnecessary delay be imposed on corporations, which were the recipients of the sanctions, evading the debate about

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395 See more about the driving forces behind EU's criminal law competence in C. Harding/J. Öberg, "The journey of EU criminal law on the ship of fools – what are the implications for supranational governance of EU criminal justice agencies?", (2021) 28 *Maastricht Journal of European and Comparative Law* 2, pp. 192–211.

396 M. Kärner, "Punitive Administrative Sanctions After the Treaty of Lisbon: Does Administrative Really Mean Administrative?, (2021) *European Criminal Law Review* 2, pp. 156–176 (p. 157).

397 See for the benefits of administrative sanctions as perceived by the EU in Communication COM (2011) 573 final 'Towards an EU criminal policy: Ensuring the effective implementation of EU policies through criminal law'.

398 See more about the development of EU competition law in D. Geradin/A. Layne-Farrar/N. Petit, *EU Competition Law and Economics* (2012), pp. 12–19.

whether legal entities could be liable in criminal terms or not, but they were also flexible, in that they allowed for linking the size of a penalty with the turnover of a particular company. Administrative procedure was furthermore more suitable for this domain, which is inundated with the need for complex economic assessments. Also it should not be forgotten that the competition rules were the result of a political compromise between France and Germany and the latter did not embrace corporate criminal liability and has time and again shown itself to be generally against the approximation of criminal laws in the EU as a reflection of core values of a particular society.[399]

3.79 Due to the dearth of an imprisonment option and the significant economic interests at stake, administrative fines have tended to reach extraordinary heights as the Commission has been nothing but increasing them over the years in order to sufficiently deter infringements together with a rapid expansion of private enforcement options,[400] even if the effect of inflation has to be considered when one talks about the rise in the size of these fines.[401] The increased level of fines, in turn, has resulted in calls for more procedural protection to be applicable to corporations and a never-ending doctrinal debate on the 'true' nature of competition fines[402] as well as questions about imputing personal liability for anticompetitive behaviour and the legitimacy of sanctions of such a whopping size, especially in cases where the liability is calculated based on the turnover of global parental companies – an issue that from the 1990s onwards resulted in a quantum leap in penalties.[403] These questions have also partially been faced on the CoE level (cf. MN. 7.35).

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399 Geradin/Layne-Farrar/Petit (n. 398), MN. 1.51–1.53. See for this principal opposition in Decision No. 2 BvE 2/08 of the *Bundesverfassungsgericht* of 30 June 2009 (the 'Lisbon Judgement').

400 It was estimated that in order to be a sufficient deterrent, competition fines have to reach 150 per cent of the annual turnover in the products concerned by the violation. Such 'draconian' fines, however, may exceed companies' abilities to pay and result in pernicious socio-economical consequences. See more about this study in W. Wils, "Is Criminalization of EU Competition Law the Answer?", (2005) 28 *World Competition* 2, pp. 117–159. In reality, however, the basic rate for corporate fines shall not exceed 10% of the undertakings's total turnover in the preceding business year (Article 23 [2] of the 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). See more about the fining policy of the EU Commission and its drawbacks in D. Geradin/C. Malamataris/J. Wileur, "The EU competition law fining system" in I. Lianos/D. Geradin (eds.), *Handbook on European Competition Law: Enforcement and Procedure* (2013), pp. 328–361.

401 See for claims that the previous level of competition fines may have been too low and the 'inflation argument' in Wils (n. 16), p. 11.

402 While the Member States are allowed to criminalize competition infringements on a national level, on the EU level, the enforcement in this domain is still non-criminal, see the debate in Wils (n. 400).

403 Yomere (n. 377), p. 21.

Even though highly visible, competition law has been far from being an exclusive domain of law, in which administrative sanctions proliferated as effective deterrents and surrogates for criminal law measures on the EU level.[404] From the 1970s onwards, the Member States were obliged to take measures to provide appropriate sanctions against certain EU law infringements mostly using the principle of loyal cooperation as a justification. They were free to choose the means for achieving this goal, i.e. they could turn to administrative, criminal, private or disciplinary law according to their national peculiarities. The Union itself was also legislating and introduced a number of fines, forfeitures, exclusions from subsidy schemes and professional disqualifications, especially in domains where clear enforcement deficits on the national level existed. The CJEU in the famous *Greek Maize* case in 1989 consolidated the criteria of punitive measures necessary to guarantee the application of Community law, i.e. they accordingly have to be "effective, proportionate and dissuasive".[405] This 'triad' harmonized the *modus operandi* of sanctions even before the Lisbon Treaty and reverberated in many legislative acts and the case law of the EU.[406] Other significant domains in which administrative sanctions have been successfully invoked are common agricultural policy,[407] fishery policy, environmental policy, air transportation law,[408] EC financial interests' protection as well as guarding the four freedoms of the Union.[409] The importance of punitive administrative sanctions has, thus, grown over the years and resulted in their parallel use together with criminal law measures within some domains, even post-Lisbon, as described above (cf. MN. 3.68)

3.5. Administrative Sanctions *qua* Criminal Sanctions: Paradigmatic Distinctions

3.81 Another way of describing a phenomenon is to juxtapose it with its 'next in kin'. However, when it comes to administrative sanctions, it seems to be an insurmountable task to tell them apart from another form of public admonition, namely, a criminal sanction. Of course, the difference should be discernible when one talks about a particular sanction within a particular

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404 Interestingly, the EU itself has admitted that administrative sanctions can ensure a higher level of enforcement within the framework of financial market rules in Communication (n. 397), p. 6.

405 *Commission of the European Communities v Hellenic Republic* (C-68/88) 21 September 1989 CJEU at [23]–[24]. See further for a catalogue of procedural safeguards developed in relation to EU administrative sanctions in de Moor-van Vugt (n. 13).

406 See, for example, a 'solution' embedded in data protection law: the GDPR allows EU Member States which do not provide for administrative fines to impose penalties by competent national courts as long as they remain "effective, proportionate and dissuasive" (Article 83 [9] GDPR).

407 See the paramount importance of agricultural law in shaping general administrative law of the EU in Böse (n. 16), pp. 138 et seq.

408 Böse (n. 16), p. 180.

409 Weyembergh/Joncheray (n. 15), p. 200.

legal framework but it is almost impossible to tell what criteria and which qualities exactly sunder them in abstract terms. As will be demonstrated below, the doctrinal endeavours have grasped certain evident truths related to this matter but not really yielded any plausible answer as to where the *summa divisio* may lie. This question is by no means new: alongside the law, another mode of governance existed for a long time, namely, the one of police power by which it was sought to maximize the welfare of a household, which can be traced back to the Greek city-states and Roman *paterfamilias* notion.[410] In the absolutist legal thinking, the police codes alongside the criminal codes were regarded as fulfilling the sovereign's task of promoting the common good and regulating various aspects of civil life.[411] The inception of a 'modern' discourse on the matter, for its part, can be attributed to Feuerbach.[412] A lot of ink has been spilled ever since in order to set the boundaries between these two legal tools as well as to answer the centrepiece questions belonging to the realm of legal policy, i.e. when should a regulator prefer criminal sanctions over administrative sanctions? And, how can it be ensured that the baby is not thrown out with the bathwater, i.e. that the procedural safeguards that particular measures merit are not compromised if they are outsourced to the administrative realm?

3.82 In the scholarship, the social harm protected by administrative sanctions and criminal sanctions has been used whilst trying to define the former both in its (supposedly lesser) quantitative and qualitative dimensions. It has been claimed that 'true' crimes cause genuine harm and not mere annoyance, inconvenience, hurt or offense.[413] However, while it is a valid claim that usually criminal transgressions pose more serious harm to members of society, this statement is relativized when it comes to administrative transgressions to 'life and limb', such as speeding. The requirement of culpability has been used as a further factor of differentiation by claiming that it is not necessary in the domain of administrative sanctions since penalties in this regulatory domain are relatively light and no stigma is attached to the finding of an offence.[414] It has also been claimed that criminal law is reserved for the protection of the core societal values and administrative law guards the periphery,[415] i.e. responds to offences deemed

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410 See on the evolution from patriarchal power to state power in Dubber (n. 308). See also MN. 3.02.

411 Weigend (n. 221), p. 67.

412 He primarily perceived administrative contraventions as representing an attack not towards the rights and interests of others but rather towards the established order, and derived them from 'police power' of a state, see also n. 221.

413 J. Feinberg, *Harm to Others: The Moral Limits of the Criminal Law* (1987), p. 188.

414 See Simester (n. 245).

415 This core-periphery argument may also be presented as *mala in se* (evil in itself) and *mala prohibita* (prohibited wrong) distinction, see for its limitations MN. 4.43 et seq. See also the 'Lisbon Judgement'

to be less dangerous to society. Yet again, this 'rule of thumb' reveals nothing of substance because such values are not only particularistic but tend to constantly change over time: some values are being born (such as the recent developments towards the protection of the environment or personal data), while others wither and are rearranged.

3.83 The ECtHR also appears to refrain from basing its assessments on 'true wrongs' as opposed to 'lesser trifles and nuisances',[416] although the *Jussila* concession has reversed this tendency somewhat (cf. MN. 4.43 et seq.). Besides, there are many instances in which criminal and administrative law share common areas of social activity as the object of their regulation.[417] The practice also shows that these two instruments of punishment tend to clash or live 'parallel lives' in situations that are not so easily untangled. For example, the legislator may choose to apply administrative liability for 'contempt of the court' practiced outside the court house and criminal liability for the same offence practiced inside the courthouse.[418] However, all of these limitations do not mean that all of the said points of differentiation should not be taken into consideration whilst faced with the necessity of identifying with which type of sanction one is dealing and what procedural safeguards one should apply.[419]

3.84 In addition, it has often been stated that administrative sanctions are less intrusive and have somewhat weaker penalizing effects than criminal sanctions but, yet again, there are plenty of instances in which the level of coercion inflicted by means of an administrative sanction approaches or even exceeds the one that is typical for criminal law.[420] The distinction by

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of the *Bundesverfassungsgericht* of 30 June 2009 endorsing the idea that by means of criminal law a legal community is punishing conduct which breaches 'core values' of a society.

416 The case of *Neste* can be singled out as an oddity here. In this case the ECtHR has declared that: "freedom of market competition is a relative, situational value and encroachments on it are not inherently wrong in themselves", see *OOO Neste St. Petersburg, ZAO Kirishiavtoservice, OOO Nevskaya Toplivnaya, ZAO Transservice, OOO Faeton and OOO PTK-Service* (69042/01, 69050/01, 69054/01, 69055/01, 69056/01, 69058/01) 3 June 2004 ECtHR (dec.). The ECtHR also makes references to the "general interests of society normally protected by criminal law" but does not go to great lengths to explain them, see, e.g., *Menarini Diagnostics S.R.L. v Italy* (43509/08) 27 September 2011 ECtHR at [40]. See also *Maresti v Croatia* (55759/07) 25 June 2009 ECtHR at [59] for a remark that "the protection of human dignity and public order [are] values and interests which normally fall within the sphere of protection of criminal law".

417 Caeiro (n. 278), p. 177.

418 See for this example *Kakabadze and Others v Georgia* (1484/07) 2 October 2012 ECtHR. See, *mutatis mutandis*, *Putz v Austria* (18892/91) 22 February 1996 ECtHR for criminal liability applicable for contempt in the face of the court and civil liability for contempt displayed outside the court.

419 R. Pawlik, "Sanctions from Perspective of *Ius Puniendi*: Between Criminal Liability and Liability for a Misdemeanour, and Administrative Liability – the Example of Poland", (2016) 4 *Societas et Iurisprudentia* 3, pp. 72–116 (p. 77).

420 In fact, the intensity of administrative coercion is not a new phenomenon. Exorbitant fines for competition law offences were introduced already in post-war Germany in order for the country to achieve a vigorous reform on decartelization, see more in Ohana (n. 220), pp. 271–281.

function is furthermore hardly possible since both sanctions may serve (and in actuality do serve) various functions in a modern-day society (cf. MN. 3.36 et seq.). All in all, it can be claimed that the delimitation of the feeble fault line between the two forms of public admonition falls into the hands of the legislator, for the most part. However, the legislator cannot do so arbitrarily but has to adhere to the constitutional values found within a particular normative framework.[421] Such values should be fundamental and not obsolete.[422]

3.85 Ideally, a pluralistic approach towards incorporating these values should be employed whilst legislating sanctions. Supranational 'European' tendencies, for their part, exert additional pressure in this regard although their actual impact varies; they may be 'hard' obligations stemming from EU law or musings of the ECtHR 'constrained' by the margin of appreciation doctrine as to what values should be protected by criminal law. The same is true for the values enshrined in international law documents against whom the imposition of administrative law sanctions should always be balanced: for example, administrative authorities cannot refuse to renew one's passport due to failure to pay taxes as that would be a clear violation of the International Covenant on Civil and Political Rights.[423] Furthermore, the legislator should pay deference to the *ultima ratio*[424] as well as 'compelling state interest'[425] doctrines whilst introducing criminal liability and the neccessity of punishment altogether while introducing any kind of liability.

3.86 Although the whole range of doctrinal endeavours that have aimed to delimit criminal sanctions from administrative sanctions cannot be discussed here due to the spatial limitations of this thesis, the following part will elucidate on three paradigmatic distinctions elaborated by

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421 On the need for the legislator to be guided by constitutional values in choosing a particular type of a sanction see I. Appel, *Verfassung und Strafe: zu den verfassungsrechtlichen Grenzen staatlichen Strafens* (1998), pp. 505 et seq. See also for the pyramid of enforcement advocating the application of 'soft strategies' of punishment such as education and negotiation before turning to more severe measures as suggested by Ayres and Braithwaite (n. 286).

422 It goes without saying that any kind of constitutional provision will not be able to serve as a convincing justification for stipulating a criminal liability. For example, the absinthe in Switzerland was outlawed until 2005 based on the country's constitution; however, it is highly debatable if such provision was meant to protect the fundamental values of society or economic interests of the producers of other alcoholic beverages.

423 Delmas-Marty/Teitgen-Colly (n. 230), p. 79.

424 See N. Jareborg, "Criminalization as Last Resort (*Ultima Ratio*)", (2005) 2 *Ohio State Journal of Criminal Law* 2, pp. 521–534. See for a critique D. Husak, "Applying *Ultima Ratio*: A Skeptical Assessment", (2005) 2 *Ohio State Journal of Criminal Law* 2, pp. 535–545.

425 This principle encapsulates the idea that measures restricting fundamental liberties should be subjected to strict scrutiny and evaluated by the onerous compelling state interest theory; whereas measures restricting non-fundamental liberties ought to be evaluated by applying the much less demanding rational basis test, see more in D. Husak, "Overcriminalization" in Patterson (n. 197), pp. 621–631 (p. 226).

James Goldschmidt, Alan Brudner and Eithan Y. Kidron. They are deemed to exert a sufficient dose of intellectual richness for the purpose at hand. It will *a fortiori* be explained why these essentialist divides remain inconclusive. In fact, it is by pulling these different doctrinal strands together that it becomes evident that the matter is too complex to cater for a clear-cut answer. Thus, the ECtHR is left to amalgamate and contextualize different factors that define the preponderance of the punitive character of a sanction *ad hoc* and in an autonomous fashion (cf. MN. 4.15).

3.5.1. Administrative Sanctions through the Prism of Public Welfare

3.87 The first elaborate theoretical endeavour in continental Europe[426] to find the fault line between the two manifestations of *ius puniendi* within the framework of administrative law can be attributed to James Goldschmidt, who drew on the previous discussion by German criminal jurists.[427] His monograph entitled *Das Verwaltungsstrafrecht* of 1902 started a fierce polemic on the nature of 'administrative penal law' or what Goldschmidt in other words termed 'pseudo-criminal law'.[428] Goldschmidt sought to delimit criminal sanctions from administrative ones by emphasizing the variable quality of the legal wrongs that these sanctions protect and the moral significance of the offence committed. Regarding the first precept, he distinguished two regulatory domains, the legal order (*Rechtsordnung*) and the administrative order (*Verwaltungsordnung*), which pursue different rationales and aims. The legal order ought to ensure peace within the society by demarcating the power spheres and safeguarding legal goods by means of criminal sanctions; it is furthermore an expression of the common will (*allgemeiner Wille*).[429] The administrative order, for its part, is tasked with a 'supporting' function in a State, namely, promoting public welfare (*Wohlfahrtförderung*) as an expression of its own particular will (*Sonderwille*), i.e. emanating not from the legislator guarding the power spheres within different societal actors.[430]

3.88 Goldschmidt identified this core task of the administration not as a particular state of things but rather as an ideal that can never be fully attained and should be striven for in a creative and

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426 At least in the German tradition that, as demonstrated above, has influenced the supranational level. See H.G. Michels, *Strafbare Handlung und Zuwiderhandlung: Versuch einer materiellen Unterscheidung zwischen Kriminal- und Verwaltungsstrafrecht* (1963), p. 77.

427 See n. 221.

428 Goldschmidt (n. 219), p. 556. See for a similar conception of criminal-administrative law in Polish legal system in Pawlik (n. 419), pp. 76 et seq. and in Austrian legal system in N. Raschauer/W. Wessely, *Verwaltungsstrafrecht: Allgemeiner Teil* (2005).

429 Goldschmidt (n. 219), pp. 530–531.

430 Goldschmidt (n. 219), p. 560.

dynamic way.[431] Administrative sanctions, as acts of 'self-help' of the administration, are protecting the pursuit of public welfare and should be imposed on anyone trying to obstruct it.[432] Quite innovatively, Goldschmidt claimed that they should be imposed by administrative courts.[433] At the same time, this raises the question of whether Goldschmidt was not defeating the very purpose of these punitive devices by subjecting them to judicial intervention in any event. Regarding the second precept, Goldschmidt claimed that administrative sanctions are morally indifferent (*ethisch nicht vorwerfbar*) and only criminal penalties are able to attract socio-ethical reprehensibility (*sozialethisches Unwerturteil*).

3.89 Even though Goldschmidt managed to capture some inevitably truthful fragments in this regard, his reliance on the said extra-legal parameters in order to delimit the two punitive spheres is not convincing because they are relative: what is considered as a morally reprehensible behaviour in a modern-day society by one group may be even encouraged by other groups and *vice versa* (cf. MN. 4.46). Furthermore, some administrative offences, by themselves, do not contain any moral bearing at all (*mala prohibita*) – except that by committing them public order or safety is endangered and this by itself may be subject to reproach – but are a matter of mere consensus. The classical example in this regard is the rule that one must drive on the right side of the street in continental Europe.

3.90 The major drawback of Goldschmidt's theory and the reason why it is derelict from a contemporary perspective is that in basing his theory on two separate punitive domains, he disregarded the fact that the administrative order should be part of the legal order. Namely, the dichotomization of these orders within a society seems contrived. In other words, since the administrative order should also be part of the legal order in a modern state guided by the rule-of-law, the two systems should not be viewed as antipodes but rather as interconnected systems.[434] It is also not fully clear from where exactly he derives the particular will of the administration, leaving the reader wondering whether it is nothing other than a 'rebranded' version of police power (cf. MN. 3.02; 3.43). Moreover, Goldschmidt does not elaborate in

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431 "*Nie ein Zustand … stets ein Ziel*", Goldschmidt (n. 219), p. 533.

432 Goldschmidt (n. 219), p. 545.

433 This is done in keeping with the logic that no penalties can be imposed without the intervention of judicial organs (*nulla poena sine judicio*), Goldschmidt (n. 219), pp. 583–584.

434 D. Ohana, "Regulatory Offences and Administrative Sanctions: Between Criminal and Administrative Law" in M. D. Dubber/T. Hörnle (eds.), *The Oxford Handbook of Criminal Law* (2014), pp. 1064–1086 (p. 1073).

substantive terms on what this 'welfare' is that the administration seeks to attain and whether it should be determined empirically or by relying on some moral precepts.

3.91 The proliferation of administrative sanctioning as a response to numerous traffic offences (cf. MN. 4.05) protecting life and bodily integrity rather than public welfare has rendered Goldschmidt's conception derelict for the most part. At the same time, it has to be stated that Goldschmidt was fully aware of the relativity of his own theory from early on: at the end of his monograph he claimed that "no absolute but only a relative difference between criminal and administrative offences can be established".[435] This claim was fortified by another sharp observation, which is that administrative offences can easily morph into criminal offences and *vice versa* by means of the so-called *Abschichtungsprozess* (a process of re-grading). Only the spatial and temporal circumstances, according to Goldschmidt, of a particular society are able to define which offences are punished by which means and there is barely a delict that could not principally fall into both categories.[436]

3.5.2. Administrative Sanctions and Freedom

3.92 Coming back to more recent times, the liberal account of punishment delivered by Alan Brudner in his seminal work "Punishment and Freedom" of 2009 is worth exploring.[437] As the name of this book implies, this theory was conceived within the framework of freedom as the fundamental norm of a liberal legal order and the basis for self-development. Brudner seeks to provide an answer to the paradoxical question of how punishment can be consistent with freedom by pondering upon permissible force as opposed to wrongful violence as well as the principles guiding the imposition of the former. In order to solve this conundrum, he introduces three cornerstone notions, which are cohesive building blocks of his theory: formal agency, real autonomy and communal solidarity (belonging). Formal agency is conceived as the pure (*a priori*) capacity to pursue self-authored aims, whereas real autonomy reflects the entitlements of goods delivered by regulatory laws.[438] In other words, the State has a duty to provide the conditions for living according to self-authored ends (formal agency, thus, turning into real autonomy), e.g., by alleviating poverty. Communal solidarity, for its part, is also a variant of freedom because by endorsing and living up to the shared norms of conduct a (virtuous)

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435 Goldschmidt (n. 219), p. 585.

436 Goldschmidt (n. 219), p. 585.

437 A. Brudner, *Punishment and Freedom* (2009).

438 Brudner (n. 437), pp. 23 et seq.

individual is able to achieve a life well lived.[439] Brudner goes on to conceive of penal law as a unity of these frameworks or a system of sub-systems.[440]

3.93 Later on, Brudner tries to situate 'true crimes' and 'public welfare offences' within the said penal system as a complex whole. 'True crimes', according to him, are actions that either pre-empt the capacity to choose ends (formal agency) through physical force or that interfere at the point of expression with threats imposing a narrow choice acting for the threatener's ends or suffering a pre-emption or destruction of capacity.[441] Meanwhile, public welfare offences are actions, omissions, or statuses that are made illegal because they are dangerous to a particular expression of the capacity in a widely shared social preference (e.g. freedom of competition) or to the agency goods necessary for any expression (e.g. regulations in transportation and industry).[442] The source of distinction, thus, lies in a concrete articulation within the structure of human agency. If the imposition of 'true crimes' is intrinsically justified because the offender denies the (equal) rights of others, e.g., by taking away property the offender denies the possessory rights of another person, then the offender who commits a regulatory breach may also be visited upon by punitive sanctions because he thereby implicitly disrespects the authority of law, which makes the actualization of the rights of the individual possible.[443]

3.94 What is more, 'true crimes' call for the establishment of culpability, even if they do not need to result in actual harm. The culpability principle in this context works both as a justifying and limiting force towards repression.[444] The same cannot be said about public welfare offences and regulatory sanctions because they are "either efficacious or inefficacious"[445] and knowingly committing a regulatory breach suffices. In fact, the language of 'desert' and 'punishment' is foreign to them since they do not vindicate any rights but seek to prevent harm.[446] For example, someone who drives in excess of the speed limit does not prevent others from pursuing ends of their choosing but he is liable to a penalty just for posing harm to others.[447] The very purpose of regulatory sanctions, according to Brudner, is to "threaten setbacks to individual happiness

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439 Brudner (n. 437), pp. 5–6.

440 Brudner (n. 437), p. 12.

441 Brudner (n. 437), p. 173.

442 Brudner (n. 437), p. 173.

443 Ohana (n. 434), pp. 1076–1077.

444 Yomere (n. 377), p. 262.

445 Brudner (n. 437), p. 177.

446 Brudner (n. 437), p. 176.

447 Brudner (n. 437), p. 13.

sufficient to outweigh the expected benefits of a breach" (cf. MN. 2.09).[448] Such an approach to administrative sanctioning by subjugating individuals to the instrumentality logic is questionable because (paradoxically) it is at odds with liberty, which is cherished by Brudner.

3.95 Brudner's theory deserves credit for reminding us of liberty's worth with regard to punishment in a similar way that Hobbes placed punishment against the paradigm of the inalienable rights of every individual confronted with the punitive power of the sovereign (cf. MN. 2.08). In the specific context of this thesis, this is extremely important, as the ECHR was created on the basis of the liberal democratic concept of freedom and autonomy of persons.[449] However, despite providing a structured account of the variants of freedom, Brudner's theory is especially abstract.[450] In terms of practicality, it is hard to imagine a legislator devising a system of punishment based on these highly theoretical and stipulated notions of human agency alone. Liberty itself, despite its utmost significance in democratic systems, is not the only factor that the latter has to consider whilst legislating; rather, the matter at hand is much more complex and calls for a pluralistic approach, i.e. putting other social values into the equation and balancing them against each other.

3.96 All of these values must furthermore be assessed in view of the prosecution costs and the probability of discovery considering the scarcity of public funds. In addition, Brudner's concept of 'real autonomy' appears to be a rebranded version of general welfare (cf. MN. 3.87 et seq.) or police power in the broad sense (cf. MN. 3.43). As with Goldschmidt's concept thereof, even if Brudner derives it not from the subjective will of the administration but from the common will, it remains unclear how its content should be defined, which leaves this notion, yet again, a sort of 'empty shell'. What is more, Brudner also falls into the trap of basing his theory on dichotomies that seem artificial: in his theory, each of them generates a distinct paradigm on their own, whereas in reality these paradigms very often blend and supplement each other.

3.5.3. Administrative Sanctioning as Corrective Justice

3.97 The foregoing theories focus their attention primarily on retribution; however, this is not the only normative lens through which administrative sanctions *vis-à-vis* criminal sanctions could be explored. Another paradigm that is useful in this regard relies on corrective justice as opposed to distributive justice (cf. MN. 3.49). This approach, adopted by Eithan Y. Kidron,

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448 Brudner (n. 437), p. 182.

449 A. Mickonytė, *Presumption of Innocence in Eu Anti-Cartel Enforcement* (2019), p. 72.

450 For more points of criticism and Brudner's answer to critics see a collection of articles "Symposium on Punishment and Freedom: A Liberal Theory of Penal Law", (2011) 14 *New Criminal Law Review: An International and Interdisciplinary Journal* 3, pp. 427–495.

builds on two concepts that are essential for its comprehension: correlativity and public right. The first concept indicates the structure of the bilateral relations between the doer and the sufferer of a specific damage, whereas the latter is based on the Kantian concept of right, i.e. legal relationships based on the notion of free action as required by the categorical imperative of reason.[451] Criminal law protects public rights in that the State punishes criminal offences, which, according to Kidron, are wilful and explicit denials of the public right. More precisely, it vindicates the harm done and reinstates the initial state of equality between the parties as free beings, should a violation of the public right occur.[452] Administrative law, for its part, is also geared towards the protection of public rights, but it seeks to prevent an excessive risk to the public right without any need for wilfulness as a precondition. The guiding 'metric' here is not the one of desert but that of dangerousness. For example, by temporarily revoking the driver's license of a driver who has breached the traffic rules, a risk to bodily integrity can be prevented.[453]

3.98 Hence, one type of sanction is reactive (*ex post*) towards an objective and subjective infringement of a public right, whereas the other is prospective (*ex ante*) towards an objective manifestation of an excessive risk to this right. In addition, other points of differentiation include the mode of sanction and evidentiary rules attached to their imposition. Criminal sanctions deny freedom through imprisonment and fines (as a response to the violator denying public rights first), while administrative sanctions restrict it through revocations, barring the violator from associations and the like.[454] Importantly, criminal sanctions are fixed in nature, i.e. they sit in direct relation to the injury done, while administrative sanctions correlate with the expected risk or, more precisely, with its degree and likelihood of materialization (cf. MN. 3.48).[455] In addition, only excessive risks ought to be prevented, i.e. administrative law should not concern itself with any kind of risk attached to daily life. Evidentiary rules, for their part, differ because the ultimate goal of these two punitive domains is also not the same: the high standard of proof in criminal law responds to the need to uncover the truth about a subjective denial of the public right. This need is non-existent in administrative sanctioning, since a manifestation of risk here is objective; hence, a lower threshold of evidence suffices.[456]

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451 Kidron (n. 206), p. 324.

452 Kidron (n. 206), p. 327.

453 Kidron (n. 206), p. 346.

454 Kidron (n. 206), p. 349.

455 Kidron (n. 206), pp. 348–349.

456 Kidron (n. 206), p. 351.

3.99 Kidron's account of administrative sanctioning appears to be more operable in conceptual terms than Brudner's because it is less abstract. Therefore, it may be beneficial in guiding the lawmaker as to the choice of a particular forum of social control. Kidron has evidently managed to capture the truth backed by empirical studies that administrative law is better geared towards precluding a risk of harm that never materializes, since regulators spend most of their time conducting inspections precisely to detect these hazards.[457] However, this does not automatically make his account absolutely true. As is the general problem with any kind of theory, the 'normative' reality of administrative sanctioning tends to be much more complex than its models. Firstly, in contemporary legal frameworks, by committing administrative offences one is capable of violating a public right. For example, by tearing off a stranger's pants a random dog and, accordingly, his inattentive owner not only presents a risk to the public right (in this case, property and/or bodily integrity) but also impinges thereon. To claim otherwise would be to negate the rationale of the so-called administrative offences law in which such nuisances abound.

3.100 Secondly, the boundary line between an *ex post* and *ex ante* reaction is also blurry: in fact, a huge part of administrative sanctioning law is reactionary in that it retaliates against transgressive behaviour and punishes recalcitrant individuals even if the intensity thereof or the actual harm done strongly diverge form criminal law. Long gone are the days when the administration was concerned only with the regulation of risks and punishment was perceived as a 'foreign' function, as this thesis seeks to demonstrate (cf. MN. 4.03). Finally, many administrative transgressions do require a subjective mental state of wilfulness or intentionality at the very least, although not necessarily, as the case of remedial administrative sanctions demonstrates (cf. MN. 3.54). If it were otherwise, then administrative penal law itself would be too exposed to arbitrary tendencies. Thus, this distinction shatters in practical terms and allows the elusiveness of discovering the partition between criminal and administrative sanctions to linger.

3.6. The 'Privatisation' of Administrative Sanctioning

3.101 As became evident from the foregoing, no watertight criteria capable of distinguishing two forms of public admonition exist on a conceptual level. Hence, a more reliable and functional way to separate the two is by looking at the relevant actor entrusted with imposing a particular sanction. In the case of administrative sanctions, this is a public body exercising a public law

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457 Regulators are also more likely to punish this type of behaviour. See more in Brown/Rankin (n. 195), pp. 340–341.

function as defined by a particular legislative framework. However, one may wonder how the practice of outsourcing administrative sanctioning to private subjects is to be perceived because this tendency *prima facie* contradicts the traditional view that only the sovereign holds the 'public sword' and has the right to punish (cf. MN. 2.08).[458] As will be demonstrated below, the overburdening of courts having to impose sanctions caused the shift from criminal to administrative sanctions and resulted in their proliferation in modern times for the most part (cf. MN. 4.03 et seq.).

3.102 Today it seems that public authorities are confronted with the very same problem and withdraw from sanctioning by transferring it into 'private hands' in certain domains. Logically, such practices firstly tend to crop up in domains that are inundated with offences and, thus, present large-scale problems of sanctioning, such as road traffic, especially when it comes to parking tickets. Usually, the need to establish the guilt of the offenders in these domains is also less intense. 'Private sanctions' can, however, sporadically appear in other domains too: for example, a private organization can exclude an individual from taking part in certain sports activities.[459] Understaffing in some sectors or the need for expertise in technical matters that the 'functional actors' have might provide additional incentives to outsource sanctioning.

3.103 The said privatisation of administrative sanctioning reflects the general trend to disperse power between 'public' and 'private' actors in a modern regulatory state due to globalisation, privatisation, marketization, destatization and the like.[460] In fact, contemporary administrative law is not only about the 'private life' of the administration but also about the 'public life' of private actors.[461] It can no longer be understood only as a mechanical structure concerned with the relationship between the *administré* and the *autorité publique*, but must also be perceived as a market, where many intersecting negotiations take place.[462] Especially in the transnational

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458 See for a recent scholarship on private involvement in the practice of criminal punishment in T. Daems/T. Vander Beker (eds.), *Privatising Punishment in Europe?* (2018).

459 This happened in the UK, where the Jockey Club having no statutory basis, disqualified racehorses and fined their owners, see more in L. van den Berge, "Rethinking the Public-Private Law Divide in the Age of Governmentality and Network Governance", (2018) 5 *European Journal of Comparative Law and Governance* 2, pp. 119–143 (pp. 133–134).

460 The public-private divide as a 'grand dichotomy' of Western thought has grown faint over time. See more on delegation of governmental power to private parties as a commonplace method in C. Donnelly, *Delegation of Governmental Power to Private Parties: A Comparative Perspective* (2007).

461 J. Barnes, "New Frontiers of Administrative Law: A Functional and Multi-Disciplinary Approach. Private Life of Administration – Public Life of Private Actors" in Blanke/Cruz Villalón/Klein/Ziller (n. 342), pp. 563–588.

462 Cassese (2012, n. 4), p. 608.

regulatory arena, such private sanctions seem to be a reality already.[463] And yet since these private actors are usually profit-driven, which at times clashes with the underlying aim of state organs to work for the benefit of the public and/or the principle of legality, which is extremely important in the given context, such a practice may quickly degenerate into arbitrariness or at the very least result in the curtailment of the standards of individual protection. This problem of 'capture' is exacerbated if public authorities create strong monetary incentives for 'punishment on steroids' themselves, for example, by letting private contractors keep a significant amount of the revenues obtained from sanctioning instead of agreeing to pay a fixed tariff for their services.[464]

3.104 Moreover, entrusting private actors with sanctioning powers raises prickly questions about legitimacy and accountability, since they are "one step further removed from the electorate"[465] – to name but a few. In particular, the accountability is no longer linear and upward since no higher public authorities, such as ministerial bodies, exist to scrutinise the outsourced practices of sanctioning. This, for its part, also means that the 'retrieval' of 'proper' sanctioning practices is contingent on the succession of proceedings initiated against these private actors[466] and is, hence, fortuitous, since not everyone is willing to embark on a long and costly litigation.

3.105 It goes without saying that a change in substance does not follow from a change in the form in the case of outsourcing sanctions. Put otherwise, the simple fact of 'contracting out' administrative sanctions does not change their qualification and the resultant implications as such. Instead the focus – from the perspective of Convention's law – should be put on the nature of the power,[467] i.e. the concrete administrative competence that a private actor is exercising that is vested to it, thus, shifting the subject-centred approach outlined above to a function-centred one. So far, there is no case law of the ECtHR that has dealt with the compatibility of 'privatising' administrative sanctions with the Convention.[468] And yet Recommendation No. R

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463 See, e.g., G. Vasconcelos Vilaca, "Transnational Legal Normativity" in M. Sellers/S. Kirste (eds.), *Encyclopedia of the Philosophy of Law and Social Philosophy* (2017), pp. 1–8 (p. 4) claiming that in this domain norms are made *by some for some* and not in the Western traditional view of laws – *by everyone for everyone.*

464 For example, in the instances described below (n. 468) private firms were allowed to keep 70% of their 'sanctioning spoils' – a practice that was criticized by relevant domestic courts. Public authorities, for their part, are also not immune to this practice and sometimes it may constitute the problem of 'structural impartiality' (cf. MN. 5.31).

465 J. Freeman, "Private Parties, Public Functions and the New Administrative Law", (2000) 52 *Administrative Law Review* 3, pp. 813–858 (p. 824).

466 See, *mutatis mutandis*, Ziller (n. 121), p. 73.

467 Harlow/Rawlings (n. 104), p. 378.

468 Some interesting examples from national case law on this question merit a brief mention here. Namely, Higher Regional Court of Frankfurt declared recently that neither the issuing of parking tickets nor the

(91) 1 makes it clear that they are conceptually acceptable, since, whilst defining an administrative sanction, it does not use the formulation "penalties … imposed by public bodies". Contrapuntally, a systematic analysis of relevant CoE acts reveals that an administrative sanction is conceived as "a penalty… taken in the exercise of public authority". Hence, enough (normative) space is left for the conferral of such an exercise of public authority to private actors, as its explanatory memorandum clearly confirms (cf. MN. 3.23). Such delegation of power, however, should not happen without a clear basis in law and the possibility of efficient judicial review attached thereto. Claiming that such a transfer is impossible, on the other hand, would not sit well with the needs of efficiency and flexibility of various Member States that the CoE, considering its internationalist mandate, has to accommodate.[469]

3.106 However, it is of utmost importance for the CoE Member States to find efficient ways of dealing with the issues mentioned above and ensuring that private actors are able to achieve key public law objectives in case they decide to privatise certain domains of administrative sanctioning. More precisely, a good deal of public law values should be integrated into the practice of 'private sanctioning'. On a more practical level, for example, the issue (regarding the lack) of accountability could be dealt with by introducing a specific mandate to check whether private actors honour procedural safeguards or make other interventions to secure appropriate outcomes.[470] Moreover, an additional and effective avenue (à la sanctioning ombudsperson) for the concerned individuals could be provided in order for them to report and remedy unfair practices of sanctioning and the structural problems attached thereto, bearing in mind that judicial review tends to be happenstantial;[471] besides, in this domain the volume of

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administration of speed cameras by private agents is lawful since such practice breaches the 'monopoly of violence' (*Gewaltmonopol*) that the State has. Moreover, it creates a fake appearance of the rule of law (*täuschender Schein der Rechtsstaatlichkeit*) especially because the said private agents wore police uniforms. However, it is obvious that the legal basis for the impugned transfer of sanctioning as a public power was missing in the particular instances – had it been in place, the relevant case law might have been different. See Decision of Higher Regional Court of Frankfurt of 3 January 2020 in Case No. 2 Ss-OWi 963/18; Decision of Higher Regional Court of Frankfurt of 27 November 2019 in Case No. 2 Ss-OWi 1092/19.

469 These criteria are also generally validated in the case law of the ECtHR, see for "demands of efficiency and economy" as legitimate factors in *Jussila v Finland* (73053/01) 23 November 2006 ECtHR [GC] at [42] and expediency in *Hermi v Italy* (18114/02) 18 October 2006 [GC] at [80]. See also *Suhadolc v Slovenia* (57655/08) 17 May 2011 ECtHR (dec.). Especially interesting in this regard is the case of *Segame SA v France* (4837/06) 7 June 2012 ECtHR in which the fines, modelled as a percentage of the unpaid tax by domestic laws, were deemed to be catering for the needs of fiscal efficiency by the ECtHR.

470 See more in C. Scott, "Accountability in the Regulatory State", (2002) 27 *Journal of Law and Society* 1, pp. 38–60 (p. 57).

471 Aronson (n. 322), p. 47.

sanctioning decisions submitted to judicial review may be very low since it usually deals with 'petty' offences.

3.107 Finally, the regulatory quality of administrative sanctioning as a part and parcel of the legality principle (cf. MN. 7.19 et seq.) should be ensured together with the transparency requirements. In fact, there is no reason why this regulatory quality should suffer in any way only because diffusion of power has taken place, i.e. the fact that the sanctioning has been outsourced into private hands due to efficiency or operational needs voiced by the administrative authorities. Quite the opposite; such logic would eviscerate the very ideals of a State governed by the rule of law due to convenience. At the same time, while ensuring that the said practice is in line with public law values, the potential to harness private capacity in the service of public goals (such as the expertise, innovation and efficiency that it offers) should not be dismissed.[472] Eventually, the State's ability to deal with volumes of trivial matters in a speedy manner may serve the same individuals in shielding them from transgressions, if they happen to be on the receiving end of the spectrum.

3.7. Conclusion

3.108 The foregoing chapter undertook an ambitious quest to discern the essence of administrative sanctions and pinpoint them within a regulatory environment in abstract terms, i.e. detached from a concrete legal framework. The task proved itself to be challenging since these sanctions are highly variegated and originate from different impulses, as a European *tour d'Horizon* on the subject matter demonstrated. There is simply no one version of what an administrative sanction is and how it comes to be. Legal systems may go down the centripetal (German system), centrifugal (French system) or introspective (British system) path of introducing administrative sanctions into their respective systems.[473] In the meantime, they may expand and innovate an already incredibly broad palette of this legal tool conducive to the decriminalization as well as facilitation of administrative law's manifold goals by ensuring immediate and 'cheap' compliance – be it through inflicting retributory pains and expressing condemnation or remedial measures aimed at vindicating the damage done or preventive measures targeting potential administrative transgressions.

3.109 Due to the latter reasons, administrative sanctions do not lend themselves to an easy definition. In fact, the preceding study revealed that such definitions are either 'endemic', i.e.

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472 Freeman (n. 465), p. 857.

473 See more on these trajectories in A. Andrijauskaitė, "A Birth of Administrative Sanctions", (2019) available at: https://europeancommonwealth.org/2019/06/11/a-birth-of-administrative-sanctions/.

found within particular normative fields, or 'precooked', i.e. devised for the specific research purposes, consist of multiple sub-definitions or rely on far too many variables to effectively fulfil the purpose of a definition (cf. MN. 3.25 et seq.). Another reason for this conceptual indeterminacy is the multitude of functions that administrative sanctions are able to perform, namely, punitive, preventive and remedial ones. Each of them follows its own rationale and tackles transgressive behaviour of a different type (cf. MN. 3.33 et seq.). But in practice, as opposed to the theoretical models, they intermingle and result in 'hybrid instrumentality'. This totality of variations ought to be acknowledged, since it expresses the very *quidditas* of administrative sanctions.

3.110 The conceptual indeterminacy of these legal tools is furthermore glaring as the scholarship has not been able to grasp and plausibly articulate the distinction between administrative and criminal law sanctions. It is obvious that administrative sanctions were ancillary to the criminal law since ages and were integrated into the antic concept of the police power (cf. MN. 3.43). But placing the difference between the two on a substantive base appears to be intractable and no intellectually defensible test capable of distinguishing the two forms of liability has been developed so far after more than 150 years of 'frustrating research'.[474] Various scholars have tried to find the roots of the distinction in 'welfare', 'human agency' and its various guises as well as 'social control' and its techniques. The distinction based on these notions is not convincing because each of them brings its own share of limitations and ambiguity. And yet the distinction exists at least at the level of societal perception[475] and terminology. Hence, the only plausible criterion separating the two punitive domains is of a formal nature, provided that it does not negate the fundamental legal values in a concrete society and the very essence of these different legal institutions (see the ontological traits defining this essence below, cf. MN. 3.112).

3.111 More precisely, it is the nature of the sanctioning power that truly separates these different forms of public admonition; in the case of administrative sanctions, it is the executive origin and the respective procedure guiding the imposition thereof by a body in whom this public power is vested.[476] This means that the work of legislators and courts as a primary sanctioning

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474 Weigend (n. 221), p. 89.

475 F. Picinali, "The denial of procedural safeguards in trials for regulatory offences: a justification", (2017) 11 *Criminal Law and Philosophy* 4, pp. 681–703 (p. 684).

476 See for delimitations thereof by the ECtHR in *Vasilescu v Romania* (53/1997/837/1043) 22 May 1998 ECtHR at [40]–[41]; *Pantea v Romania* (33343/96) 3 June 2003 ECtHR at [238]–[239].

power is excluded.[477] It goes without saying that these formal criteria are contingent upon a particular constitutional arrangement in a legal system following either a separation of powers doctrine or a hierarchy of norms.[478] Hence, administrative sanctions in broad strokes are all measures capable of adversely affecting an individual that bodies in the exercise of public (executive) authority are vested with power to impose as opposed to criminal law sanctions imposed by judicial bodies in line with the criminal procedure that is of an enhanced nature, i.e. invoking stricter standards of individual protection. The emphasis here is not on the actor (administrative authority) because the emergent practice of outsourcing administrative sanctions to private hands (cf. MN. 3.101 et seq.) as well as the heterogeneity of this notion (cf. MN. 3.06 et seq.) blurs such a conceptualization. In fact, nowadays even "a greasy man in overalls may act as a part-time public authority" since he, for example, hands out safety certificates.[479]

3.112 Even if finding the distinction between administrative and criminal sanctions based on substantive criteria remains a quandary, they should still be taken (and in actuality are relied on to demarcate the boundary)[480] into consideration in this pursuit. This means that they are able to provide a strong indication about on which basis the 'true' identity of a particular sanction may be established. Such a bouquet of ontological traits or, put otherwise, 'customary distinguishing features', that are able to differentiate the two forums of liability include: features typical to criminal law only, such as imprisonment as well as judicial powers of seizure and arrest and criminal record[481] and their ripple effects such as exclusion from the civil service, prohibition on running for the office and the like; the (relative) tendency of the latter to protect 'fundamental' legal values, such as physical life (cf. MN. 3.82; 3.99);[482] indictment criteria (the

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477 Della Cananea, (2016, n. 4), p. 1.

478 E. Tauschinsky, *Commission Loyalty: A Fiduciary Approach to Delegated and Implementing Acts* (2016), p. 45. See further B. Ackerman, "The New Separation of Powers", (2000) 113 *Harvard Law Review* 3, pp. 633–729.

479 Verheij (n. 323), p. 60.

480 See, e.g., *Lauko v Slovakia* (26138/95) 2 September 1998 ECtHR at [52] and *Kadubec v Slovakia* (5/1998/908/1120) 2 September 1998 ECtHR at [47], in which the respondent state invoked an array of ontological traits to showcase that the impugned sanctions belonged to the domain of minor offences necessitating a differentiated approach.

481 That is not to say that a record of administrative infractions is irrelevant. In fact, it is often invoked when regulatory actors have to 'calibrate' the size of a sanction. Moreover, sometimes Member States do not differentiate and include administrative offences into the criminal record, see to this effect *Buliga v Romania* (22003/12) 16 February 2021 ECtHR at [20] and *Negulescu v Romania* (11230/12) 16 February 2021 ECtHR at [18].

482 One can claim that while administrative law could in theory absorb some of the elements of these fundamental societal values (cf. MN. 3.99), the reverse conclusion is not valid for criminal law as it would not be acceptable under the rule-of-law imperative for the latter to respond to, say, breaches of

need to establish guilt or criminal negligence as forms of *mens rea* in criminal law as opposed to lower or even non-existent levels of intent and volition attached to committing offences in administrative law) and, hence, a higher evidentiary and prosecutorial threshold applicable to criminal law as well as stronger procedural protection; shorter limitation periods in administrative penal law as well as a broader array of defences that can be invoked in view of its lesser social relevance; a lesser or almost non-existent intensity of moral opprobrium with regard to administrative offences; a possibility to deviate from the prosecution of administrative offences (*Opportunitätsprinzip*, cf. MN. 3.08) and dispense with marginal cases or cases requiring too many resources or strike 'pragmatic' deals, as the example of admonitory fines demonstrates (cf. MN. 4.07) as well as more discretion being afforded to the administrative authorities by the legislator with regard to their imposition; and (the possibility of) relinquishment of more severe sanctions for recidivists in administrative penal law since the pressure to atone and express condemnation as a reflection of a society's endorsement of certain values denounced by administrative law transgressions is generally lower.[483] Finally, these 'customary distinguishing features' of criminal law are interrelated: the possibility of imprisonment and moral opprobrium create a stronger push for procedural protection to avoid false convictions.[484] Administrative punishment, for its part, does not have these elements (or they are less intense) and, thus, procedural protection dwindles together with the need to establish *mens rea*, which in some specialized domains of administrative law can even turn out to be corrosive to the overall efficiency of sanctioning.[485]

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administrative order and obligations to fill declarations facilitating sound administration *per se* with no serious damage having arisen out of this contravention.

483 See also an overview of differences between enforcement regimes in Ogus (n. 316316), p. 44.

484 See more on the link between characteristics of criminal law in Wils (n. 400), p. 120.

485 E.g., strict liability has proven itself to be especially suitable regarding insider dealing with the CJEU admitting that "the effectiveness of administrative sanctions would be weakened if made subject to a systemic analysis of the existence of a mental element", see *Spector Photo Group NV and Chris Van Raemdonck v Commissie voor het Bank-, Financie- en Assurantiewezen (CBFA)* (C-45/08) 23 December 2009 CJEU at [37].

CHAPTER 4
TOWARDS A PAN-EUROPEAN ADMINISTRATIVE SANCTION

"The application of the Engel criteria is not an exact science; much depends on where the emphasis is placed."

Judges Sicilianos, Ravarani and Serghides

4.1. Introduction

4.01 The doctrinal exploration of administrative sanctions shall be followed by an inquiry into their (concrete) perception within the framework of the CoE since the latter tend to be 'endemic', for lack of a better term. As noted in the introduction, the CoE has been developing and harmonizing administrative standards for decades and currently its work in this domain can be said to form a 'coherent whole' (cf. MN. 1.08; 1.36; 1.39). Hence, all of the normative sources relevant to administrative punishment should also be assessed in a congruent and systematic manner. In this vein, this inquiry will include the gradual percolation of administrative sanctions into the case law of the ECtHR by means of the so-called *Engel* criteria, which were initially devised in the 1970s to confront the 'mislabelling' tendencies of some Member States of the CoE undertaken in order to circumnavigate the guarantees offered to punitive measures by the ECHR, the refinement of the latter over time as well as the notion of an administrative sanction found in the case law of the ECtHR.

4.02 Having carved out the contours of a pan-European administrative sanction, an examination of the so-called '*Jussila* concession' will be offered. More precisely, it took the ECtHR around thirty years after the creation of the *Engel* criteria to admit in the seminal *Jussila* case of 2006 that not all punitive measures carry the 'the same degree of stigma' and to start differentiating between the hard-core and the peripheral cases of punishment. Administrative sanctions often fall within the latter's purview, thus attracting a somewhat lowered standard of protection. Hence, revealing the full perception of a pan-European administrative sanction would not be possible without taking the implications that this qualifier and the case law developed thereafter bear into consideration. After this is done, the scene will be set to move on towards the examination of which procedural and substantive guarantees stemming from the ECHR administrative sanctions typically attract and where the possible gaps in individual protection may lie.

4.2. Administrative Sanctions and the ECtHR

4.03 As noted above, the ECHR itself is silent on administrative sanctions. Thus, their absorption was a praetorian development born out of the obvious necessity. More precisely, the percolation

of administrative sanctions into the case law of the ECtHR happened against the backdrop of the growth of the 'administrative state', which took on more and more novel functions and the increasing use of administrative sanctions as a handy tool to achieve the goals of public administration in post-war Europe. The exercise of new functions by public authorities has often left individuals in a vulnerable position and, hence, called for the need to adopt regulatory acts to protect them. The CoE has been active in this domain since the 1980s, when the already mentioned landmark Resolution (77) 31 on the protection of the individual in relation to the acts of administrative authorities was adopted.[486] Recommendation No. R (91) 1, for its part, makes a direct reference to Resolution (77) 31 as well as to Recommendation No. R (80) 2, concerning the exercise of discretionary powers by administrative authorities, adopted on 11 March 1980. Thus, it clearly stipulates that in addition to the specific principles of sanctioning, the general principles of fair administrative procedure should apply (cf. MN. 5.114). This not only (yet again) shows that the CoE's work in the administrative domain forms a 'coherent whole' but is also a logical development, since the imposition of sanctions is an outcome of an administrative procedure *lato sensu* (cf. MN. 1.08; 1.36; 1.39).

4.04 The corresponding academic interest in administrative law has also grown since that point in time, transversally.[487] Moreover, it coincided with the general push towards decriminalization, as capable of protecting both the interests of the individual (by her no longer being liable in criminal terms) and the need for proper administration of justice (by fostering effective functioning of the courts, which were relieved of the task of dealing with the great majority of regulatory offences). This trend has been encouraged by the ECtHR itself together with the broad margin of appreciation afforded to the criminal policy of the Member States.[488] A growing number of countries have begun to realize that (over)criminalization leads to overpunishment as well as to the depletion of public resources, since the criminal procedure is

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486 See also the pilot study by the CoE on such a need in Europe slightly preceding Resolution (77) 31 as well as *Engel* criteria, *The protection of the individual in relation to acts of administrative authorities – An analytical survey of the rights of the individual in the administrative procedure and its remedies against administrative acts* (1975) (appearing as a brochure). See also Stelkens/Andrijauskaitė (n. 7), MN. 1.64; 31.19 et seq.

487 Barnes (n. 461), p. 565.

488 "The Convention is not opposed to States, in the performance of their task as guardians of the public interest, both creating or maintaining a distinction between different categories of offences for the purposes of their domestic law", see, e.g., *Öztürk v Germany* [8544/79] 21 February 1984 ECtHR at [49], [52]) but also by the CoE, see, e.g., Recommendation No. R (91) 1 on administrative sanctions and Recommendation No. R (95) 12 on the management of criminal justice. The reverse trend is, however, currently visible in certain regulatory domains of the EU, such as environmental law and financial regulation, especially since a new legal framework in regard to criminal law under the Lisbon Treaty has been set up (cf. MN. 3.77 et seq.), see more in Communication (n. 397).

pricey and error-prone.[489] Decriminalization, for its part, seemed to be the 'high road' to safeguard the needs of different Member States, which are periodically confronted with an overload of *contra legem* behaviour that does not bear a high degree of offensiveness.[490] Societal shifts, such as the pressure to reduce the use of criminal law to enforce controversial norms of morality, have also contributed.[491] The general sentiment grew against applying criminal sanctions to 'morally neutral conduct', even if its determination has remained extremely obscure, as it was deemed to be both unjust and dilute the value of criminal law.[492] Administrative sanctioning, for its part, seemed to serve as a sort of 'surrogate' capable of warding off the ills of the said pernicious practice of overcriminalization. Moreover, it proved to be conducive to punishing legal persons especially in systems that do not recognize the possibility of applying criminal liability to corporations (*societas delinquere non potest*) (cf. MN. 3.69 et seq.).[493]

4.05 One particular factor could be singled out as having contributed to a large extent to the shift towards the use of administrative sanctions from criminal measures, namely, the rise of automobilism and the high-volume of penalties in this domain. For example, around the time when administrative sanctions percolated into the case law of the ECtHR they comprised up 90 percent of the fines issued in some countries.[494] Confronted with these high numbers, the legislators also had to come to terms with the fact that courts may not be the most effective organs to deal with these types of sanctions.[495] Instead, the executive bodies were entrusted with this task and there was a drift away from the notion that the infliction of punishment is quintessentially a judicial function,[496] thus making the road traffic regulation one of the first

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489 D. Husak, "Overcriminalization" in Patterson (n. 197), pp. 621–631.

490 See more in L. Del Federico/F. Montarani, "Decriminalization of Tax Law by Administrative Penalties on Tax Duties" in Seer/Wilms (n. 16), pp. 101– 116 (pp. 111; 115).

491 Ohana (n. 220), p. 285.

492 Green (n. 148), pp. 1536; 1541.

493 See in this regard CoE's Recommendation No. R (88) 18 of the Committee of Ministers to Member States Concerning liability of enterprises having legal personality for offences committed in the exercise of their activities of 20 October 1988.

494 *Öztürk v Germany* [8544/79] 21 February 1984 ECtHR at [40]. See for a further approval to transfer the prosecution and punishment of minor offences to administrative authorities in *Baischer v Austria* (32381/96) 20 December 2001 ECtHR at [23]; *Malige v France* (27812/95) 23 September 1998 ECtHR at [45].

495 Adler (n. 186), p. 196.

496 Yeung (n. 200), p. 325.

subjects of depenalization born out of the need for effectiveness.[497] The same need for effectiveness also spurred codifications on an international level.[498]

4.06 The tax domain quickly followed suit (albeit with a few limitations) in starting to use a panoply of administrative sanctions, given its task of securing "a functioning State and thus a functioning society".[499] Often the need for greater efficiency also prompted the (parallel) elimination of subjective elements (criminal intent or negligence) from the scope of decriminalised offences.[500] For example, in the tax domain it became evident that it would be nearly impossible to consider the culpability of non-compliant tax-payers on an individual basis in hundreds of thousands or even millions of tax cases each year. Also in certain instances these subjective elements do not really make a lot of difference to start with: for example, the duty to enter correct tax data in the books is an obligation *per se*, whose breach does not depend on the subsequent (mis)use of such data, i.e. whether it happens by mistake or by design with an eventual aim of using it for tax fraud.[501] Thus, the requirement of subjective guilt was removed altogether, especially when it came to less serious and formal contraventions, like breaches of cooperation duty or any other negligible 'technical' or administrative rules.[502]

4.07 Another rather 'mundane' but important factor influencing the diffusion of administrative sanctions was the fact that an increasing number of offenders earned enough to be able to pay a fine (thus, the need to turn to imprisonment as a classical type of punishment diminished).[503] Eventually, administrative sanctions were 'supplemented' by (procedural) intermediate steps to

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497 Rubini (n. 189), p. 507.

498 See CoE's European Convention on the Punishment of Road Traffic Offences of 30 November 1964 adopted out of "necessity of the mutual co-operation in ensuring more effective punishment of road traffic offences committed in the territories of the CoE Member States".

499 *A and B v Norway* (24130/11 and 29758/11) 15 November 2016 ECtHR [GC] at [144]. See for the ECtHR's 'conceptual blessing' in this domain cases of *Bendenoun v France* [12547/86] 24 February 1994 ECtHR at [47] as well as *Janosevic v Sweden* (34619/97) 23 July 2002 ECtHR; and *Västberga Taxi Aktiebolag and Vulic v Sweden* (36985/97) 23 July 2002 ECtHR, etc. See, however, for a general debate regarding the non-applicability of the ECHR to tax matters in *Ferrazzini v Italy* (44759/98) 12 July 2001 ECtHR as forming 'hard-core of public-authority prerogatives'. See further *Georgiou v the United Kingdom* (40042/98) 16 May 2000 ECtHR (dec.) admitting that sometimes the consideration of punitive tax surcharges necessarily involve pure tax assessments to a certain extent.

500 *Västberga Taxi Aktiebolag and Vulic v Sweden* (36985/97) 23 July 2002 ECtHR at [39]. See further *Rosenquist v Sweden* (60619/00) 14 September 2000 ECtHR (dec.).

501 See *Lucky Dev v Sweden* (7356/10) 27 November 2014 ECtHR at [55] and the case law indicated therein.

502 R. Seer/A. L. Wilms, "General Report" in Seer/Wilms (n. 16), pp. 3–27 (p. 11).

503 Adler (n. 186), p. 197.

unburden the court system[504] and/or by so-called admonitory fines in some countries to effectuate the whole system even further, i.e. reduced fines could be paid provided that the transgressor did not object to their imposition and paid them immediately.[505] Administrative authorities, for their part, spared themselves not only the effort of having to prove that an administrative offence had been committed but also the supervening execution of penalties.[506] It could be extrapolated that the CoE does not object to the use of admonitory fines because Recommendation No. R (91) 1 trades-off certain guarantees itself in cases of minor importance subject to the consent of the applicant (cf. MN. 5.09). The validation of such a system can *a fortiori* be deduced from the fact that the ECtHR does not object to waivers of judicial review provided that they are not tainted by pressure or any other constraint (cf. MN. 5.27 et seq.).

4.08 As noted above, the ECtHR, by developing and applying the famous *Engel* criteria,[507] proved as early as the 1970s – the time when it started to be "a real player in the European integration"[508] – its willingness to defend standards of individual protection against so-called 'mislabelling' tendencies, i.e. the (arbitrary) practice of using administrative punishment in cases deserving enhanced safeguards offered by a criminal procedure. The pervasiveness and 'ingenuity' in this regard among Member States should not be underestimated: it goes from pleading that certain measures are classified as 'administrative' by mistake and stretches as far as claiming that a punitive sanction is not a sanction at all but instead, for example, the destruction of physical evidence.[509] In addition, sometimes the domestic terminology given to a particular punitive measure can be somewhat delphic and impart the impression that it is

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504 For example, in Germany if the applicant challenges the imposition of an administrative fine, her claim has to go to the public prosecutor (*Staatsanwaltschaft*) at first and can be subjected to judicial review only if the latter upholds the fine, see more in Nowrousian (n. 227), p. 246.

505 In Germany this institution is known as '*Verwarnungsgeld*' and in France as '*le paiement immédiat*'. Both of them reduce the administrative fine to be paid significantly in exchange of the transgressor not challenging their lawfulness and complying therewith on the spot or very soon.

506 See for the acknowledgment of admonitory fines in the case law of the ECtHR in *Siwak v Poland* (51018/99) 1 July 2004 ECtHR (dec.).

507 See *Engel and Others v Netherlands* (5100/71, 5101/71, 5102/71, 5354/72, 5370/72) 8 June 1976 ECtHR. For a more recent affirmation of these criteria by the Grand Chamber also see *Ezeh and Connors v the United Kingdom* (39665/98 and 40086/98) 9 October 2003 ECtHR [GC].

508 Before that the Convention system was conceived rather as an early warning system, see more in E. Lambert Abdelgawad, "European Court of Human Rights" in S. Schmahl/M. Breuer (eds.), *The Council of Europe – Its Laws and Policies* (2017), pp. 227–268 (p. 229).

509 This occurred in the *Ismayilov v Russia* (30352/03) 6 November 2008 ECtHR in which a considerable amount of money was confiscated by public authorities and vanished under the pretext of the applicant bringing it unlawfully into the country, even though the law only stipulated a duty for the applicant to inform the authorities thereof.

something else, i.e. a compensatory measure,[510], a secondary penalty,[511] a *sui generis* measure[512] or a "special kind of social sanction".[513] Another classical defence put forward by respondent states is the simple claim that the punitive measures at issue belong to "a new branch of law created to deal with certain situations not meriting protection by the criminal law" and, subsequently do not fall under the 'criminal charge' requirement of Article 6 ECHR.[514]

4.09 Such notions as the ECtHR being a 'living instrument' to be interpreted in the light of present-day conditions and 'European consensus' have, for their part, helped the ECtHR to overcome all of these defences as well as textual limitations of the ECtHR, i.e. the fact that it has no explicit bearing on administrative law (the original impact of administrative law was not as wide and deep as that of criminal or civil law) let alone administrative sanctions.[515] They have also enabled the ECtHR to apply the 'criminal charge' requirement autonomously or 'from the point of view of the Convention' and, according to some, in a 'sweepingly broad' manner,[516] i.e. regardless of the national legal classification (although the latter can be indicative for the ECtHR) of the impugned measure, provided that it is substantial or has deterrent and punitive purposes (cf. MN. 4.31 et seq.). The ECtHR also applies this technique of autonomous interpretation with regard to the 'civil limb', which is nothing but a logical outcome in a multilateral legal setting.

4.10 According to the ECtHR itself, it is the prominent place held in a democratic society by the right to a fair trial that prompts it to prefer a 'substantive', rather than a 'formal', conception of the 'criminal charge' contemplated by that article.[517] In other words, the said significance of the right to a fair administration of justice excludes a restrictive interpretation of Article 6 ECHR, which would not correspond to the aim and purpose of that provision.[518] The ECtHR

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510 For example, a measure named 'fuel fee debit', see in this regard *Ruotsalainen v Finland* (13079/03) 16 June 2009 ECtHR. See also *VP-Kuljetus Oy and Others v Finland* (15396/12) 6 January 2015 ECtHR (dec.).

511 *Malige v France* (27812/95) 23 September 1998 ECtHR.

512 *Mort v the United Kingdom* (44564/98) 6 September 2001 ECtHR (dec.).

513 *S. v Sweden* (11464/85) 15 May 1987 CHR (dec.) [Plenary].

514 See in this regard, e.g., *Ioan Pop v Romania* (40301/04) 28 June 2011 ECtHR (dec.).

515 S. Mirate, "The ECrtHR Case Law as a Tool for Harmonization of Domestic Administrative Laws in Europe", (2012) 5 *Review of European Administrative Law* 2, pp. 47–60 (p. 48). See further on the evolutive interpretation of the ECHR in J. Gerards, *General Principles of the European Convention on Human Rights* (2019), pp. 51–53. See further K. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (2015).

516 Mickonytė (n. 449), p. 69.

517 See *H.M. v Germany* (62512/00) 9 June 2005 ECtHR (dec.).

518 See, e.g., *Delcourt v Belgium* (2686/65) 17 January 1970 ECtHR at [25].

also invokes the said autonomous approach when it comes to other notions relevant for administrative punishment, such as 'penal procedure' in the text of Article 4 of Protocol No. 7 or 'penalty' in the text of Article 7 ECHR (cf. MN. 7.13 et seq.), thus creating a harmony of interpretation in the whole body of *ius puniendi* in the ECHR. Put differently, the notion of a 'penalty' should not have different meanings under different provisions of the ECHR.[519] This hermeneutic harmony is a welcome development since more often than not applicants invoke several ECHR violations in relation to a particular punitive measure at the same time.[520] The following part will look at the *Engel* criteria as a gateway for administrative sanctions into the Convention, as well as their evolution over time and critique, more closely.

4.2.1 The *Engel* Criteria Dissected

4.11 It seems important to re-emphasize at the very outset that administrative sanctions do not operate under ECHR law on their own accord. At the time of drafting the ECHR the full reach of administrative law was not clear, let alone the intricacies of administrative sanctioning. Thus, there is no explicit normative basis validating their use. Instead they are conceptually dependent on the (determination of) a 'criminal charge' in each case *sub judice* – an inescapable legal parameter uniquely[521] embedded in the very wording of Article 6 ECHR – and thus reflect its object and purpose, i. e. the factors that the ECtHR has to follow in its interpretation.[522] In fact, the ECtHR eschews generalizations towards certain types of sanctions as automatically falling within the purview of Article 6 ECHR but prefers to assess each situation individually.[523] This autonomous and individual attribution of the 'criminal charge' to administrative punishment is

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519 *Göktan v France* (33402/96) 2 July 2002 ECtHR at [48].

520 See in this regard, e.g., *Mayer v Germany* (77792/01) 16 March 2006 ECtHR (dec.).

521 No any other international instrument ties individual guarantees either with 'criminal charge' or 'civil rights and obligations', see more in P. Leanza/O. Pridal, *The Right to a Fair Trial: Article 6 of the European Convention on Human Rights* (2014), p. 31. For the latter's connection to the administrative law see extensively D.J. Harris, "The Application of Article 6 (1) of the European Convention on Human Rights to Administrative Law", (1976) 47 *British Yearbook of International Law* 1, pp. 157–200.

522 In the author's opinion it is precisely this formulation (the 'semantic trap' of Article 6 ECHR) that has facilitated the recognition that, e.g., antitrust fines can be of a criminal nature within the meaning of the ECHR (see, e.g., *Menarini Diagnostics S.R.L. v Italy* [43509/08] 27 September 2011 ECtHR at [42]) – which is still somewhat of a 'taboo' in the EU law, see on various divergent points between the two legal systems in Wils (n. 16), pp. 5–29, and for further discussion see Bailleux (n. 1). However, it is also true that the proliferation of administrative sanctions came to pass years after Article 6 ECHR was drafted. Thus, the 'original intent' of the Convention drafters regarding those type of sanctions remains unclear, see the Dissenting Opinion of Judge Matscher in *Öztürk v Germany* [8544/79] 21 February 1984 ECtHR.

523 For example, in the case of *OOO Neste St. Petersburg, ZAO Kirishiavtoservice, OOO Nevskaya Toplivnaya, ZAO Transservice, OOO Faeton and OOO PTK-Service* (69042/01, 69050/01, 69054/01, 69055/01, 69056/01, 69058/01) 3 June 2004 ECtHR (dec.) it elegantly evaded giving a concrete answer to the question whether competition law offences should be regarded as 'criminal' within the meaning of Article 6 ECHR. Instead it chose "to consider the applicant companies' individual situation against the principal criteria defining the notion of 'criminal'".

not problematic in itself because, as rightly noted by the ECtHR, "there is in fact nothing to suggest that the criminal offence referred to in the Convention necessarily implies a certain degree of seriousness".[524]

4.12 The inauguration of sanctions other than criminal ones into *acquis conventionnelle* happened in the landmark case of *Engel and Others v Netherlands* of 1976.[525] As mentioned above, this coincided with the start of normative activity of the CoE regarding the protection of the individual *vis-à-vis* the administration as well as with increased interest in administrative law scholarship (cf. MN. 4.04). This case and the criteria developed therein had powerful resonance in the subsequent case law and have been modified over time.[526] The said case took place in a very specific context – military discipline law - and concerned penalties imposed on servicemen for offences against military discipline (such as an unauthorized absence from service, reckless driving, undermining military discipline and the like). These penalties occasioned the deprivation of liberty for the applicants – ranging from light to severe arrest and also to the so-called committal to a disciplinary unit, placing the offenders under stricter discipline than normal by sending them to an establishment specifically designated for that purpose. Hence, the applicants claimed that Article 5 ECHR as well as Article 6 ECHR had been breached, since not only were they unlawfully detained but also the proceedings before the military authorities that the applicants initiated to have these penalties removed did not entail all of the guarantees of the latter article. The ECtHR was left with the tricky task of having to balance individual guarantees against the intricacies of military disciplinary law, which by its very nature, implied the possibility of placing additional limitations on certain rights and freedoms of the servicemen.[527]

4.13 After pondering on the nature and effects of disciplinary measures in the given context and paying deference to the prerogative of the Member States to maintain or establish a distinction between criminal law and disciplinary law,[528] the ECtHR went on to assess whether the disciplinary character of concrete penalties still counted as 'criminal' within the meaning of Article 6 ECHR in this particular case. It concluded that in fact "the 'autonomy' of the concept

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524 *Öztürk v Germany* (8544/79) 21 February 1984 ECtHR at [51].

525 *Engel and Others v Netherlands* (5100/71, 5101/71, 5102/71, 5354/72, 5370/72) 8 June 1976 ECtHR.

526 A search in the "Hudoc" database reveals that the keyword "Engel" appears in more than a couple of thousand cases.

527 *Engel and Others v Netherlands* (5100/71, 5101/71, 5102/71, 5354/72, 5370/72) 8 June 1976 ECtHR at [57].

528 *Engel and Others v Netherlands* (5100/71, 5101/71, 5102/71, 5354/72, 5370/72) 8 June 1976 ECtHR at [80] – [81].

of 'criminal' still counts, as it were, one way only".[529] In order to approach this matter more conceptually, the ECtHR had to work out the exact criteria for the determination of the 'criminal charge'. It started with the observation that – quite evidently – the first criterion, i.e. the national classification of a particular measure (i), as hinted at above, can only be of indicative value, otherwise the Member States would be induced to escape the supervision of the ECtHR by giving 'false labels' to punitive measures, which merit 'enhanced protection' due to their great detriment. It is the ECtHR that is the master of the characterisation to be given in law to the facts of a case.[530] Sometimes the domestic legal classification is rather clear and the terminology used facilitates the determination of the criminal charge by the ECtHR.[531] However, this is not always the case: interestingly, even if the national legal classification designates a certain measure as 'criminal' this is not necessarily decisive for the ECtHR, since it does not conflate a legal classification with a broader, autonomous concept of the 'criminal charge'.[532] Usually, the ECtHR chooses to examine such classifications in the light of the common denominator of the respective legislation of the various Member States.[533] In fact, it is not the 'appearances' but the 'realities of the situation' that the ECtHR assesses for this purpose. This is a valid approach, especially considering the fact that sometimes even the Member States themselves do not know precisely with what type of penalties or proceedings they are dealing with.[534]

4.14 By contrast, the second criterion, i.e. the very nature of the offence (ii) was deemed to be of far greater importance. The ECtHR did not explicate how this 'nature' was to be determined; however, in line with the previous strand of legal reasoning, it is likely that the 'consensual'

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529 *Engel and Others v Netherlands* (5100/71, 5101/71, 5102/71, 5354/72, 5370/72) 8 June 1976 ECtHR at [81]. And yet it was not really "the only way" since the applicants in this case alternatively argued that Convention guarantees were applicable under the 'civil limb' of Article 6 ECHR. Hence, the ECtHR had a choice but (as it follows from the judgment's reasoning) was willing to afford protection to the broadest possible extent, including the guarantees of Article 6 (2) and (3) ECHR applicable only to the 'criminal limb' and thus opted for it, see this reasoning at [86] – [87].

530 *Černius and Rinkevičius v Lithuania* (73579/17 and 14620/18) 18 February 2020 ECtHR at [49].

531 See, e.g., a string of Austrian cases cited below (cf. MN. 5.47) in which the ECtHR highlighted that Austrian law itself refers to traffic violations as administrative offences (*Verwaltungsstraftaten*) and administrative criminal procedure (*Verwaltungsstrafverfahren*).

532 See, e.g., *Escoubet v Belgium* (26780/95) 28 October 1999 ECtHR, in which a measure provided for in a criminal statute of a respondent state was not deemed to fall within the scope of Article 6 ECHR by the ECtHR. See further *Jónsson and Ragnar Halldór Hall v Iceland* (68273/14 and 68271/14) 22 December 2020 ECtHR [GC].

533 *Engel and Others v Netherlands* (5100/71, 5101/71, 5102/71, 5354/72, 5370/72) 8 June 1976 ECtHR at [82]. See for a critique and the difficulties of finding this 'common denominator' in Dzehtsiarou (n. 515), pp. 78–82.

534 See to this effect, e.g., *J.B. v Switzerland* (31827/96) 3 May 2001 ECtHR in which the Swiss authorities claimed that tax assessment and tax evasion proceedings leading to an imposition of a disciplinary fine for failing to provide information, were "*sui generis*, although they bore a closer resemblance to administrative proceedings than to criminal proceedings" at [43].

approach was meant here as well.[535] In subsequent case law, it also transpired that this criterion has to be interpreted in light of the object and purpose of the Convention's provisions as well as the ordinary meaning of the terms.[536] It was also settled that the ECtHR would assess it through the 'punitive and deterrent' aims that a sanction ought to have (cf. MN. 4.31 et sq.). Finally, the ECtHR highlighted the nature and degree of severity of the penalty that the person concerned risks incurring as the third criterion (iii). The emphasis lies on the word 'risks' here meaning that the ECtHR will take into consideration not the actual penalty imposed but the degree of severity of the penalty to which the person concerned is *a priori* liable.[537] The actual penalty imposed, for its part, is relevant to the determination of the 'criminal charge' but it cannot diminish the importance of what was initially at stake.[538] The possibility of converting a particular fine into imprisonment would especially alarm the ECtHR to this effect.[539] In fact, only "entirely exceptionally, and only if the deprivation of liberty cannot be considered 'appreciably detrimental' given its nature, duration or manner of execution" can this presumption be rebutted.[540] The criterion of severity is definitely the most subjective parameter as it is 'quantitative' and always involves a degree of judgment.[541] The ECtHR went on to apply these criteria to the factual circumstances in the *Engel* case and found the 'charges' against some of the applicants to come within the 'criminal' sphere beyond peradventure and thus

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535 As attested by, e.g., *Öztürk v Germany* [8544/79] 21 February 1984 ECtHR in which the ECtHR remarked that the particular offence is 'criminal' in a great majority of States, at [53]. See for this approach also *Weber v Switzerland* (11034/84) 22 May 1990 ECtHR at [33].

536 See, e.g., *Lauko v Slovakia* (26138/95) 2 September 1998 ECtHR at [56]; *Garyfallou AEBE v Greece* (18996/91) 24 September 1997 ECtHR at [32].

537 See *Campbell and Fell v the United Kingdom* (7819/77; 7878/77) 28 June 1984 ECtHR at [72]; *Weber v Switzerland* (11034/84) 22 May 1990 ECtHR at [34]; *Demicoli v Malta* (13057/87) 27 August 1991 ECtHR at [34]; *Benham v United Kingdom* (19380/92) 10 June 1996 ECtHR at [56]; *Garyfallou AEBE v Greece* (18996/91) 24 September 1997 ECtHR at [33] – [34].

538 See, e.g., *Ezeh and Connors v the United Kingdom* (39665/98 and 40086/98) 9 October 2003 ECtHR [GC] at [120].

539 See n. 303.

540 *Sergey Zolotukhin v Russia* (14939/03) 10 February 2009 ECtHR [GC] at [56]; *Maresti v Croatia* (55759/07) 25 June 2009 ECtHR at [60].

541 Bahçeci (n. 289), p. 884. See on the arbitrary nature of this criterion as reflected in the dissenting opinion of Judge De Meyer in the case of *Putz v Austria* (18892/91) 22 February 1996 ECtHR in which Article 6 ECHR was deemed inapplicable for the offence of contempt of court, even though the applicant was facing multiple days of custody: "Does it really have to be accepted that a person does not have the right to be tried properly where only a small fine or a short term of imprisonment is at stake? And if so, where does the threshold of severity lie that triggers entitlement to that right? What amount? How many days' imprisonment?".

called for the application of a full range of guarantees under Article 6 ECHR (namely, the imposition of serious punishments involving the deprivation of liberty).[542]

4.15 These criteria are in principle alternative and, as was made clear in the subsequent case law of the ECtHR, the second and third criteria are not necessarily cumulative. In fact, it is enough that the offence in question can by its very nature be regarded as criminal or that the offence renders the person liable to a penalty that by its nature and degree of severity belongs in the general criminal sphere.[543] And yet a cumulative approach is not excluded in cases where a separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge ("none of the criteria is decisive on its own"). All of the different circumstances of the case must be weighed and if, taken together, they predominantly have a 'criminal connotation', then the existence of a 'criminal charge' shall be established.[544] Such a 'criminal connotation' or 'criminal colouring' of the case can be revealed, for example, by the fact that the administrative sanctions at issue are adjudicated "by criminal chambers of the domestic courts"[545] or that the criminal procedure codes are applicable to them *mutatis mutandis*, even if in a summary fashion.[546] However, in some situations, such as tax surcharges, the hearings may also take place in commercial chambers of the domestic courts and this will not change the fact that these sanctions have a punitive essence.[547] The emphasis here should be placed on the word 'predominant' since it is possible that certain sanctions will originate from criminal law framework, e.g., be dependent on the finding of a criminal offence, but by themselves will have a set of traits whose clear predominance does not have a 'criminal connotation'.[548] Interestingly, a 'criminal connotation' may cease to be applicable, if punitive sanctions, forming a part of a greater whole, are revoked while the proceedings are under way.

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542 *Engel and Others v Netherlands* (5100/71, 5101/71, 5102/71, 5354/72, 5370/72) 8 June 1976 ECtHR at [85]. Paradoxically the penalty imposed on Mr. Engel was not deemed to be severe enough to attract the 'criminal charge' since he was detained for 'barely' 2 days – an aspect criticized by some judges contending that "the nature of punishment itself [here] in fact overrides its duration", see Separate Opinion of Judge Cremona given in the case.

543 See *Campbell and Fell v the United Kingdom* (7819/77; 7878/77) 28 June 1984 ECtHR at [35]–[38]; *Jussila v Finland* (73053/01) 23 November 2006 ECtHR [GC] at [31]; *Ezeh and Connors v the United Kingdom* (39665/98 and 40086/98) 9 October 2003 ECtHR [GC] at [86].

544 See *Bendenoun v France* (12547/86) 24 February 1994 ECtHR at [47]; *Benham v United Kingdom* (19380/92) 10 June 1996 ECtHR at [56]; *Garyfallou AEBE v Greece* (18996/91) 24 September 1997 ECtHR at [33]; *Lauko v Slovakia* (26138/95) 2 September 1998 ECtHR at [57].

545 See in this regard *Ziliberberg v Moldova* (61821/00) 1 February 2005 ECtHR at [34].

546 See, e.g., *Siwak v Poland* (51018/99) 1 July 2004 ECtHR (dec.); *Matyjek v Poland* (38184/03) 30 May 2006 ECtHR (dec.) at [56].

547 See, e.g., *Paykar Yev Haghtanak Ltd v Armenia* (21638/03) 20 December 2007 ECtHR.

548 See *Mayer v Germany* (77792/01) 16 March 2006 ECtHR (dec.); *H.M. v Germany* (62512/00) 9 June 2005 ECtHR (dec.).

In cases like these, the ECtHR might declare such individual petitions inadmissible under the criminal limb of Article 6 ECHR.[549]

4.16 It should also be added that whereas the ECtHR left no doubt in this case that it would interpret the term 'criminal [charge]' under Article 6 ECHR autonomously and worked out a conceptual scheme for this purpose, it did not elucidate the meaning of a 'charge'. This is not a trivial matter since it may be crucial in adjudicating whether, for example, the right to a hearing within a reasonable time as enshrined in Article 6 (1) ECHR was violated; or, *mutatis mutandis*, whether the proceedings before administrative authorities were determined within a reasonable time (cf. MN. 5.13 et seq.). The said term was explicated in the subsequent case law: it was stated that not only can this parameter in general mean "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence" but at times it may also "take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect".[550]

4.17 This certainly bears relevance to administrative punishment as interpreted autonomously under the ECHR – a context in which no criminal charges in a formal sense are pressed. Instead, the imposition of a fine or any other administrative sanction by means of adopting an administrative act will mark the moment of 'charging' a person within the meaning of Article 6 ECHR. For example, a notification by an administrative authority that the applicant was liable to lose points from his driving license on account of the traffic offence he had committed,[551] the reception of a preliminary report that the transfer of an applicant's assets was being investigated for taxation purposes by the administrative authorities[552] or the drafting of an audit report whereby tax surcharges were imposed on the applicant[553] were deemed by the ECtHR to be a starting point for that matter. In any case, it should be clear to the applicant with which offence exactly she is charged, the place and date thereof as well as the relevant statute.[554] In other words, this information should at all times be included in the charge sheet (administrative

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549 In the case of *Mieg de Boofzheim v France* (52938/99) 3 December 2002 ECtHR (dec.), this occurred where the tax surcharges were cancelled by the national authorities, but the additional taxes were still required from the applicants.

550 See *Foti and Others v Italy* (7604/76; 7719/76; 7781/77; 7913/77) 10 December 1982 ECtHR at [52] and *Corigliano v Italy* (8304/78) 10 December 1982 ECtHR at [34]; *Västberga Taxi Aktiebolag and Vulic v Sweden* (36985/97) 23 July 2002 ECtHR at [103].

551 *Malige v France* (27812/95) 23 September 1998 ECtHR at [44].

552 See *Paulow v Finland* (53434/99) 14 February 2006 ECtHR (dec.).

553 See *Janosevic v Sweden* (34619/97) 23 July 2002 ECtHR at [92].

554 See *mutatis mutandis Brozicek v Italy* (10964/84) 19 December 1989 ECtHR [Plenary] at [42].

act), since it is closely connected with the ability to exercise her defence rights properly, on the one hand, and the precision of the (administrative) prosecution, on the other (the latter element becomes significant when multiple offences are committed at around the same time). It can be deemed to be a sort of enhanced duty to give reasons for administrative decisions – one of the cornerstone principles of administrative law (cf. MN. 5.51 et seq.).

4.2.2. The *Engel* Criteria Re-Calibrated

4.18 As noted above, the *Engel* criteria have not stagnated over time but instead have kept on being recalibrated to fit the ever-changing context of punishment and the expansion of its forms. The first alteration came in the milestone case of *Öztürk v Germany*[555] of 1984, in which a 'cascading road map' of these criteria was developed.[556] Here the ECtHR was once again confronted with the question of whether the national classification of a measure as a 'regulatory offence' was the decisive factor in terms of the Convention.[557] More precisely, the applicant in this case complained of having to bear the interpreter's fees in the court proceedings in connection with his contravention against road safety and claimed a violation of Article 6 (3) e) ECHR (cf. MN. 5.83 et seq.). The ECtHR modified the second *Engel* criteria and shifted the analysis from the nature of the offence (the social-ethical relevance of the charges) to the nature and the aim of the applicable sanctions, i.e. it highlighted that they have to be both 'punitive and deterrent' in order to attract the guarantees of Article 6 ECHR – the twin purpose that pretty much defines the conception of a sanction in the case law of the ECtHR (cf. MN. 4.31 et seq.).[558]

4.19 In addition, the 'general scope' of these sanctions was included in the assessment, i.e. the requirement for a rule to be directed to the public at large. It is not the concrete number of the addressees of the legal provisions that matters but rather their 'special status', i.e. their quality as members of a particular group, combined with the interests protected by the pertinent rule.[559] Among them, judges,[560] members of the armed forces or civil servants acting in their

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555 *Öztürk v Germany* (8544/79) 21 February 1984 ECtHR.

556 Bahçeci (n. 289), p. 870.

557 See also *Lutz v Germany* (9912/82) 25 August 1987 ECtHR for the same problem.

558 Caeiro (n. 278), p. 176; *Öztürk v Germany* (8544/79) 21 February 1984 ECtHR at [52]–[53].

559 T. Barkhuysen/M. Van Emmerik/O. Jansen/M. Fedorova, "Right to a Fair Trial (Article 6)" in P. Van Dijk/F. Van Hoof/A. Van Rijn/ L. Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights* (2018), pp. 497–655 (p. 528).

560 See, e.g., *Ramos Nunes de Carvalho e Sá v Portugal* (55391/13, 57728/13 and 74041/13) 6 November 2018 ECtHR [GC] at [125].

professional capacity,[561] and persons in leading positions within corporations,[562] could be mentioned (in the case of *Öztürk*, for its part, the legal rule infringed was addressed to all road-users).[563] It remains questionable as to what extent this criterion should really matter because only in a limited number of cases can the legal requirements truly be said to be 'general'. In most cases, administrative law regulations are addressed towards a limited number of persons or firms operating in particular regulated industries, such as the environment, workplace safety and the like.[564] For example, in the *Neste* case, the ECtHR did not recognize that antitrust proceedings should be considered 'criminal' because the requirement at hand applied only to "relations which influence competition in commodity markets", and was thus deemed to be of a restricted, not universal, application.[565]

4.20 The latter requirement was developed and expounded upon in the post-*Öztürk* case law, among other things, in cases dealing with tax penalties[566] or penalties comparable thereto.[567] This requirement above all enables the differentiation between punitive and disciplinary measures that presuppose a 'special relationship of obligation'[568] and 'subordination in a

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561 See *Guisset v France* (33933/96) 9 March 1998 CHR (dec.) [Plenary] even though the severity of the fine imposed in this particular case rendered this parameter irrelevant. See further on the special bond of trust and loyalty required from the civil servants in *Pellegrin v France* (28541/95) 8 December 1999 ECtHR [GC] at [65].

562 For the latter see *Plåt Rör och Svets Service i Norden AB v Sweden* (12637/05) 26 May 2009 ECtHR (dec.) at [54].

563 *Öztürk v Germany* (8544/79) 21 February 1984 ECtHR at [53]; see also *Siwak v Poland* (51018/99) 1 July 2004 ECtHR (dec.); *Ioan Pop v Romania* (40301/04) 28 June 2011 ECtHR (dec.) at [25]. See further for the general scope of a rule addressed to all citizens as taxpayers in *Bendenoun v France* (12547/86) 24 February 1994 ECtHR at [47].

564 Green (n. 148), p. 1544.

565 *OOO Neste St. Petersburg, ZAO Kirishiavtoservice, OOO Nevskaya Toplivnaya, ZAO Transservice, OOO Faeton and OOO PTK-Service* (69042/01, 69050/01, 69054/01, 69055/01, 69056/01, 69058/01) 3 June 2004 ECtHR (dec.). *A contrario*, the ECtHR did not shy away from adjudicating on situations concerning the abuse of dominant position in similar cases of *Lilly France v France* (53892/00) 14 October 2003 ECtHR and *The Fortum Corporation v Finland* (32559/96) 15 July 2003 ECtHR.

566 See *Bendenoun v France* (12547/86) 24 February 1994 ECtHR at [47] acknowledging that the provision at issue covers "all citizens in their capacity as taxpayers", see further *Janosevic v Sweden* (34619/97) 23 July 2002 ECtHR at [68]; *Jussila v Finland* (73053/01) 23 November 2006 ECtHR [GC] at [38]. See also for 'parafiscal' charges directed to a more restricted group of persons in connection to their economic activity yet meeting the 'general scope' requirement in *Steininger v Austria* (21539/07) 17 April 2012 ECtHR at [36].

567 See in this regard the case of *Ruotsalainen v Finland* (13079/03) 16 June 2009 ECtHR at [46]. See also *VP-Kuljetus Oy and Others v Finland* (15396/12) 6 January 2015 ECtHR (dec.) at [38] for a fuel fee debit "directed towards all citizens [as owners or users of diesel engine vehicles] rather than towards a group possessing a special status".

568 See to this effect *Suküt v Turkey* (59773/00) 11 September 2007 ECtHR (dec.) in which the discharge from the army for breaches of discipline was not deemed to fall within the scope of Article 6 ECHR as it would have called into question "the special bond of trust and loyalty".

hierarchical structure'[569] stretching far beyond the 'ordinary' duties of a citizen, also meaning that the latter measures are directed towards a limited number of people – usually towards civil servants, soldiers, prisoners and the like. Although the meta-rationale of these two types of sanctions is different,[570] the potential for confusion is never too far away and is exacerbated by the jurisdictional work of professional organizations.[571]

4.21 Firstly, this is so because disciplinary law used to belong to the domain of special criminal law and forged its own path relatively late.[572] Born in the context of learned professions, the notion of disciplinary proceedings was primarily aimed at getting rid of unsuitable members of a particular profession, i.e. they could be brought only for conduct of a serious nature.[573] Only when professional bodies incrementally came to see themselves as guardians of the public interest was the range of offences and sanctions lengthened and diversified.[574] Furthermore, in most countries, their imposition is not necessarily based on the finding of fault of the transgressor, as is the case with certain administrative sanctions (cf. MN. 3.54).[575] They also require lower standards of proof than criminal law sanctions and this fact coupled with the original rationale of disciplinary sanctions shapes their relationship with other Convention guarantees, such as *ne bis in idem*, which is rather unproblematic, as will be demonstrated below (cf. MN. 6.22). At the same time, disciplinary measures could also be said to pursue the aims of punishment and deterrence in a similar vein to punitive administrative sanctions.

4.22 However, disciplinary measures usually fall outside the scope of enhanced ECHR guarantees. The ECtHR recognizes as a general rule that disciplinary proceedings ordinarily lead to no determination of a 'criminal charge' and only in exceptional cases will a disciplinary measure

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569 Delmas-Marty/Teitgen-Colly (n. 230), p. 13.

570 Whereas disciplinary sanctions directed to civil servants are primarily aimed at ensuring the proper functioning of the public service and its integrity, the ones directed to, for example, the members of learned professions seek to protect citizens from inadequate services, see more in Fliedner (n. 226), pp. 34–35, as well as to enforce the rules of an organization, see more in Harris/Carnes/Byrne (n. 304), p. 66. See further B. Bahçeci, "Questioning the Penal Character of Disciplinary Sanctions in the European Court of Human Rights' Case Law", (2020) *The 7th International Scientific Conference of the Faculty of Law of the University of Latvia [Conference Paper]*, pp. 242–249.

571 In this case, they should either follow the guarantees of Article 6 ECHR or a comprehensive subsequent judicial control has to be granted. See for this two-fold approach in *Albert and Le Compte v Belgium* (7299/75; 7496/76) 10 February 1986 ECtHR (Plenary).

572 At least in the German legal tradition, see more in U. Lambrecht, *Strafrecht und Disziplinarrecht: Abhängigkeiten und Überschneidungen* (1997), pp. 24–26.

573 Harris/Carnes/Byrne (n. 304), p. 67. See the rationale of this severest sanction in *Müller-Hartburg v Austria* (47195/06) 19 February 2013 ECtHR at [45]; [48].

574 Harris/Carnes/Byrne (n. 304), p. 311.

575 C. Debbasch/F. Colin, *Administration publique* (2005), p. 690.

fall under either the 'civil' or 'criminal' head of Article 6 (1) ECHR. And yet if the measure imposed is extremely severe, the ECtHR might deviate from this general rule: in the *Guisset* case, for example, the applicant – a civil servant responsible for the management of public money – might have been ordered to pay twice the equivalent of his gross annual salary.[576] According to the ECtHR, this by default exceeded what could be deemed a purely disciplinary sanction and dealt with the case on the merits of the 'criminal charge' made against the applicant. In extremis, this seems to be a logical upshot stemming from the autonomous interpretation technique bearing in mind that some countries in fact link disciplinary offences with criminal repression;[577] hence, the dividing line appears yet again to be rather fluid.

4.23 Furthermore, it is extremely challenging to tell these two types of detrimental measures apart, in situations when the domestic legal framework is cumbersome or institutionally fuzzy. For example, in the case of *Čanády* (no. 2),[578] the applicant – a professional soldier – was fined for committing an administrative offence against civic propriety by the rector of the military academy in the context of disciplinary proceedings under the Military Service Act. The legal basis for this fine, however, was embedded in the Minor Offences Act, which is applicable to the whole population at large. The ECtHR, thus, had to navigate through a 'regulatory cobweb' and identify from which provision the administrative offence at issue was actually derived. It held that the sanction imposed on the applicant did not derive from the fact that, in the context of his service, he had breached the duties of a soldier within the meaning of the relevant section of the Military Service Act. On the contrary, the inappropriate action imputed to the applicant related to a conflict that he had had with his neighbours outside the context of his service in the army and, thus, could be qualified as being of a criminal nature for the purpose of Article 6 (1) ECHR.[579]

4.24 To illustrate the point further, in the case of *Weber v Switzerland*,[580] the applicant was fined for having disclosed information about the investigation proceedings launched against him at a press conference, thus breaching the confidentiality of the judicial investigation, which is punishable by law. The ECtHR rejected the argument that the relevant provision stipulating a penalty applied to a limited number of people who shared the characteristic of taking part in a

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576 *Guisset v France* (33933/96) 9 March 1998 CHR (dec.) [Plenary]. In the actual case, the applicant was discharged from liability but it was the upper, possible limit of the fine that was essential.

577 Debbasch/Colin (n. 575), p. 689.

578 *Čanády v Slovakia (no. 2)* (18268/03) 20 October 2009 ECtHR.

579 *Čanády v Slovakia (no. 2)* (18268/03) 20 October 2009 ECtHR at [40].

580 *Weber v Switzerland* (11034/84) 22 May 1990 ECtHR.

judicial investigation, thus subjecting them to a 'special discipline'. On the contrary, it made it clear that this provision practically applied to the whole population since anyone could potentially find himself or herself taking part therein.[581]

4.25 This approach was confirmed in the *Demicoli v Malta*[582] case, in which the applicant was fined for publishing an insulting article regarding several Members of the Parliament and thus committing a breach of privilege. The ECtHR did not support the view that the breach of privilege proceedings taken against the applicant were of a disciplinary character and pointed out once again that the legal basis of the offence potentially affected the whole population, i.e. it operated independently from the fact of whether the offender was a Member of Parliament or not and where the defamatory article had been published. Hence, it was in no way connected to the internal regulation and orderly functioning of the Parliament – factors that could imply the said special relationship and denote that a disciplinary measure was at play.[583]

4.26 And yet the 'general scope' requirement should be approached critically with some authors even calling for its abandonment altogether,[584] firstly because it has been interpreted divergently when it comes to sanctions against a disturbance of court proceedings: whereas in the foregoing cases it was deemed that the population at large could potentially participate in the court proceedings and be subjected to these sanctions, in the cases of *Ravnsborg v Sweden* and *Putz v Austria*, for instance, the ECtHR held that the "rules enabling a court to sanction disorderly conduct are more akin to the exercise of disciplinary powers".[585] Hence, no protection of Article 6 ECHR was afforded in these cases although the applicants were 'simply' litigants here, i.e. acting without any professional function. Furthermore, in addition to pecuniary fines, they were facing custodial sentences (in the case of failure to pay) but that did not prevent the ECtHR from establishing the lack of severity of penalties capable of bringing the matter into the 'criminal' sphere'. The same line of reasoning was reaffirmed in the recent Grand Chamber case of *Jónsson and Ragnar Halldór Hall v Iceland*, in which two lawyers acting as defence counsels received fines for not showing up at criminal proceedings and expressing contempt for the court.[586] Their offence was not deemed to fall within the 'criminal

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581 *Weber v Switzerland* (11034/84) 22 May 1990 ECtHR at [32] – [33].

582 *Demicoli v Malta* (13057/87) 27 August 1991 ECtHR.

583 *Demicoli v Malta* (13057/87) 27 August 1991 ECtHR at [33].

584 Caeiro (n. 278), p. 189.

585 *Ravnsborg v Sweden* (14220/88) 23 March 1994 ECtHR at [34] and *Putz v Austria* (18892/91) 22 February 1996 ECtHR. See also *Veriter v France* (25308/94) 2 September 1996 CHR (dec.) [Plenary].

586 *Jónsson and Ragnar Halldór Hall v Iceland* (68273/14 and 68271/14) 22 December 2020 ECtHR [GC] at [86] – [89].

limb', as it appeared that the need to ensure proper administration of justice overtrumped considerations that the measures imposed on the applicant were in fact 'punitive and deterrent'.[587]

4.27 Further interpretational inconsistencies abound in other domains, such as construction law and market manipulation.[588] This makes the 'real' value of this criterion questionable, especially acknowledging that other *Engel* criteria tend to overtrump it. Cases relating to prison disciplinary matters illustrate this point quite well. For example, in the case of *Ezeh and Connors v the United Kingdom*,[589] the fact that the relevant provision was directed towards a group possessing a special status, i.e. prisoners, was quickly superseded by the consideration that the penalties at issue were 'appreciably detrimental' to the applicants, i.e. they were awarded up to 42 days of additional custody for the offence of breaching prison rules. Again, the ECtHR was sensitized by the deprivation of liberty argument whilst paying attention to the severity criterion and concluded that the offences with which the applicants were charged in this particular case gave "a certain colouring which does not entirely coincide with that of a purely disciplinary matter".[590]

4.2.3. The *Engel* Criteria Under Critique

4.28 The *Engel* criteria, like any other 'evolutive development' in the case law of the ECtHR, have not been immune to criticism. Whereas in the *Engel* judgement itself, such criticism remained moderate presumably because the deprivation of liberty was at stake for the applicants, in the *Öztürk* case it became much more pronounced due to the perceivably 'minor' importance of the subject matter. The criticism tends to resurface every time the ECtHR expands the guarantees given to non-criminal sanctions deemed to have (ostensibly too) meagre effects on the individual as a promoter of the European public order, even if the disparity in its interpretation of what is a 'minor' offence is glaring.[591] This is understandable since it impedes efficiency

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587 See more on this case and the meta-rationale leading the ECtHR to deny admissibility to such measures in A. Andrijauskaitė, "The Case of Gestur Jónsson and Ragnar Halldór Hall v Iceland: Between Two Paradigms of Punishment", (2021) available at: https://strasbourgobservers.com/2021/02/19/the-case-of-gestur-jonsson-and-ragnar-halldor-hall-v-iceland-between-two-paradigms-of-punishment/

588 Compare *Inocêncio v Portugal* (43862/98) 11 January 2001 ECtHR (dec.) where the requirement to obtain a permit before carrying out construction work was interpreted as not constituting a measure of general application to all citizens, with *Grande Stevens and Others v Italy* (18640/10) 4 March 2014 ECtHR [GC] where a contrary conclusion was reached with regard to provisions addressed to those who operate in the stock market.

589 *Ezeh and Connors v the United Kingdom* (39665/98 and 40086/98) 9 October 2003 ECtHR [GC].

590 *Ezeh and Connors v the United Kingdom* (39665/98 and 40086/98) 9 October 2003 ECtHR [GC] at [106]. See also *Campbell and Fell v the United Kingdom* (7819/77; 7878/77) 28 June 1984 ECtHR at [71].

591 Arslan (n. 15), p. 21.

sought by domestic lawmakers. It was claimed by dissenting judges in the *Öztürk* case that the removal of certain acts from the ambit of criminal law aimed at humanising it, i.e. penalties imposed for their breaches were no longer to be entered in criminal records, their effect was not stigmatic and they would give rise to no social rejection.[592] Hence, no great imbalance arose between public authorities and individuals that would militate for the protection of fundamental rights and freedoms[593] – the (only) ones that the Convention's institutions have a duty to safeguard.[594] Moreover, the excessive interpretation of the concept of the 'criminal charge' by affording fundamental guarantees to petty offences twists the very object and purpose of Article 6 ECHR and the rationale behind the decriminalisation trend itself.[595]

4.29 These are all points that warrant consideration and yet it should be emphasized that while the concrete application of the *Engel* criteria will always happen *ad hoc* and, thus, the manner and consistency of their invocation will remain open to interpretation under particular circumstances, these criteria remain flexible enough to give deference to the choice of Member States to put a broad range of offences outside the scope of criminal law. More precisely, firstly, the 'severity' requirement (the third *Engel* criterion) prevents the ECtHR from stretching the Convention guarantees too far, if it is really evident that the size of the sanctions is 'derisory'. This was attested in the landmark *Jussila* case (cf. MN. 4.43 et seq.). The said logic is fortified by the requirement that the applicant has to have suffered a significant disadvantage as one of the admissibility preconditions pursuant to Article 35 (3) (b) ECHR. This requirement hinges on the idea that a violation of a right, however 'real' from a purely legal point of view, should attain a minimum level of severity.[596] It is assessed against both subjective perceptions and what is objectively at stake in a particular situation.[597]

4.30 The ECtHR has 'successfully' applied this requirement with regard to administrative punishment as the case law demonstrates: for example, in the *Cecchetti* case, the financial impact of the 3.48 EUR tax penalty was deemed too small for the ECtHR to start considering

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592 See the Dissenting Opinion of Judge Liesch in *Öztürk v Germany* (8544/79) 21 February 1984 ECtHR at [6], [8].

593 See the Dissenting Opinion of Judge Liesch in *Öztürk v Germany* (8544/79) 21 February 1984 ECtHR at [12].

594 See the Dissenting Opinion of Judge Matscher in *Öztürk v Germany* (8544/79) 21 February 1984 ECtHR.

595 See the Dissenting Opinion of Judge Bernhardt in *Öztürk v Germany* (8544/79) 21 February 1984 ECtHR.

596 In line with *de minimis non curat praetor* rule. See Research Report by the Council of Europe, "The new admissibility criterion under Article 35 § 3 (b) of the Convention: case-law principles two years on", (2012), pp. 2–4.

597 See more in *Luchaninova v Ukraine* (16347/02) 9 June 2011 ECtHR at [46] – [50]; *Korolev v Russia* (25551/05) 1 July 2010 ECtHR (dec.).

the substance of the applicant's grievances.[598] At the same time, if there are structural deficiencies inherent in the domestic legal systems that the ECtHR is scrutinizing or any other 'interests of justice', then this criterion will be applied in a lax manner and the ECtHR will step in to ensure the proper exercise of fundamental rights and freedoms in order to avoid the denial of justice (cf. MN. 4.52 et seq.). In fact, construed together, these two approaches sufficiently enable the ECtHR to pay deference to the idiosyncrasies of the administrative penal systems of the Contracting States but at the same time allow it to keep a watchful eye over the structural deficiencies that may lie therein despite the supposed 'triviality' of the matter at hand. The only risk attached thereto is the relative lack of predictability of the case law – a trait that is hardly attainable in such a multilateral legislative framework anyway.

4.2.4. The Notion of An (Administrative) Sanction in the Case Law of the ECtHR

4.31 As hinted at above, it is the twin purpose of a sanction being both 'deterrent and punitive' that will 'truly' define it and unlock the 'enhanced protection' within the framework of the ECHR, as was first conceived in the *Öztürk* case. The ECtHR has elicited the meaning of the said requirement in a litany of post-*Öztürk* cases, at times by referring to the pertinent domestic legal acts hinting thereto[599] and at other times by interpreting the said formula autonomously and by clearly excluding certain detrimental measures following other purposes from the scope of the ECHR. Naturally, various purposes that sanctions follow more often than not tend to blend in practice, their effects intertwine and the ECtHR recognizes that they may interact in a synergic fashion (cf. MN. 3.36);[600] thus, both the 'deterrent and punitive' aims of a particular measure have to be predominant and not incidental in order to attract the full range of ECHR guarantees. The following part will delve into this conception by surveying the concrete examples found in the ECtHR's case law.

4.32 The pertinent case law reveals first off that it is not enough for a sanction to follow a remedial aim only in order to fall under the 'criminal head' requirement.[601] For example, in the

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598 *Cecchetti v San Marino* (40174/08) 9 April 2013 ECtHR (dec.).

599 For example, in the case of *Balsytė-Lideikienė* the ECtHR attached particular significance to the fact that Article 20 of the Lithuanian Code on Administrative Law Offences stipulated that the aim of administrative punishment is to punish offenders and to deter them from reoffending, see *Balsytė-Lideikienė v Lithuania* (72596/01) 4 November 2008 ECtHR at [58].

600 See, e.g., *Janosevic v Sweden* (34619/97) 23 July 2002 ECtHR at [103] for tax penalties securing the State's main source of income.

601 See n. 333333. See also *OOO Neste St. Petersburg, ZAO Kirishiavtoservice, OOO Nevskaya Toplivnaya, ZAO Transservice, OOO Faeton and OOO PTK-Service* (69042/01, 69050/01, 69054/01, 69055/01, 69056/01, 69058/01) 3 June 2004 ECtHR (dec.) in which the confiscation of unlawfully gained profits was deemed to belong to the 'regulatory domain'.

Bendenoun case, the ECtHR highlighted that the tax surcharges at issue were not intended as a "pecuniary compensation for damage but essentially as a punishment to deter reoffending" and, hence, went on to assess their compatibility with the ECHR.[602] This can be determined by, for example, establishing that the damage caused by an offence was multiplied several times[603] or that the fine simply does not correspond to the actual damage.[604] The *Steininger* case echoed this line of reasoning by stating that there had to be an additional layer of detriment to a sanction rather than its sole pecuniary goal being directed towards recuperating from the damage caused by the offence or compensating the administration for the additional work provided, as had happened in this case concerning agricultural marketing surcharges that were up to double the original charge.[605]

4.33 A somewhat tricky situation regarding the 'true' nature of the penalty imposed occurred in the case of *Valico,*[606] in which it *ex lege* corresponded to 100% of the value of the construction work performed in breach of the regulations. Hence, it *prima facie* appeared to be nothing but the compensation for the damage caused to the landscape and environment especially because the penalties at issue were termed 'pecuniary indemnities'. And yet the ECtHR did not fail to notice that the relevant regulatory framework also provided for a possibility to impose such a penalty even without the actual damage being caused. Alternatively, a demolition of the unlawful construction could be ordered. These were strong indications that, construed together, led the ECtHR to declare that despite appearances the said sanction in construction law went beyond compensatory aims and was, in fact, both of a 'punitive and deterrent' nature.

4.34 Importantly, a remedial effect does not necessarily have to have a pecuniary expression but it may as well take on an abstract dimension. This was exemplified in the case of *Produkcija*

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602 *Bendenoun v France* [12547/86] 24 February 1994 ECtHR at [47]. See for the same logic regarding administrative fines imposed for social security breaches, i.e. a failure to declare employment in *Hüseyin Turan v Turkey* (11529/02) 4 March 2008 ECtHR at [19] or operating a mine outside licensed area *Özmurat İnşaat Elektrik Nakliyat Temizlik San. ve Tic. Ltd. Şti. v Turkey* (48657/06) 28 November 2017 ECtHR at [25].

603 See *Ruotsalainen v Finland* (13079/03) 16 June 2009 ECtHR at [46]: "even if [a fine] corresponded with the damage caused… it in fact trebled such damage... and was intended as a punishment". See also *VP-Kuljetus Oy and Others v Finland* (15396/12) 6 January 2015 ECtHR (dec.) case in which "50% increase in the fuel fees rendered [the fine] 'deterrent and punitive'" at [39].

604 In *Petersen v Denmark* (24989/94) 14 September 1998 CHR (dec.) [Plenary] this occurred. Even though it was claimed in *travaux préparatoires* that the "parking charges were considered as charges for using the parking area in excess of the permitted use," the actual charge imposed did not correspond to a service rendered or a parking place occupied.

605 *Steininger v Austria* (21539/07) 17 April 2012 ECtHR at [37]. See also *Mort v the United Kingdom* (44564/98) 6 September 2001 ECtHR (dec.) in which it was established that the penalty at issue went "beyond considerations of debt enforcement".

606 *Valico S.r.l. v Italy* (70074/01) 21 March 2006 ECtHR (dec.).

Plus storitveno podjetje d.o.o. v Slovenia concerning, among other things, a declaratory decision on the abuse of a dominant position by the competition authorities.[607] Here the ECtHR did not establish any monetary obligation imposed on the applicant company and noted that the impugned decision was not of a criminal character and was not intended to punish or deter but, rather, to restore the normal market situation, thus rejecting its admissibility under the 'criminal limb' of Article 6 ECHR.[608] The ECtHR, however, went on to assess the lawfulness of other measures imposed on the applicant within the framework of competition law, namely fines for the obstruction of an inspection.

4.35 In addition, it is not enough for a sanction to exclusively follow a preventive purpose[609] or a combination of preventive and remedial aims in order to be afforded the full guarantees of the ECHR. If sanctions follow preventive purposes only, then, of course, they may still come within the ECHR's purview because often they are tantamount to other interferences with ECHR rights. However, if they are not qualified according to the '*Engel* scheme' they will also not enjoy the 'enhanced protection';[610] although even this statement sometimes becomes relative in practice. For example, in the case of *Karajanov* the impugned lustration decisions establishing collaboration with the former State security organs by the applicant were not deemed to be 'punitive and deterrent' [sanctions] and, hence, worthy of attracting the guarantees of Article 6 ECHR under its criminal head, namely the presumption of innocence.[611] This conclusion was drawn because lustration as a procedure undertaken by administrative authorities should not exclusively aim at punishment and revenge, which are reserved for the criminal law.[612] Instead, the objective of protecting the newly emerged democracy and societal peace was the key. However, the fact that the Lustration Commission's decision at issue was

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607 *Produkcija Plus storitveno podjetje d.o.o. v Slovenia* (47072/15) 23 October 2018 ECtHR.

608 *Produkcija Plus storitveno podjetje d.o.o. v Slovenia* (47072/15) 23 October 2018 ECtHR at [43].

609 *Lauko v Slovakia* (26138/95) 2 September 1998 ECtHR at [52].

610 For example, in the *Hentrich* case it was stated that the administrative pre-emption decision adopted by public bodies to buy the plot of land at issue was "concerned only with a physical fact, namely that the price paid for a property transfer was too low, and it did not necessarily imply a fraud amounting to a criminal offence". Hence, the pre-emption measure was not tantamount to a declaration of guilt and the ECtHR did not consider its applicability with the presumption of innocence granted by Article 6 (2) ECHR, see *Hentrich v France* (13616/88) 22 September 1994 ECtHR at [62] – [64].

611 See *Karajanov v the former Yugoslav Republic of Macedonia* (2229/15) 6 April 2017 ECtHR. The ECtHR, however, concedes that sometimes lustration proceedings may come under the 'criminal head' of Article 6 ECHR depending on the circumstances of the case, i.e. if they are repression-related or not, see to this effect: *Matyjek v Poland* (38184/03) 30 May 2006 ECtHR (dec.); *Bobek v Poland* (68761/01) 17 July 2007 ECtHR and *Mościcki v Poland* (52443/07) 14 June 2011 ECtHR.

612 See *Ādamsons v Latvia* (3669/03) 24 June 2008 ECtHR at [116].

published on its website before it had become final was held to be irreconcilable with the right to respect for the applicant's private life according to Article 8 ECHR in the particular case.

4.36 The preventive purposes of a sanction, for their part, can either be directed towards precluding a very concrete and real danger, such as by means of removing a dangerous driver from the road for a specific period of time by withdrawing his driving license,[613] or ordering compulsory hospitalization[614] or psychiatric treatment[615] of the applicants, or have a more abstract dimension. The latter may encompass all of the versatile aims that administrative law is capable of following, such as controlling the use of property for the purposes of a balanced town-planning policy,[616] imparting information about groups commonly referred to as 'sects' in order to protect public safety and the rights and freedoms of others,[617] exercising the right of pre-emption in order to prevent tax evasion and safeguard the general functioning of the property market,[618] ensuring the prevention of crime by issuing prohibition orders to enter 'problematic' areas of a city,[619] securing road-safety by committing the offender to educational courses,[620] controlling anti-social behaviour,[621] controlling immigration by ordering expulsion,[622] etc.

4.37 In addition, as hinted at above, procedural sanctions imposed by the (administrative) judge intended to prevent abuse of the court system and thus shield it from vexatious claims do not come within the 'criminal charge' requirement but are closer to the exercise of disciplinary powers (cf. MN. 4.20). It furthermore transpired from the case law that 'political sanctions', i.e. measures that apply to persons having a special status or responsibility that are compensatory

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613 This precautionary withdrawal of driver's license shall not be confused with disqualification from driving as both – a preventive and punitive measure, see *Escoubet v Belgium* (26780/95) 28 October 1999 ECtHR at [21]; [33].

614 *Berland v France* (42875/10) 3 September 2015 ECtHR.

615 *Patoux v France* (35079/06) 14 April 2011 ECtHR.

616 See *Inocêncio v Portugal* (43862/98) 11 January 2001 ECtHR (dec.).

617 See *Leela Förderkreis E.V. and Others v Germany* (58911/00) 6 November 2008 ECtHR at [92]–[94]; [99].

618 See *Hentrich v France* (13616/88) 22 September 1994 ECtHR at [38]–[39]; [44]: "the right of pre-emption … is not designed to punish tax evasion … but has a deterrent nature … and is only used the price [of the property at issue] is too low with a view of warning others against temptation to evade taxes".

619 *Landvreugd v the Netherlands* (37331/97) 4 June 2002 ECtHR at [68].

620 *Blokker v the Netherlands* (45282/99) 7 November 2000 ECtHR (dec.).

621 See *Hashman and Harrup v the United Kingdom* (25594/94) 25 November 1995 ECtHR in which binding over orders had "only prospective effect and did not require that there had (already) been a breach of the peace" at [35]; See also *Steel and Others v the United Kingdom* (24838/94) 9 April 1997 CHR (dec.).

622 *Maaouia v France* (39652/98) 5 October 2000 ECtHR [GC].

and regulatory rather than penal in nature will not be considered to constitute a 'criminal charge' under the ECHR. Such a situation came to the fore in the case of *Porter*,[623] wherein the applicant was ordered to pay for the losses suffered by the local taxpayers of Westminster under the Local Government Finance Act due to his misuse of the council's powers as a local politician. The fact that the particular sanction was extremely onerous to the applicant, namely it amounted to over GBP 26 million, did not convince the ECtHR to hold otherwise. This was so because according to the ECtHR "it is equally conceivable, for example, that a person be found liable to pay very substantial sums in civil proceedings". Hence, although the sanction at issue stemmed from a public law regulation it was its remedial aim, i.e. its direct correlation with the amount of the penalty and the losses incurred by taxpayers resulting from the offence, that tipped the proverbial scale. In the case of *Pierre-Bloch*,[624] the same logic was at play: the requirement to pay the sum corresponding to the amount by which the election campaign expenditure of the applicant had been exceeded, was deemed to be the "*quid pro quo* for the State's financing of political parties". No punitive element of this sanction – a payment aimed at making good the transgression of improperly taking advantage of the electorate – was thus established.

4.38 The lack of criminal intent or negligence attached to the offence is, for its part, not an obstacle for a particular measure to be classified as 'punitive and deterrent'. The ECtHR has made it clear that the non-determination of subjective elements does not necessarily deprive an offence of its criminal character; indeed, criminal offences based solely on objective elements may be found in the laws of the Contracting States and are *per se* accepted under the ECHR.[625] This is in line with the (historical) trend indicated above (cf. MN. 4.06), namely, the fact that the proliferation of administrative sanctions often coincided with the removal of subjective elements from *corpus delicti*. The fact that penalties are imposed at the discretion of administrative authorities also does not change the nature of the 'criminal charge'.[626]

4.39 In addition, the small size or the relative lack of seriousness of the penalty at stake – even if it *prima facie* clashes with the third *Engel* criterion – also cannot sap it of its inherently 'punitive

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623 *Porter v the United Kingdom* (15814/02) 8 April 2003 ECtHR (dec.).

624 The petition was not deemed to fall under the 'civil' limb of Article 6 ECHR either as the dispute concerning the right to engage in political activities, *Pierre-Bloch v France* (24194/94) 21 October 1997 ECtHR at [46].

625 See, e.g., *Salabiaku v France* (10519/83) 7 October 1988 ECtHR at [27]; *Janosevic v Sweden* (34619/97) 23 July 2002 ECtHR at [68]; *Västberga Taxi Aktiebolag and Vulic v Sweden* (36985/97) 23 July 2002 ECtHR at [79].

626 See, e.g., *Kadubec v Slovakia* (5/1998/908/1120) 2 September 1998 ECtHR at [47].

and deterrent' nature. In the *Luchaninova* case, for instance, it was admitted by the ECtHR that (even) an administrative reprimand issued for a petty theft came within the ambit of Article 6 ECHR since a "verbal reprimand is not a discharge from administrative liability".[627] Furthermore, in the *Lauko* case, the ECtHR deemed that even though the penalty imposed on the applicant for an administrative infraction against civic propriety equated to one-twentieth of his average monthly income, it was still intended as "a punishment to deter reoffending".[628] Additionally, it should always be kept in mind that the characterization of a penalty as being small or not is of a relative nature: for instance, in the *Ziliberberg* case the fine imposed was just above three euros; yet it was also established that it constituted more than half of the monthly income of the applicant, who was a student.[629] Hence, a well-pronounced punitive nature of particular measures assessed in the light of the individual situation of the applicant can easily trump *de minimis* considerations although this is not always the case.[630] Again, weighing different circumstances of the case in order to detect a (predominant) criminal connotation is the key.

4.40 In spite of these developments, the ECtHR does not really go to great lengths to define the substance of what is considered to be a 'punitive and deterrent' [nature of a sanction] within the meaning of the ECHR, i.e. it does not elaborate on its content in an especially systemic or abstract way.[631] The *Menarini* case, for instance, appears to be more of an exception in which the ECtHR explicated that antitrust sanctions, despite being stipulated by an administrative legal act, are 'punitive and deterrent' because, firstly, they "are repressive in nature since they aim to sanction an irregularity", and, secondly, they are "preventive because their aim is to dissuade the applicant company from recommitting such an irregularity".[632] Regarding the first point, it should be highlighted that the punitive element (repression) can be either straightforward or conditional, e.g. requesting a certain course of action and penalizing non-

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627 *Luchaninova v Ukraine* (16347/02) 9 June 2011 ECtHR at [43].

628 *Lauko v Slovakia* (26138/95) 2 September 1998 ECtHR at [52], [58].

629 *Ziliberberg v Moldova* (61821/00) 1 February 2005 ECtHR at [27].

630 For example, in the case of *Morel v France* (54559/00) 3 June 2000 ECtHR (dec.) the 'criminal charge' was not determined with regard to tax surcharges amounting to 10% of the tax base in terms of "both the rate imposed and the amount in absolute terms".

631 See also for a critique on this point the Dissenting Opinion of Judges Tümen and Jočienė given in *Hüseyin Turan v Turkey* (11529/02) 4 March 2008 ECtHR urging the ECtHR to set out clear criteria in order to foster legal certainty.

632 In addition, the ECtHR took into consideration the fact that domestic jurisprudence also finds these sanctions to be of punitive nature, see *Menarini Diagnostics S.R.L. v Italy* [43509/08] 27 September 2011 ECtHR at [41].

compliance therewith.[633] And when it comes to the second point, in several tax cases it was added that deterrence is basically aimed at "exerting pressure on the potential offenders (in this case, tax payers) to comply with their legal obligations".[634] This lack of a conceptual approach (substituting it with an *in concreto* assessment of circumstances) may become even more acute in the future as it appears to be only a matter of time until the further hybridisation of (the aims and the forms of) sanctions takes place. The conceptual grasp of such hybridisation is especially pressing when sanctions are primarily devised as compensatory measures, yet have punitive undertones in their actual effects.

4.41 So far the ECtHR has not dealt with the latter type of sanctions in substance. For example, in the recent *Baltic Master Ltd* case, this was not done because the applicant was ordered to pay late payment interest for customs tax offences but was then exempted from it by the Tax Disputes Commission.[635] However, it seems highly debatable as to whether the said measure can be considered as having an exclusively restitutory character or whether by ordering late payment interest the authorities are actually penalizing the offenders especially if, for example, the situation is exarcerbated by a protracted investigation being undertaken by the same authorities. The current indications found in the admissibility decisions of the ECtHR suggest that it will be hard for these measures to make the cut. For example, a 'standardized amount of interest' designed as mere pecuniary compensation for the losses of treasury ("aimed at absorbing profits made from unlawful behavior only") caused by the taxpayer will most likely not be qualified as falling under the 'criminal charge'.[636] The same goes for a 'tax debt' in the form of unlawful VAT deductions being made, since they are considered to be a pecuniary compensation that one owes to the State for the damage caused provided that there are no "surcharges, fees or similar punitive elements" on top.[637]

4.42 Another instance of such a kind of problem concerned the ordering of an additional reassessment of taxes for a prolonged period of time by the relevant authorities after it emerged that the applicant was evading taxes.[638] In this case, the ECtHR yet again claimed that no

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633 As is the case with binding over orders known under common law: such orders require from persons to keep the peace and/or to be of good behaviour or otherwise face severe consequences. See, e.g., *Steel and Others v the United Kingdom* (24838/94) 9 April 1997 CHR (dec.) at [47] – [48].

634 See *Janosevic v Sweden* (34619/97) 23 July 2002 ECtHR at [68]; *Västberga Taxi Aktiebolag and Vulic v Sweden* (36985/97) 23 July 2002 ECtHR at [79].

635 *Baltic Master Ltd. v Lithuania* (55092/16) 16 April 2019 ECtHR at [12].

636 See *Mayer v Germany* (77792/01) 16 March 2006 ECtHR (dec.).

637 *Plåt Rör och Svets Service i Norden AB v Sweden* (12637/05) 26 May 2009 ECtHR (dec.) at [54].

638 See *H.M. v Germany* (62512/00) 9 June 2005 ECtHR (dec.).

punitive element was attached to such measures but deemed them to be "a compensation for the losses due to incorrect information supplied in the tax return". It performed a balancing test and found that even though the applicant was aggravated in that the authorities assessed 10 years instead of 4 years of her taxation period and subsequently ordered supplementary tax payments, such behaviour was justified by the applicant not acting *bona fides* herself. This, according to the ECtHR, diminished her legitimate expectations in the finality of the tax assessment, on the one hand, and increased the public interest that the taxpayer's duty to pay taxes is correctly assessed and enforced, on the other. Thus, according to the well-settled case law of the ECtHR it is neither the remedial nor preventive purposes (alone or in combination) attached to a sanction that afford the protection in line with the 'Engel scheme'. On the contrary, it is the totality of the 'punitive and deterrent' elements that enable a sanction to make the cut regardless of its size. The ECtHR, however, is reticent about the content of these elements and does not explicate them in an abstract and systematic way, which is regrettable because there are new forms of sanctions emerging that are marked by hybridisation in terms of the aims they pursue. The potential for similar questions to arise in the future lies dormant in the data protection field[639] as well as in market regulation law.[640]

4.3. The *Jussila* 'Concession' – An Age of Double Standards

4.43 After having surveyed the conception of a sanction that is capable of attracting the 'enhanced protection' in the case law of the ECtHR, it is now time to look for somewhat deviant trends dwelling in the so-called 'penumbra of punishment'.[641] More precisely, the case law of the ECtHR is clear-cut when it comes to 'traditional' criminal matters, especially those entailing the possibility of imprisonment[642] or the registration of a particular offence in criminal records,[643] but it becomes more nuanced in 'fringe' cases of punishment. In such cases, the ECtHR uses a sort of 'sliding scale' approach between different kinds of punitive measures, as

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639 See, e.g., Article 149 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons regarding to the processing of personal data, and on the free movement of such data, as well as repealing Directive 95/46/EC (General Data Protection Regulation 'GDPR') stipulating deprivation of the profits obtained through infringements of this Regulation as one of the penalties available.

640 See *Grande Stevens and Others v Italy* (18640/10) 4 March 2014 ECtHR [GC] for proceeds or profit obtained through the unlawful conduct (market manipulation) as a sanction.

641 This trope is taken from the article by the author of this thesis entitled "Exploring the Penumbra of Punishment under the ECHR", (2019) 10 *New Journal of European Criminal Law* 4, pp. 363–375. This part of the thesis is an expanded version of said article.

642 See more about the possibility of imprisonment as triggering enhanced standards of legal protection in n. 303.

643 See, e.g., *Sancaklı v Turkey* (1385/07) 15 May 2008 ECtHR at [26] and [49].

is evinced by the seminal *Jussila* judgment of 2006,[644] which dealt with the limited application of the Convention guarantees to administrative sanctions. As it transpired, the ECtHR will not uphold the Convention guarantees with their full stringency in cases involving any kind of measures capable of having penalizing effects on the individual. Instead it differentiates between the 'hard core' of criminal measures deserving an increased level of individual protection and those on the periphery, which attract only somewhat lowered standards thereof. This differentiation, undertaken by the ECtHR, resonates with doctrinal discussions that took place around the same time about the criminal law containing a core, which, according to some, is intuitive (cf. MN. 3.82).[645] However, it should be added that the ECtHR was *de facto* applying lowered requirements in cases pre-dating *Jussila* and this judgment only enunciated the relaxation of standards in a systemic manner.[646] The main issue with this differentiation is, of course, its highly arbitrary nature.[647]

4.44 In this case, concerning tax penalties imposed for errors in book-keeping on the applicant that amounted to 10% of the respective tax liability (or just above three hundred euros), the ECtHR basically conceded that there is a genus of sanctions devoid of the 'enhanced protection' under the Convention.[648] Namely, the tax surcharges at issue assessed in the light of the overall circumstances of the case led the ECtHR to state that "there are clearly 'criminal charges' of differing weight" and that "it is *self-evident* that some criminal cases do not carry any significant degree of stigma" (emphasis added).[649] Consequently, such criminal cases do not trigger the application of the 'criminal charge' guarantees with their full stringency.[650] Following this line of reasoning, a concrete 'trade-off' was made in *Jussila*: an oral hearing as guaranteed by Article 6 ECHR was not deemed necessary in tax law proceedings undertaken by an administrative court. Symbolically, the said 'trade-off' happened within the 'Nordic context' where the principle of general access to documents was always strong and, arguably, could be said to have offset the risk of allowing court proceedings without an oral hearing.[651]

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644 See *Jussila v Finland* (73053/01) 23 November 2006 ECtHR.

645 See more in D. Husak, "Crimes Outside the Core", (2004) 39 *Tulsa Law Review* 4, pp. 755–779.

646 Such as, e.g., *Öztürk v Germany* (8544/79) 21 February 1984 ECtHR. See further Bailleux (n. 1), p. 145.

647 Mickonytė (n. 449), p. 45.

648 In the regulatory context of the *Jussila* case, taxation is symbolic because this was exactly the birthplace of administrative sanctions in some European jurisdictions such as France, cf. MN. 3.10.

649 *Jussila v Finland* (73053/01) 23 November 2006 ECtHR at [43].

650 *Jussila v Finland* (73053/01) 23 November 2006 ECtHR at [43].

651 The world's first Freedom of Information Act was the Swedish one adopted in 1766 and its openness helped form part of the stereotype 'Nordic brand', P.B. Koch/R. Gottrup/M. Gøtze, "Special Report:

4.45 However, an important caveat has to be highlighted: the ECtHR took into account the fact that the applicant "was given ample opportunity to put forward his case in writing and to comment on the submissions of the tax authorities".[652] In other words, the proceedings at the domestic level, despite lacking an oral hearing, were deemed to be 'impeccable'.[653] This appears to be in alignment with the general notion found in the ECtHR's case law that dispending with an oral hearing basically comes down to the "nature of the issues to be decided by the competent national court" meaning that in rather technical cases involving expert opinions it is far from being a rarity.[654] All in all, it can be assumed from the *Jussila's* dictum that by making the said concession the ECtHR was trying to evade the difficulty of classifying a particular measure as being of an administrative or criminal nature.[655] It was also not ready to articulate a blanket removal of certain administrative sanctions from the ambit of Article 6 ECHR due to their meagre effects on the individual.[656] In other words, the ECtHR wanted to have its cake and eat it. They wanted to not deny the overall protection of the Convention guarantees regarding punitive measures of a lesser calibre but at the same time they wanted leave some wiggle room for the Member States to deviate in contexts that are 'administrative' or, for the lack of a better word, 'technical'.

4.3.1. Problems with the *Jussila* 'Concession' – the Elusiveness of 'Stigma' Criterion

4.46 However, evoking 'stigma' as a self-evident (!) criterion capable of expressing the blameworthiness of a particular offence with a view to factually delimiting the two fields (or, at the very least, delimitating the core and periphery of punishment) was complicated to begin with and did not sit well even with some of the judges of the ECtHR, as illustrated by the partial

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Transparency on a Bumpy Road – Denmark" in D. C. Dragos/P. Kovač/A.T. Marseille (eds.), *The Laws of Transparency in Action: A European Perspective* (2019), pp. 563–595 (pp. 563–564).

652 *Jussila v Finland* (73053/01) 23 November 2006 ECtHR at [48].

653 This is attested by the formulation that "an oral hearing may not be required where there are no issues of credibility or contested facts which necessitate an oral presentation of evidence or the cross-examination of witnesses […]", *Jussila v Finland* (73053/01) 23 November 2006 ECtHR at [41]–[42].

654 See to this effect, e.g., *Fexler v Sweden* (36801/06) 13 October 2011 ECtHR at [57]; *Miller v Sweden* (55853/00) 8 February 2005 ECtHR at [29].

655 Weyembergh/Joncheray (n. 15), p. 191.

656 *Jussila v Finland* (73053/01) 23 November 2006 ECtHR at [38]. Most likely stating this bluntly would have been perceived as undermining the spirit and purpose of the ECHR, and as a failure to give credence to the respect for human rights (see, e.g., Art. 37 [1] and 35 [3] b] ECHR). This was however done *de facto* in the 'admissibility' stage (before *Jussila*, see *Morel v France* [54559/00] 3 June 2000 ECtHR [dec.]) and after *Jussila* – see *Suhadolc v Slovenia* (57655/08) 17 May 2011 ECtHR (dec.).

dissents they gave in the case.[657] Several reasons make the reliance on 'stigma' as a non-legalistic notion problematic: firstly, it is widely agreed that 'stigma' in a contemporary 'pluri-ethic' society is a relative concept.[658] What is considered morally reprehensible (despicable) behaviour by one group in society may be even encouraged by other groups and *vice versa*.[659] Although it is worthwhile taking this into account whilst considering whether to criminalize a particular offence,[660] the existence of stigma *per se* can by no means provide a watertight distinction between criminal and administrative liability.[661] In fact, the prevailing contemporary view is that no substantive criteria are able to do that and the distinction is left for the legislator to make to a great extent whilst paying deference to the fundamental values guiding the choice of the punitive forum, the *ultima ratio* doctrine and other axiological considerations (cf. MN. 3.110).[662]

4.47 Secondly, even if one agrees with the claim that a 'stigma' of some sort whose perception is shared by a predominant number of members of society indeed exists, it should not be forgotten that stigmas change over time, thus making it a rather elusive concept,[663] as, *mutatis mutandis*, has been expressed by the ECtHR itself: the "requirement of morals … varies from time to time and from place to place, especially in our era".[664] Finally, the 'stigma' criterion turns to

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657 See for a further critique of stigma and the lack of its real application in the ECtHR's case law in Separate Opinion of Judge Pinto de Albuquerque given in *A and B v Norway* (24130/11 and 29758/11) 15 November 2016 ECtHR [GC] at [26] – [32].

658 Appel (n. 421), pp. 482–488 (p. 485).

659 A good example thereof is 'home birth cases', derided by proponents of institutionalized medicine and encouraged by promoters of natural deliveries without any unnecessary medical intervention. As a consequence, the criminalization of such practices remains highly debated, see to this effect *Pojatina v Croatia* (18568/12) 4 October 2018 ECtHR; *Dubská and Krejzová v the Czech Republic* (28859/11 and 28473/12) 15 November 2016 ECtHR [GC].

660 Namely, if stigma is desired by a policy maker, criminal law should be used to this effect due to its expressive, signalling function, Svatikova (n. 2), p. 151. See more on the reprobative symbolism of punishment in J. Feinberg, "The Expressive Function of Punishment", (1965) 49 *The Monist* 1, pp. 397–423; also more generally in C. R. Sunstein, "On the Expressive Function of Law", (1996) 144 *University of Pennsylvania Law Review*, pp. 2021–2053 (pp. 2044–2045).

661 In fact, the ECtHR has itself admitted that even civil proceedings may have a degree of stigma, see *Carmel Saliba v Malta* (24221/13) 29 November 2016 ECtHR at [73].

662 The ECtHR, for its part, has recognized the impossibility of the 'strict' division of the two types of liability since early on "the Court ... has not lost sight of the fact that no absolute partition separates [German] criminal law from 'the law on regulatory offences'", see, e.g., *Öztürk v Germany* (8544/79) 21 February 1984 ECtHR at [51].

663 It is worthwhile noting that the change of stigma is bi-directional: stigma becomes obsolete regarding some offences (like in the case of 'medical cannabis' as reflected by its legalization in multiple European countries, e.g., Italy [2015] and Germany [2017]), while for others, it intensifies (for example, although currently driving under the influence seems to attract a great deal of stigma across European states, it was nothing more than a 'cavalier's delict' this in the early days of automobilism).

664 See to this effect *Handyside v The United Kingdom* (5493/72) 7 December 1976 ECtHR (Plenary) at [48]. See also *Dudgeon v The United Kingdom* (7525/76) 22 October 1981 ECtHR (Plenary) at [52] finding

'extraneous' factors of punishment, namely its perception by society, and fails to incorporate intrinsic ones (punishment as conceived *in foro interno*, cf. MN. 2.28), without which the understanding of the effects of punishment remains limited because – ultimately – "punishment is in the eye of the beholder".[665] As was accurately observed in one of the dissents given in *Jussila*, for "the persons concerned … all cases have their importance"[666] and the 'technical nature' of a particular dispute or claim that it does not carry any stigma does not convincingly alter this fact. Even though, as outlined above, some legal theorists have claimed that administrative sanctions are nothing more than 'taxes on conduct' (cf. MN. 2.24), this view seems to be far-fetched and can be convincingly rebutted by another incisive observation coming from legal theory that "punishment, even a fine, is not experienced just as the price one has to pay for doing a crime in the way one pays for a cinema ticket".[667] Put otherwise, even if some fines become similar to taxes in that they may shape incentives for behaviour, the two can never be equated because the latter category simply does not espouse such concepts as 'blame' or 'censure'. Also if no 'stigma' can really be attributed to the committal of administrative offences, then the concept of making some administrative sanctions public and dissuading other persons will also be redundant (cf. MN. 3.33; 3.41).

4.3.2 Pro-*Jussila* Case Law: A Casuistic Use of Stigma by the ECtHR

4.48 The analysis performed on the subsequent use of the approach adopted in *Jussila* reveals that it is not limited to accepting the lack of an oral hearing but may be extended to other procedural guarantees covered by Article 6 ECHR, such as justifying the absence of the accused at a hearing in the context of administrative punishment, or even to (at least partially) helping to accept deviations from the *ne bis in idem* principle under Article 4 (1) of Protocol No. 7 to the ECHR. Such a pro-*Jussila* stance, however, mostly tends to be unconditionally upheld in cases where various sanctions can be said to be 'light' or even 'derisory'. The criterion of stigma, for its part, is still applied in a differentiated manner: in 'techy' domains it is applied quite boldly, whereas in cases that are – to use the words of the ECtHR – not so self-evident when it comes to stigma, it still lets the modesty of fines triumph in the adjudicatory outcome.

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that criminalisation of male homosexual practices can no longer be deemed to protect moral ethos of society.

665 Kennedy (n. 150), p. 37; See more in M. Schmideberg, "Psychological Factors Underlying Criminal Behavior", (1947) 37 *Journal of Criminal Law and Criminology* 6, pp. 458–476 (p. 472).

666 See the partly dissenting opinion of Judge Loucaides, joined by Judges Zupančič and Spielmann in *Jussila v Finland* (73053/01) 23 November 2006 ECtHR.

667 A. Ross, *On Guilt, Responsibility and Punishment* (1975), p. 90.

4.49 A clear conclusion that there was no stigma attached to a particular offence was made, for example, in the case of *Kammerer v Austria*,[668] which concerned a fine imposed on the applicant for his non-compliance with the obligation to have his car duly inspected. The minor sum of the penalty (approx. 72 euro), for its part, seems to have been a secondary but significant enough motive for the ECtHR to state that administrative criminal proceedings against the applicant had not been deemed unfair on account of his absence from the hearing. In another case of a regulatory nature – *Vyacheslav Korchagin v Russia*[669] – in which the applicant was penalized as an individual entrepreneur for non-compliance with technical regulations regarding food storage and therefore for committing a so-called 'public welfare offence', such an approach was also clearly followed by direct reference to the *Kammerer* case. The ECtHR – which cumulatively assessed all of the relevant circumstances of the case – did not find that 'defective notifications' about the administrative offence proceedings and the subsequent lack of personal participation in them amounted to a violation of Article 6 (1) ECHR. Considering the nature and extent of the grievance complained about and the fine of (only) 298 euro regarding sanctioning in the entrepreneurial context (which, hence, usually bears more risks to the persons concerned) the ECtHR found no force in the arguments to the contrary.

4.50 However, stigma (probably due to the elusiveness outlined above) is easily side-lined in more nuanced cases. This, for example, came to the fore very clearly in the case of *Sancaklı v Turkey*,[670] in which it was alleged that the applicant had provided premises for prostitution as a hotel owner and he was eventually found guilty of a failure to obey the orders of an official authority in that regard. He subsequently complained before the ECtHR that the administrative punishment for the said misdemeanour had happened without an oral hearing being held (in fact quite similarly to the situation in *Jussila*). Although penalties imposed due to the facilitation of prostitution probably have stigmatizing effects on the individual by definition, and thus at least at face value should logically 'destroy' the '*Jussila* mantra' about certain offences just "not carrying a significant degree of stigma", the ECtHR remained unfazed by this argument in its judgement. Instead, reading the judgement closely, it becomes clear that the modesty of the fine (totalling approx. 16 euro) and the said 'impeccability' of the domestic proceedings triumphed over the alleged "negative impact on the applicant's reputation" and gave way to the demands of efficiency and economy.[671] No invocation of stigma or any other implications of

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668 *Kammerer v Austria* (32435/06) 12 May 2010 ECtHR.

669 *Vyacheslav Korchagin v Russia* (12307/16) 28 August 2018 ECtHR.

670 See *Sancaklı v Turkey* (1385/07) 15 May 2008 ECtHR.

671 See *Sancaklı v Turkey* (1385/07) 15 May 2008 ECtHR at [49].

the punishment happened in this case by the ECtHR, despite the applicant arguing about the impact that such a nefarious offence had had on him.[672]

4.51 Finally, in another (rather controversial) case, that of *A and B v Norway*,[673] *Jussila's* reasoning was an ancillary[674] tool that helped the ECtHR to justify and accept deviations from the prohibition against double jeopardy and thus reassure those States developing their administrative penal systems. More precisely, whilst elaborating on the *bis*-aspect of the *ne bis in idem* principle enshrined in Article 4 (1) of Protocol No. 7 to the ECHR, the ECtHR took into consideration the fact that this article was intended by its drafters to apply to criminal proceedings in the strict sense. Put simply, this means that its wording "no one shall be liable to be tried or punished again in criminal proceedings […] for an offence for which he has already been finally acquitted or convicted […]" in itself does not prohibit Member States from responding to the same socially offensive conduct by combined means of criminal as well as administrative law (elegantly termed a 'calibrated regulatory approach' by the ECtHR) (cf. MN. 6.77 et seq.).[675] The ECtHR has made it clear that it will have regard to the stigmatizing effects of administrative proceedings within the meaning of *Jussila*, whilst assessing compliance with the *ne bis in idem* principle. In other words, double jeopardy is allowed in principle when it comes to applying measures of 'hard-core criminal law' together with penumbral ones as long as the latter "do not carry any significant degree of stigma" and do not unforeseeably "entail a disproportionate burden on the accused person".[676]

4.3.3. Case Law Diluting *Jussila* 'Concession': *Quantum*, Procedural Imperfection and Fundamental Rights Concerns

4.52 The further analysis has shown that the pro-*Jussila* approach is easily pushed aside by the ECtHR in cases that concern either substantial penalties in both absolute and proportionate meanings and/or structural deficiencies in the administration of justice and/or the fundamental rights character of the grievances put before the ECtHR that are simply too blatant to be dismissed. The first glaring divergence in the use of the *Jussila* approach comes in the same

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672 See *Sancaklı v Turkey* (1385/07) 15 May 2008 ECtHR at [41].

673 *A and B v Norway* (24130/11 and 29758/11) 15 November 2016 ECtHR [GC].

674 The word 'ancillary' is important here because it is far from being the primary reason that has led the ECtHR to accept sanctioning by combined means of criminal and administrative law. Instead underlying tensions with the EU framework may have pushed the ECtHR to focus on the *bis*-aspect in the interpretation of the *ne bis in idem* principle. For a comment see van Kempen/Bemelmans (n. 16), pp. 260 et seq. and the analysis provided in Chapter 6 of this thesis.

675 See *A and B v Norway* (24130/11 and 29758/11) 15 November 2016 ECtHR [GC] at [106], [124].

676 See *A and B v Norway* (24130/11 and 29758/11) 15 November 2016 ECtHR [GC] at [130].

regulatory context in which it was conceived, namely taxation. Following *Jussila* the general claim should have been that tax penalties were de-stigmatized and thus merited a lower level of protection under the ECHR. However, the coin was quickly flipped in the case of *Chap Ltd v Armenia*,[677] which dealt with penalties that amounted to 60% of the taxable amount (more than 50,000 euros). Although the ECtHR, relying on *Jussila's* authority, reaffirmed that tax surcharges differ from the hard core of criminal law and, consequently, do not necessarily attract the application of criminal-limb guarantees with their full stringency, it was not ready to dispense with any of the 'fair trial' guarantees in this case and upheld the applicant's right to challenge the veracity of the information provided by the witnesses in the administrative proceedings, i.e. to examine them in accordance with the procedural safeguards stipulated by Article 6 (1) ECHR, read in conjunction with Article 6 (3) (d) ECHR.

4.53 Several reasons may have contributed to this stance being taken by the ECtHR in this particular case. As already noted, the first factor must have been the notable size of the administrative sanctions in comparison with *Jussila*, which dealt with a penalty of just over three hundred euros. Furthermore, the 'political' character[678] of the case, as opposed to the 'technical' or 'everything-can-neatly-be-solved-in-a-documentary-manner' character of *Jussila*, and other factual circumstances, such as the differing degree of probative value of the witnesses' statements,[679] may have led the ECtHR to arrive at a different conclusion even though the procedural grievance of the applicants in both peripheral cases of punishment were identical – to have the witnesses examined before an administrative court. Nonetheless, in *Jussila* the ECtHR did not see any 'added value' in that, whereas in *Chap Ltd* the examination of the witnesses was deemed "decisive for the determination of the applicant company's tax surcharges", and it was considered that a failure to carry this out would result in an unreasonable restriction of the applicant's right, as guaranteed by the ECHR.[680]

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677 *Chap Ltd v Armenia* (15485/09) 4 May 2017 ECtHR.

678 The applicant claimed that the whole tax evasion case was 'politically fabricated', see *Chap Ltd v Armenia* (15485/09) 4 May 2017 ECtHR at [11].

679 In *Jussila*, written submissions obtained in the tax inspection procedure were deemed to be enough for the domestic administrative court to resolve the case and, thus, it was held that no additional information could be gathered from oral examination. In *Chap Ltd*, by contrast, the ability to examine witnesses upon whose statements the whole tax inspection was based on, seemed to have touched the very heart of the right to challenge the incriminatory evidence. Such a divergent perspective fits well into the general leitmotif of the ECtHR that "there may be proceedings in which an oral hearing may not be required, for example, where there are no issues of credibility or contested facts which necessitate a hearing and the courts may fairly and reasonably decide the case on the basis of the parties' submissions and other written materials", see *Döry v Sweden* (28394/95) 12 November 2002 ECtHR at [37].

680 See, for a similar rationale, the case of *Özmurat İnşaat Elektrik Nakliyat Temizlik San. ve Tic. Ltd. Şti. v Turkey* (48657/06) 28 November 2017. The ECtHR admitted that the penalty imposed for operating a mining business outside of the licensed area was 'purely technical' and by itself was not part of the 'hard-

4.54 Significantly, the ECtHR also took the lack of "procedural safeguards to compensate for the handicaps caused to the applicant as a result of being unable to examine the witnesses" into consideration as this is an important factor in forming a decision as to whether such a crucial participatory right has been breached (cf. MN. 5.77 et seq.).[681] This flexible formulation *a fortiori* demonstrates that the ECtHR, despite the concrete findings in this case, may still be wishing to stay close to the course set by *Jussila*. In other words, it may be willing to accept deviations from the Convention guarantees in cases where doing so may be justified by reliable and fair sanctioning mechanisms and practices at a domestic level. Such an approach seems to be quite in line with the 'overall fairness' test used in the ECtHR's case law regarding criminal proceedings.[682]

4.55 The case of *Chap Ltd* is not an isolated instance of the size of a penalty causing the ECtHR to depart from *Jussila's* line of reasoning. In another case, *Pákozdi v Hungary*,[683] in which the tax penalties levied on the additional personal income tax amounted to 50% surcharges and interest (approx. 39,100 Eur), the ECtHR, although perfunctorily invoking *Jussila's* formula that tax surcharges differ from the hard core of criminal law, was again not ready to do away with the requirement of an oral hearing before an administrative court, as granted by Article 6 (1) ECHR. Here the ECtHR did not shy away from admitting that the tax surcharges were "very substantial"[684] and ruled that an oral hearing should have been held at the appeal stage even without the applicant requesting it.[685] Aside from the severity of the penalty at issue another crucial factor that seemingly affected the adjudicatory outcome a great deal in this case was the fact that the administrative proceedings took an unexpected turn (the situation of so-called 'procedural surprises').

4.56 Namely, whilst at the first-instance court the decision of the tax authority imposing the said heavy penalties on the applicant was quashed, at the higher-instance court this was reversed.

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core criminal law'. However, the allegations of extortion by inspectors involved in the fining process seem to have sufficiently alerted the ECtHR to trigger the enhanced protection of Convention guarantees.

681 *Chap Ltd v Armenia* (15485/09) 4 May 2017 ECtHR at [51].

682 See more in K. Ambos, *European Criminal Law* (2018), pp. 101–103. See further on this test and the ECtHR becoming more result-orientated in its assessment of various breaches of Article 6 ECHR in P. Lemmens, "The Right to a Fair Trial and Its Multiple Manifestations: Article 6 (1) ECHR" in E. Brems/J. Gerards (eds.), *Shaping Rights in the ECHR* (2013), pp. 294–314 (pp. 307–313).

683 *Pákozdi v Hungary* (51269/07) 25 November 2014 ECtHR.

684 Additionally, it considered "what was at stake for the applicant", see *Pákozdi v Hungary* (51269/07) 25 November 2014 ECtHR at [28] and [39].

685 This is despite the Hungarian Code of Civil Procedure explicitly providing for this possibility, see *Pákozdi v Hungary* (51269/07) 25 November 2014 ECtHR at [9].

According to the ECtHR, the reassessment of the crucial evidence (namely, the applicant's father's testimony about the taxable amount of her income had to be defined in the dispute) by the last instance court, against which no further remedy was available, had been "unforeseeable" for the applicant.[686] Thus, forsaking an oral hearing, as an element of a fair trial, will not be accepted by the ECtHR in cases where the burden of proof is reversed to the detriment of the applicant in domestic proceedings. Undermining 'foreseeability' on the domestic level, which is geared towards precluding arbitrariness in punishment, seems to have been enough of an argument for the ECtHR to side-line any ponderings on 'stigma' and the varied scale of guarantees that it attracts in the field of tax surcharges *à la Jussila*.

4.57 Finally, as already hinted at, at the beginning, the derisory size of penalties does not always play a decisive role in the ECtHR's determination of whether punitive measures falling outside the hard core of criminal law deserve a heightened level of protection. If the ECtHR identifies a potential danger to fundamental rights from any kind of punitive measures (be they hard-core or penumbra) it will tend – quite consistently with the overall logic of the Convention – to enhance the level of protection. The case of *Mikhaylova v Russia*[687] clearly demonstrates that. In this case the ECtHR ascertained that despite the low amount of the fine - even by national standards (approx. 28 euro) - imposed on the applicant for her participation in a march and subsequent disobedience regarding the police order, the respondent State had to make free legal assistance available for her to challenge the said fine, whose imposition clearly constituted an intrusion into her fundamental rights, as guaranteed by articles 10 and 11 ECHR. The State's failure to do so led to a violation of Articles 6 (1) and (3) (c) ECHR being established.

4.58 The ECtHR was mindful of the fact that it was dealing with a 'peripheral punishment' in the present case, namely one belonging to the category of administrative offences. However, it acknowledged that 'interests of justice' may "compel the State to provide for the assistance of a lawyer even outside the criminal law sphere".[688] By dissecting the latter requirement of 'interests of justice' it becomes clear that the possibility of fifteen days' detention for the said offence enshrined in the relevant statute (even if applied only in exceptional cases)[689] and the

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686 *Pákozdi v Hungary* (51269/07) 25 November 2014 ECtHR at [39].

687 *Mikhaylova v Russia* (46998/08) 19 November 2015 ECtHR.

688 *Mikhaylova v Russia* (46998/08) 19 November 2015 ECtHR at [84].

689 This becomes obvious from the ECtHR's dedication of the whole structural part of this judgement under the headline of "additional considerations" to the analysis thereof, see *Mikhaylova v Russia* (46998/08) 19 November 2015 ECtHR at [65] – [69]. See, for a case in which this possibility of administrative detention turned into reality and was in fact applied by the same respondent State in a similar context of public gatherings, and thus triggering the enhanced protection of Convention guarantees, *Butkevich v Russia* (5865/07) 13 February 2018 ECtHR.

individual circumstances of the applicant, which reflected her 'social vulnerability' (old age, lack of legal training, etc.), were the crucial reasons that led the ECtHR to arrive at the said conclusion.[690] In other words, a structural deficiency in the domestic legal order (*inter alia*, the absence of any provision stipulating a right to free legal assistance under the Russian Code of Administrative Offences) presented an impediment to the exercise of fundamental rights or freedoms for the ECtHR, and the 'triviality' of the sanctioning at hand could not convince it to hold otherwise.

4.3.4. Non-Pecuniary Sanctions: Towards a Default 'Stigma-Intense' Punishment

4.59 Whereas the previous examples from the case law have shown that the use of *Jussila's* authority is varied when it comes to financial penalties, in the field of non-pecuniary sanctions its use appears to be completely diluted. This is quite understandable: non-pecuniary sanctions usually have tangible effects on the sanctioned person, causing the intensification of stigma. Consequently, it becomes harder to justify stripping away any of the individual guarantees in such matters and thereby compromising the very integrity of the persons on whom such sanctions are imposed, be they penumbra or not. This was clearly highlighted in the *Grande Stevens and Others v Italy*[691] case, in which, together with severe financial penalties, 'professional bans' were imposed on the applicants (namely, the suspension of their right to carry out their professional activity) for market manipulations. The ECtHR was quite unequivocal in finding that "the penalties which some of the applicants were liable to incur carried […] a significant degree of stigma, and were likely to adversely affect the professional honour and reputation of the persons concerned".[692]

4.60 As a consequence, derogation from an oral hearing within the meaning of Article 6 (1) ECHR, as happened in *Jussila*, was not accepted by the ECtHR in this case. Such a *pro persona* stance is a welcome development considering the shift towards the use of such individual sanctions in, e.g., EU competition law but it does not (as yet) reveal the whole picture: it appears to be an isolated case dealing with a 'multi-speed punishment' in the context of non-pecuniary sanctions, rendering the whole analysis somewhat inconclusive. Considering the extreme diversity of administrative sanctions that fall outside the hard core of the criminal law it remains to be seen whether this approach will be upheld in all cases, especially in contexts that are

690 *Mikhaylova v Russia* (46998/08) 19 November 2015 ECtHR at [30], [47].

691 *Grande Stevens and Others v Italy* (18640/10) 4 March 2014 ECtHR [GC].

692 *Grande Stevens and Others v Italy* (18640/10) 4 March 2014 ECtHR [GC] at [122].

"more administrative and less punitive" by nature, such as the withdrawal of a previously granted right to perform a special activity or the like.

4.3.5. The Way Forward for the *Jussila* 'Concession'

4.61 The reasoning given in *Jussila* and, hence, relaxed standards of individual protection, tend to be applied in 'regulatory' types of cases provided that the ECtHR cannot establish 'procedural imperfection' or any other danger to the exercise of fundamental rights and freedoms. In particular, 'unforeseeable' effects on an individual as an outcome of inconsistent or otherwise flawed sanctioning practices will not be tolerated by the ECtHR. This can only be seen as facilitating the goal of precluding arbitrariness in (any) kind of punishment. Up to now such relaxed standards of Convention protection, endorsed by means of invoking *Jussila's* authority, have included dispensing with the necessity to hold an oral hearing in administrative proceedings as well as 'tolerating' the requirement for an accused person to be present at a hearing on sanctioning and a 'strict' ban on double jeopardy when it comes to imposing both administrative and criminal sanctions.

4.62 Despite the said developments the clear contours of this penumbra remain fuzzy. In particular, the criterion of stigma tends to be applied in a casuistic manner: in some cases the ECtHR (quite justifiably) disregards the lack of stigma attached to punitive measures and weighs in factors that are more important for rendering the Convention rights real and effective. As the examples of the *Chap Ltd v Armenia* and *Pákozdi v Hungary* cases discussed above have shown, if sanctions constitute over 50% of the respective tax liability then 'stigma talk' is superfluous because the quantity itself is pernicious enough to unlock the enhanced level of protection for the applicants. However, in some cases the lack of stigma is overemphasized and the intrinsic effects of punishment for the individuals concerned slip under the radar. In such cases, instead of spilling a lot of ink on 'stigma considerations' the ECtHR could explicitly communicate in its case law the idea that some penalties, despite being de-stigmatized and 'techy', merit the 'enhanced protection' of the Convention guarantees because of their severity alone.

4.63 Needless to say, it is not easy to define what severity actually is, as all 'quantitative' parameters tend to be case-dependent At the same time, it is crucial because there is a lot at stake for the individual and the ECtHR should not (once again) be led astray by 'false labels' on the purported severity of the impugned sanction. Together with evaluating the sheer size of a particular fine, the ECtHR could have regard for its broader case law and the elucidation of this notion found therein: it has already identified a severe sanction as "having a substantial

impact on the person concerned",[693] "having far-reaching detriment"[694] and being "particularly harsh and intrusive".[695] All of these formulations put more focus on the intrinsic effects of a punitive measure – something that is missing in the *Jussila* formulation but reflects a rather complex picture of a sanction and its attendant consequences more precisely.[696] There is nothing stopping the ECtHR from developing these explications further in order to ensure that the wider implications of a sanction, which may at times be hidden, are uncovered and interpreted correctly.

4.64 This would not only foster consistency in the case law but also convergence with the *Engel* criteria;[697] furthermore, it would empower the ECtHR to be hermeneutically better equipped to meet future challenges, especially because it seems to be only a question of time before "a new industrial revolution will be unleashed leaving no stratum of society untouched"[698] and causing new liability concerns in typical administrative law domains like data protection.[699] In some countries there is talk about automating sanctioning in some of these domains.[700] In fact, a tentative research on the matter has shown that transferring administrative decision-making to robotic process automation is closer than one might expect and the legal infrastructure designed for this matter already exists in some legal systems, even if it is only suitable for repetitive tasks of administration where no administrative discretion is involved.[701] It is furthermore probable

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693 *Welch v the United Kingdom* (17440/90) 9 February 1995 ECtHR at [32].

694 *Welch v the United Kingdom* (17440/90) 9 February 1995 ECtHR at [34].

695 *G.I.E.M. S.r.l. and Others v Italy* (1828/06 et al.) 28 June 2018 ECtHR [GC] at [227].

696 See for a depiction of the whole range of elements of a sanction in Kennedy (n. 150), pp. 32 et seq.

697 As already hinted, the degree of severity of the penalty that the person concerned risks incurring is one of the criteria relying on which the ECtHR performs 'criminal charge' test, and i.e., proves the applicability of articles 6 and 7 ECHR to a particular measure of punitive nature. Of course, if this logic is to be followed, then a circular question of whether or not the *Jussila* formula is superfluous in such cases can be raised.

698 As eloquently expressed in the European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)).

699 The exorbitance of competition fines is a phenomenon that the ECtHR is recurrently confronted with, see for a newer case-law, *Orlen Lietuva Ltd. v Lithuania* (45849/13) 29 January 2019 ECtHR. A similar nascent tendency can be observed in the data protection field, with national regulators imposing first fines for breaches of the GDPR (n. 639) (with France's data protection regulator recently fining Google 50 million euro for its failure to comply with the GDPR, constituting only a proverbial tip of the iceberg). In the future, adjudication on the 'human rights' dimension' may realistically spill over to the ECtHR.

700 For example, in Lithuania there are currently plans to automate the issuing of speeding tickets and the Ministry of Interior is allotting funds to this endeavour. This means that fines for some road offences will be imposed exclusively by technical devices, i.e., without the intervention of a police officer or a court.

701 In Germany, administrative act may be adopted entirely by automatic means, provided that this is permitted by law and that there is neither any discretion nor any margin of assessment according to §35a of the German Administrative Procedure Act. See more about the risks of such approach in S. Alpers/C. Becker/M. Pieper/M. Wagner/A. Oberweis, "Legal challenges of Robotic Process Automation (RPA) in administrative services", (2019) online paper.

that in the foreseeable future this phenomenon will only expand and 'penumbral punishment' will be outsourced to artificial intelligence (especially in taxation or other paperwork intense domains), which, initially, may not be particularly well-versed in assessing and applying such a sociological criterion as stigma, let alone pondering the intrinsic effects of punishment or grasping any other complexity to this effect. Additional tensions stemming from the EU legal framework and the need to reconcile different views on sanctioning practices will not make the task of protecting individual rights in these domains any easier.[702]

4.4. Conclusion

4.65 The exploration of the notion of a pan-European administrative sanction has shown that there were multiple forces behind its rise in post-war Europe and granular percolation into the case law of the ECtHR. Three 'tectonic' shifts can be distinguished that contributed to the proliferation of this legal tool: a shift in societal life (e.g., the rise of automobilism), a shift in the administration, which took on more and more novel functions in order to respond to these societal shifts and, finally, a corresponding shift in legal consciousness, in that the imposition of punishment was no longer deemed to be a quintessentially judicial function. The CoE has countered these developments by expanding its normative activity towards the protection of the individual *vis-à-vis* the administration since the 1980s, and the ECtHR has done so by developing the *Engel* criteria, which have enabled it to adjudicate on administrative sanctions autonomously in order to combat the widespread phenomenon of 'mislabelling'.

4.66 These alternative criteria include the national classification of a particular measure whose assessment has only indicative value for the ECtHR, the very nature of the offence and the nature and severity of the sanction. Over time, the 'general scope' requirement was added to the said criteria and the nature of the offence was supplemented with the need to establish that the (predominant) aim of a particular sanction was 'punitive and deterrent' as opposed to 'remedial', i.e. only providing indemnity for a loss made by a transgression, or 'preventive', i.e. only seeking to avoid the materialization of danger. In fact, the fulfilment of the latter characteristics is crucial in order for aggravating measures to fall under the 'enhanced protection' of the ECHR. Even if the use of these criteria remains somewhat casuistic (cf. MN. 4.29), principally they are elastic enough to allow the ECtHR to grant protection for sanctions that, at least at face value, appear to be trifling but – assessed autonomously and individually – militate for the intervention by this court.

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[702] For current tensions in sanctioning regimes see, e.g., Mateo (n. 17).

4.67 The study has also revealed that the 'pan-European' perception of an administrative sanction is congruent within the normative framework of the CoE. There are no major discrepancies between the notions found in Recommendation No. R (91) 1 and in the case law of the ECtHR since both of them conceptualize sanctions in a broad fashion as a contemporary reflection of the crucial role of the right to access a court (cf. MN. 5.19). However, the *Jussila* concession introduced in 2006 obfuscated the view somewhat and relaxed the standards of individual protection with regard to sanctions that are not conceived as being 'hard-core', basing its assessment thereof on the 'stigma' criterion. This criterion is extrinsic as well as elusive and, hence, not especially conducive to legal certainty as various deviations from it in the case law of the ECtHR show (cf. MN. 4.46 et seq.). Instead of trading-off certain guarantees based on this criterion, the ECtHR could clearly indicate 'punition and deterrence' as the bedrock parameters that enable the unlocking of the 'enhanced protection' of the ECHR for administrative sanctions. Elaboration in this regard would allow for contextualizing a particular sanction better. More precisely, it would allow for factoring in the intrinsic elements of sanctions that are at times missing in the current interpretation of the matter.

4.68 The examples given above show that, for example, a sanction can be derisory in absolute terms, but severe in individual terms, in that it deprives the individual of a substantial part of her livelihood (cf. MN. 4.39). In addition, the wider 'real-life' ramifications that a *prima facie* meagre fine can have should be acknowledged: for example, one can be fined for breaching a traffic rule of minor importance but suffer from negative 'prejudicial consequences' such as not being able to receive a full insurance pay-out as a consequence.[703] Even if one could argue that the said intrinsic considerations may be hard to discern due to their complexity, they are still a far more reliable metric than the extrinsic criterion of 'stigma', which is highly debated in the scholarship due to its tendency to shift according to the public opinion and political agenda.[704] Moreover, the need to discern the impact of the (individual) repression and spell out its components in a systemic manner is furthermore pressing because novel sanctions are emerging and with them will come challenges, be it new administrative liability concerns in fledgling domains like data protection or market regulation (cf. MN. 4.42) or remedial administrative

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703 As it happened in the case of *Varuzza v Italy* (35260/97) 9 November 1999 ECtHR (dec.). In this case, the applicant was fined for supposedly breaching a traffic rule first and was deemed to be partially responsible for a car accident later by the insurance company commensurately reducing his payout for the damage suffered.

704 Brudner (n. 437), p. 191.

sanctions with clear punitive undertones that the elusive criterion of ‘stigma’ is not always capable of grasping (cf. MN. 4.40).

CHAPTER 5
ADMINISTRATIVE PUNISHMENT: THE PROCEDURAL SIDE

"*And, however convenient summary criminal proceedings may appear at first (as doubtless all arbitrary powers well executed, are the most convenient) yet let it be again remembered, that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty*"

Sir William Blackstone

5.1. Introduction

5.01 Having identified the concrete notion of an administrative sanction within the legal framework of the CoE, it is now time to take a look at the practical dimension and what a correct - for lack of a better word - imposition of these sanctions consists of. Put otherwise, this chapter intends to discern and take stock of the concrete procedural safeguards that ought to be attached to the imposition of administrative sanctions within this normative field. Adhering to such safeguards may not only ensure the protection of fundamental rights but also boost the feeling of self-worth of the person sanctioned and, hence, the legitimacy of sanctioning and the eventual acceptance of its outcome, since the individuals concerned assess not only the final result but also the 'quality' of, and their involvement in, the process conducted by the public hand.[705]

5.02 Most of the safeguards stem from Article 6 ECHR – the provision generating the highest number of cases in the ECtHR's docket as well as most commentaries or, put otherwise, the provision that is a 'staple diet' of the ECHR system.[706] This provision did not appear out of the thin air but demonstrates affinities with articles 10 and 11 of the Universal Declaration of Human Rights of 1948 and, hence, can be said to express the prevailing expectations regarding punishment and a fair trial at the relevant time.[707] Although the ECtHR has made it clear that Article 6 ECHR offers 'procedural' and not 'substantive' protection, i.e. it cannot control the content of a State's national law,[708] for the purposes of this thesis the term 'procedural' will be

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705 See Bernatt (n. 16), pp. 8–9. See further on the importance of due process in D.J. Galligan, *Due Process and Fair Procedures* (1996); E. Brems, "Procedural Protection: An Examination of Procedural Safeguards Read into Substantive Convention Rights" in E. Brems/J.H. Gerards (eds.), *Shaping Rights in the ECHR. The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (2013), pp. 137–161; E. Brems/L. Lavrysen, "Procedural Justice in Human Rights Adjudication: The European Court of Human Rights", (2013) 35 *Human Rights Quarterly*, pp. 176–200; Gerards/Brems (n. 188).

706 D.J. Harris/M. O'Boyle/E.P. Bates/C.M. Buckley (eds.), *Law of the European Convention on Human Rights* (2009), p. 329.

707 See for the connection Preparatory Work on Article 6 of the ECHR of 8 October 1965 Nr. DH (56) 11 by the European Commission of Human Rights.

708 Only in extremely rare cases will the ECtHR use this provision to examine the merits of the impugned national decision, see more in Harris/O'Boyle/Bates/Buckley (n. 706), p. 202; p. 224.

used loosely, i.e. acknowledging that procedure impacts substance and *vice versa* and, hence, the boundaries between the two also remain fluid.[709] Given the distinctive rationale of administrative sanctions – to grant effective compliance with administrative law and facilitate its manifold goals – as well as the blurry lines between them and criminal law measures, a few pressing questions come to the fore.

5.03 First, one may wonder whether procedural principles generally applicable to criminal sanctions ought to be applied to administrative punitive sanctions *en bloc*, or whether, in turn, one can speak about an autonomous body of principles that is applicable to the latter. What exactly are their points of intersection? The proposition that administrative punitive sanctions might have their own idiosyncratic principles *vis-à-vis* the ones of criminal origin is borne out by the already mentioned regulatory link between the general principles of sanctioning and the specific principles of fair administrative procedure (such as the right to be heard) embedded in the CoE's regulation (cf. MN. 4.03). Secondly, it is important to find out the extent to which these guarantees apply and whether there are any limitations considering the potential for the fundamental rights to clash with each other.[710] Can these limitations be justified in the light of the need for functional enforcement and the interest that the public has in the safe performance of the regulated activity?[711] What practical implications for an individual are posed by such limitations? And, finally, are there any 'ironclad' guarantees? Put otherwise, is there a minimum core of *ius puniendi administrativus* that should be granted at all times?

5.04 If so, how can one exercise it correctly given the fact that the field of administrative punishment has been marked by general mistrust between the various actors. In some countries, for example France, the administration feels that a generalist judge may not be in a position to appreciate the appropriateness of an administrative decision and, inversely, the former is criticized time and again for not being able to grasp the subtleties of criminal law and procedure.[712] This problem is immanent to the 'normative architecture' of the CoE, which prescribes safeguards on a bilateral level – administrative and judicial. These levels intertwine and at times impact on each other, as is vividly highlighted by the discussion on the acceptable

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709 Della Cananea (2016, n. 4), p. 7. In the particular context of the ECHR, see an elaborate study on the matter by R. Möller, *Verfahrensdimensionen materieller Garantien der Europäischen Menschenrechtskonvention* (2005).

710 See on this topic E. Brems (ed.), *Conflicts Between Fundamental Rights* (2008).

711 Indeed, the lesser the safeguards, the easier it is to achieve the conviction that in turn leads to the greater deterrent effect for the regulated actors, see more in Picinali (n. 475), p. 683.

712 M. Delmas-Marty, "Introduction" in *Les problèmes juridiques* (n. 189), pp. 27–37 (p. 34).

scope of judicial review and the deference that judicial bodies should give to the assessment of facts and circumstances in administrative proceedings (cf. MN. 5.46).

5.05 Indeed, administrative authorities comprise civil servants who are not judges, and hence some of the procedural guarantees may well slip under their radar. Moreover, these bodies are not specialized and institutionally arranged towards the punitive function *per se* (punishment being one function out of the many), which may yield an increased level of flexibility but presents deficiencies in the procedural protection.[713] At the same time, requiring too high a standard may also potentially forfeit the many advantages of this alternate forum of punishment and placing additional layers of individual protection thereon does not necessarily ensure that the correct decision will be reached.[714] In other words, even highly sophisticated procedures may lead to unfair outcomes and, paradoxically, result in more formalism and window-dressing than actual substance.[715]

5.06 Against this backdrop, this chapter will be structured as follows. Firstly, a regulatory overview will be offered in order to draw the contours of the applicable rules in light of the administrative sanctions within the framework of the CoE. The following parts of the chapter will be structured regarding the said normative content stemming from Recommendation No. R (91) 1 as well as Article 6 ECHR, since it also defines the pathway for the academic quest. More precisely, this chapter will be divided into the 'umbrella' rubrics covering the requirement of reasonable time and legal certainty, defence rights, legality control and the burden of proof grouped with the presumption of innocence. The focus throughout the chapter will be laid on the case law analysis, which is capable of depicting 'guarantees in action' and their many practical implications. The concluding part will seek to synthesize the findings of this analysis and provide some possible answers to the questions raised above. The topics concerning the legality principle and the accumulation of sanctions, for their part, were deemed to be extensive enough to be handled separately in the subsequent chapters, 6 and 7, of this thesis.

5.2. Regulatory Overview

5.07 As noted above, Recommendation No. R (91) 1 and the ECHR are the main regulatory instruments within the context of administrative punishment as conceived by the CoE, whose normative sources within the administrative domain have been shown to form a 'coherent whole' and rely on one another, cf. MN. 1.08; 1.36; 1.39. They shall be read in conjunction

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713 Delmas-Marty/Teitgen-Colly (n. 230), p. 106.

714 Bernatt (n. 16), p. 9.

715 Gerards/Brems (n. 188), p. 6.

with Resolution (77) 31 and Recommendation No. R (80) 2, forming the whole of *ius puniendi administrativus*. These sources stipulate the general principles applicable to the adoption of administrative acts since the imposition of an administrative sanction is also one of the many possible outcomes. Such general principles broaden and supplement strictly 'sanctioning principles' on both the substantive[716] and procedural levels. The main goal of this sub-section is to develop an overview thereof as well as of the interrelationship between them rather than to provide verbatim quotes of the provisions set out in the aforementioned normative acts (although sometimes this is unavoidable). Duplications of regulations will be omitted from this overview giving precedence to the specific regulation of sanctioning procedures. This, in turn, will guide and facilitate further research by shedding light on 'what should we look for' in the case law exemplifying these tenets. It goes without saying that the case law specifying all of the safeguards listed below is abundant due to their broad scope of application; thus, the focus will be primarily placed on how it was given a particular shape in the 'sanctioning' cases.

5.08 The first three principles of Recommendation No. R (91) 1 regulate legality[717] and the accumulation of sanctions – topics that are extensively dealt with in other chapters and will not be explored here. Principles 4 and 5 of this recommendation, for their part, can be explored together because they both impinge upon the legal certainty of the individual on whom a sanction is imposed, which is a fundamental component of the rule of law. Namely, Principle 4 enshrines the reasonable time requirement, which is *a fortiori* broken down into two provisions: that any action by administrative authorities against conduct contrary to the applicable rules shall be taken within a reasonable time (Part 1) and that when an administrative authority has set in motion a procedure capable of resulting in the imposition of an administrative sanction, they shall act with reasonable speed in the circumstances (Part 2). Such a wording implies that not only must the sanctioning itself be performed in a speedy manner in balance with the legal goods protected and (limited) administrative resources but so should the 'prosecution' or administrative data collection to this effect. Logically, not all such inquiries automatically result in the imposition of sanctions; however, legal certainty requires that an investigatory procedure

716 Remarkably, these acts stipulate a few important substantive principles, such as the equality before the law by avoiding unfair discrimination (Part II [3] of Recommendation No. R (80) 2) and the consistent application of general administrative guidelines pronounced publicly (Part II [3] of Recommendation No. R (80) 2). Any deviations from that have to be especially well-reasoned (Part III [8] of Recommendation No. R (80) 2).

717 Part II [1] of Recommendation No. R (80) 2 also specifies the imperative to stay within one's mandate for administrative authorities, i.e., not to pursue any other purpose for which the power has been conferred, which is tightly connected to the legality principle and its meta-aim to fight the arbitrariness of power.

leading to no sanctions at all should also be executed promptly. Principle 5 of Recommendation No. R (91) 1 supplements these tenets by making clear that in either of these two cases a decision that terminates the administrative proceedings shall be adopted. This echoes the general idea found in the case law that punitive proceedings shall terminate in a finite decision.[718] Otherwise, the individual under administrative investigation would be left in legal limbo, which would also harm or render nugatory her possibility of disputing the outcome of the proceedings, *inter alia*, in a judicial forum. The 'finality' of sanctioning would not be reached. If administrative silence occurs nonetheless, then the individual shall be able to proceed with submitting her grievance to the subsequent and external control.[719]

5.09 Principle 6 of Recommendation No. R (91) 1 lays down an array of further procedural guarantees that may be broadly termed 'defence rights': to be informed about the charge made against the individual; to have sufficient time to prepare one's case, taking into account the complexity of the matter as well as the severity of the sanctions at hand; to have a representative who ought to be informed of the nature of the evidence against the individual; and, to have the opportunity to be heard before any decision is taken and to get acquainted with the reasons on which the decision to impose sanctions is based. Importantly, Part 2 of this Principle allows for derogations from these safeguards subject to the consent of the person concerned in cases of minor importance, which are liable to limited pecuniary penalties. The Explanatory Memorandum of this Recommendation makes clear that in cases in which it would not be possible to seek the consent of the person concerned (such as parking tickets) this may be 'implied', as it states that 'in such cases the requirements of good and efficient administration … might provide grounds for the non-application of this particular rule'.[720] Resolution (77) 31 and Recommendation No. R (80) 2 also allow for such derogations provided that either the highest possible degree of fairness or the spirit of the recommendation is upheld.

5.10 Article 6 ECHR lays down a similar yet normatively broader[721] array of 'defence rights' (that take place on the judicial and not on the administrative level) that ought to be conducted by an independent and impartial tribunal established by law. Put otherwise, Article 6 ECHR assumes

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718 See, *mutatis mutandis*, *Delcourt v Belgium* (2689/65) 17 January 1970 ECtHR at [25]: "Criminal proceedings form an entity and must, in the ordinary way terminate in an enforceable decision".

719 See, *mutatis mutandis*, Part IV [10] of Recommendation No. R (80) 2.

720 Council of Europe (n. 8), p. 463.

721 For example, no right to examine witnesses on the administrative level is explicitly stipulated by Recommendation No. R (91) 1 and it can be debated whether this right can be derived from the right to be heard as codified by the Principle I of Resolution (77) 31 and Principle 6 of Recommendation No. R (91) 1. Furthermore, no 'language rights' are provided therein.

court-like proceedings.[722] As already elaborated, this article has 'civil' and 'criminal' limbs – the latter being of relevance in the sanctioning context and also ensuring that the individual concerned is subjected to the 'enhanced protection' as set out in Article 6 (2) and (3) ECHR and Article 2 of Protocol No. 7 to the ECHR. Namely, everyone charged with a criminal offence, as interpreted autonomously by the ECtHR, shall: be informed promptly, in a language that he understands and in detail, of the nature and cause of the accusation against him (a); have adequate time and facilities for the preparation of his defence (b); be able to defend himself in person or through legal assistance of his own choosing or, if he does not have sufficient means to pay for legal assistance, be given it free when the interests of justice so require (c); have the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses against him (d); and, have the free assistance of an interpreter if he cannot understand or speak the language used in court (e). Principle V of Resolution (77) 31 adds a very administrative requirement that the normal remedies against an adversarial administrative act, as well as the time-limits for their utilization, shall be indicated to the individual concerned.

5.11 Principle 7 of Recommendation No. R (91) 1 stipulates that the onus of proof shall be on the administrative authority. This tenet has a similar rationale to that of Article 6 (2) ECHR ensuring that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law and the privilege against self-incrimination.

5.12 Principle 8 of Recommendation No. R (91) 1 enshrines that an act imposing administrative sanction shall be subject, as a minimum requirement, to the control of legality by an independent and impartial court established by law. This rudimentarily echoes the right to a fair trial embedded in Article 6 ECHR, although it has to be kept in mind that Principle 8 of Recommendation No. R (91) 1 grants only the 'control of legality' as opposed to the 'full jurisdiction' requirement (cf. MN. 5.45 et seq.) because this was what the developments in European legal thinking allowed for at the time of its adoption.[723] Article 2 of Protocol No. 7 to the ECHR, for its part, can be viewed as a supplement to these provisions, as it prescribes the right to have a conviction or a sentence reviewed by a higher tribunal in criminal matters (as interpreted autonomously by the ECtHR). One important caveat should be kept in mind, however: it has no universal application to administrative punishment because its second paragraph allows for deviations with regard to offences of a minor character that should be

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722 Harris (n. 521), p. 198.

723 Council of Europe (n. 8), p. 463.

prescribed by law. It is furthermore not applicable to situations in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal. At the same time, the ECtHR does recognize its relevance to administrative sanctions (cf. MN. 5.57 et seq.).

5.3. Reasonable Time

5.13 The requirement to conduct sanctioning proceedings and reach a finite decision in a timely fashion is linked to many other significant safeguards in a system guided by the rule of law and yet it appears to be the most recurrent violation.[724] Other safeguards, for their part, such as the duty to hold a public hearing[725] or the duty to investigate administrative transgressions in a diligent manner and motivate administrative decisions (although representing their own added-value) present obstacles thereto. Apart from conspicuous - for lack of a better word - breaches of the length of proceedings,[726] the determination of what is 'reasonable' tends to be case-specific. It usually takes into consideration the complexity and importance of the subject matter as well as the conduct of all of the actors involved (including the possibility of compensation on the national level) and objective hurdles affecting the celerity of action as a whole.[727] Importantly, no outright excessive delays imperilling or *in extremis* annihilating the very legal certainty of the individual are allowed. Justifications for periods of inactivity imputable to public authorities are also significant whilst evaluating the length of proceedings. If there no credible ones are provided by the State, then the ECtHR will be more inclined to declare a violation.[728]

5.14 This requirement furthermore applies to both the administrative and the judicial actors implying a positive duty for the CoE Member States to create a viable infrastructure to this end.[729] Prolonged inaction of public authorities cannot generally be justified by unfavourable

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724 Leanza/Pridal (n. 521), p. 76.

725 See on this point explicitly in *Jan-Åke Andersson v Sweden* (11274/84) 29 October 1991 ECtHR (Plenary) at [27] and *Fejde v Sweden* (12631/87) 29 October 1991 ECtHR at [31].

726 Such as, e.g., taking over twenty years to settle disputes in three judicial instances, see to this effect *Kapetanios and Others v Greece* (3453/12, 42941/12 and 9028/13) 30 April 2015 ECtHR.

727 See, among many authorities, *Pélissier and Sassi v France* (25444/94) 25 March 1999 ECtHR [GC] at [67]; *Smirnova v Russia* (46133/99 and 48183/99) 24 July 2003 ECtHR at [82]. See also *Bachmaier v Austria* (77413/01) 2 September 2004 ECtHR (dec.), in which one year and ten months for three levels of jurisdiction was deemed to be a reasonable duration in an administrative punitive context; *Sismanidis and Sitaridis v Greece* (66602/09 and 71879/12) 9 June 2016 ECtHR, in which six years and ten months for two levels of jurisdiction for a customs offence case was deemed excessive.

728 See, e.g., *Luksch v Austria* (37075/97) 21 November 2000 ECtHR.

729 See, e.g., *Deak v Romania and the United Kingdom* (19055/05) 3 June 2008 ECtHR at [80]; *Salesi v Italy* (13023/87) 26 February 1993 ECtHR at [24].

economic conditions or more mundane reasons, such as a lack of the appropriate software or missing paperwork.[730] The defining moment for this begins when the person concerned is factually 'charged' – a factor which is assessed autonomously by the ECtHR. In the administrative punitive context, this can be marked either by the notification of the opening of sanctioning proceedings, the adoption of an administrative act inflicting a sanction or another administrative action, like an early enforcement of a fine, whereby the situation of the individual becomes 'substantially affected' (cf. MN. 4.16).[731] In other words, it is not (necessarily) tied to a judicial act inflicting punishment on the individual: on the contrary, it has time and again been emphasized in the ECtHR's case law that Article 6 ECHR gains importance even before the commencement of trial proceedings and retains importance all the way through until the 'charge' is finally settled.[732]

5.15 The latter was glaringly exemplified by the case of *Västberga Taxi Aktiebolag and Vulic v Sweden*, among other authorities.[733] This case appears to be a paragon of how administrative and judicial delays are interlinked and what an unfortunate turn of events they may bring for the applicants. The case concerned tax surcharges imposed on the applicants who were willing to challenge them before a court, basing their claim on the inaccuracy of the tax assessment. The whole situation was exacerbated by the fact that, firstly, the court's examination was contingent upon reconsideration of the appeal by the tax authority. Only if there were special reasons could the appeal be referred directly to the court.[734] Secondly, no stay of execution for the applicants burdened by additional taxes and tax surcharges was granted, meaning that the enforcement of the administrative sanction happened immediately (cf. MN. 5.95 et seq.). Regardless of these clearly unfavourable factors for the applicants, the tax authorities took respectively one year and nine months and one and a half years to reconsider the appeal, thus unduly delaying the court's determination of the dispute without indicating any convincing

730 See in a general context *Ališić and Others v Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* (60642/08) 16 July 2014 [GC] ECtHR at [148]; *Krstić v Serbia* (45395/06) 10 December 2013 ECtHR at [85].

731 See, e.g., *Deweer v Belgium* (6903/75) 27 February 1980 ECtHR at [46] where the proposal for a friendly settlement instead of a shop closure marked the moment of 'charging' the applicant. See also *Funke v France* (10828/84) 25 February 1993 ECtHR where the 'charging' was defined by the customs authorities seizing the assets of the applicant.

732 In fact, pre-trial actions (in our context – administrative behaviour) can seriously prejudice the subsequent fairness of the trial, see, e.g., *Salduz v Turkey* (36391/02) 27 November 2008 ECtHR [GC] at [50].

733 *Västberga Taxi Aktiebolag and Vulic v Sweden* (36985/97) 23 July 2002 ECtHR. See also a very similar case of *Janosevic v Sweden* (34619/97) 23 July 2002 ECtHR against Sweden in which the administrative handling of the complaint as a precondition to apply to the court went as far as taking almost three years and the whole prooceedings exceeded six years.

734 *Västberga Taxi Aktiebolag and Vulic v Sweden* (36985/97) 23 July 2002 ECtHR at [96].

reasons. Combined with the subsequent judicial proceedings, the proceedings lasted in total seven years and five months for the first applicant (they were still ongoing when the case reached the ECtHR) and six years and nine months for the second applicant.[735] In the meantime, one of the applicants was declared bankrupt and the other had his bank savings seized.

5.16 The ECtHR, firstly, found that such prolonged inaction by the tax authorities had impeded the applicants' effective access to the courts and thus, declared a violation of Article 6 (1) ECHR. It was underscored that the enforcement measures taken against the applicants and the situation in which they were placed made it indispensable for the administrative authorities to act promptly, so that the applicants could have effective access to the courts.[736] This hinted once again at the well-established notion of the ECtHR that domestic authorities should not be indifferent to what is at stake for the applicant in the concrete situation. If there are particularly serious implications at play, then even more urgency is expected from the public authorities. Furthermore, the behaviour of the domestic courts themselves was deemed faulty. More precisely, the ECtHR criticized the fact that the undue delays were not even connected to deciding on the merits of the case but concerned procedural questions. It took the domestic courts one year and three months to determine the relatively uncomplicated question of the first applicant's right to act as a party to the relevant proceedings and more than a year to decide on the question of whether to grant the second applicant leave to appeal.[737] The latter shows the ECtHR's intention to assess not only the duration of sanctioning proceedings taken as a whole but also the intermediary procedural steps. This reflects the overall *telos* of Article 6 ECHR: the requirement of celerity is stipulated not only by its first paragraph but also by the litera a) of the third paragraph ("to be informed *promptly* … of the nature and cause of the accusation made").

5.17 Such an 'atomistic' assessment was furthermore confirmed in the case of *Impar LtD. v Lithuania*[738] also concerning the imposition of tax penalties. Here the proceedings became protracted due to the fact that the expert report on the applicant company's documents was commissioned in connection to the ongoing criminal case against the company's director. All in all they lasted six years and one month at three levels of jurisdiction. The ECtHR acknowledged the applicant company's fault in delaying the proceedings in that it was her who

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735 Cf. *Rikoma LtD. v Lithuania* (9668/06) 18 January 2011 ECtHR where the whole proceedings in a tax case lasted nearly eight years for three levels of jurisdiction.

736 *Västberga Taxi Aktiebolag and Vulic v Sweden* (36985/97) 23 July 2002 ECtHR at [100].

737 *Västberga Taxi Aktiebolag and Vulic v Sweden* (36985/97) 23 July 2002 ECtHR at [106].

738 *Impar LtD. v Lithuania* (13102/04) 5 January 2010 ECtHR.

had requested that the court stay the proceedings pending the result of this expert report. But at the same time it was declared that the domestic authorities were also partly responsible for the delay. This was so because the expert report turned out to be related to other violations, which had not been the subject matter of the relevant tax dispute; furthermore, the report was not conclusive since the experts had not received all of the necessary documents.[739] Accordingly, a breach of Article 6 (1) ECHR was declared.

5.4. Judicial Control

5.18 If one had to choose the most salient requirement in the punitive context, the one granting the supervision of aggravating measures at the judicial level would be an irrefutable contender. The ECtHR made it clear early on that decisions taken by administrative authorities that do not themselves satisfy the requirement of Article 6 (1) ECHR must be subject to subsequent control by a "judicial body that has full jurisdiction" (cf. MN. 5.45 et seq.).[740] In other words, access to an external tribunal bearing all of the hallmarks and safeguards of a 'fair trial' and thus capable of adjudicating on the legality of sanctions adopted by administrative authorities and eventually quashing such sanctions has to be available in a legal system. In this way, a two-fold aim was fulfilled: on the one hand, it was secured that administrative decisions do not escape the judicial scrutiny but, on the other hand, an implicit conceptual acceptance on the use of administrative punitive proceedings was given. Regarding the former guarantee, one does not have to look far to justify its importance: judicial review is one of the fundamental principles of Western constitutionalism and has traditionally been regarded as a central device for ensuring accountability as well as achieving administrative justice for individuals.[741] Article 6 ECHR was also modelled as a template for 'trial courts of the classical kind' and, in case of doubt, one should not lose sight of this initial design.[742] All in all, there are currently very few areas - mostly belonging to the direct and unequivocal exercise of State's sovereign powers - not covered by the said provision, so the question is usually not 'if' the matter is actionable but rather 'how' or 'what standards of a trial' apply thereto.

5.19 The ECtHR has also time and again emphasized that the right to a fair trial holds a prominent place in a democratic society and, therefore, has interpreted many of its facets in a broad

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739 *Impar LtD. v Lithuania* (13102/04) 5 January 2010 ECtHR at [14]; [27].

740 See *Öztürk v Germany* (8544/79) 21 February 1984 ECtHR at [56]. See futher *Umlauft v Austria* (15527/89) 23 October 1995 ECtHR at [37] and the case law indicated therein.

741 Aronson (n. 322), p. 70.

742 Harris/O'Boyle/Bates/Buckley (n. 706), p. 204.

fashion.[743] Exclusions to this right – on the contrary – are interpreted restrictively and the general presumption that in 'borderline' cases Article 6 ECHR applies, unless it has been unequivocally proven to the contrary by the respondent government, prevails.[744] Any measure or decision alleged to violate Article 6 ECHR, thus, calls for a particularly careful review.[745] The (provision of) judicial review has also been used as a justification to derogate from procedural safeguards at the administrative level in certain cases.[746] However, having a broader perspective in mind, it can equally be claimed that judicial review is far from being the only means to control the legality of a decision: in fact, in some legal systems, such as the Nordic legal family, the ombudsman is perceived as a significant supplement to the control exercised by courts. Such an approach is predicated on the sovereignty of the people as the governing principle for the organization of the state and affording the Parliament a central role in the constitutional system. This also implies that the Parliament decides which role fundamental rights should play in the domestic legal system, instead of the courts. [747] In this regard, it should not be forgotten that the judiciary is not an elected body, meaning that it is also further away from the electorate, which at times may result in deficits in terms of democratic accountability.

5.20 Moreover, the way that judicial review is proceduralised tends to be rather heterogeneous in Europe.[748] In the administrative context, judicial review is dependent on the conception of administrative law in a particular legal system, especially on the margin of appreciation delegated to the administration whilst adopting administrative decisions.[749] The relative lack of awareness of fair trial standards, when it comes to administrative justice, in post-conflict countries presents its own share of difficulties[750] as the examples of 'mechanistic' administrative punishment (cf. MN. 5.93 et seq.) or denying judicial control altogether show

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743 See, among many other authorities, *Airey v Ireland* (6289/73) 9 October 1979 ECtHR at [24].

744 See, e.g., in the context of public service law *Vilho Eskelinen and Others v Finland* (63235/00) 19 April 2007 ECtHR [GC] at [62].

745 *Deweer v Belgium* (6903/75) 27 February 1980 ECtHR at [49].

746 Bailleux (n. 1), pp. 145–146.

747 See Reichel (n. 370), (MN. 9.04). See also Blanc-Gonnet Jonason (n. 366), p. 581.

748 Bell (n. 207), p. 167.

749 Stelkens/Andrijauskaitė (n. 7), MN. 31.33 et seq. For different causes and use of deference to administration in judicial review see G. Zhu, *Deference to the Administration in Judicial Review: Comparative Perspectives* (2019); See further M. Bernatt, "The Compatibility of Deferential Standard of Judicial Review in the EU Competition Proceedings with Article 6 of the European Convention on Human Rights", (2014) *Institute for Consumer Antitrust Studies Working Papers*, available at: https://ssrn.com/abstract=2447884.

750 See more in A. Zrvandyan, *Casebook on European fair trial standards in administrative justice* (2016), p. 10.

(cf. MN. 5.23 et seq.). The ECtHR has to bear all of these considerations in mind whilst adjudicating and the indications stemming from the case law hint at the fact that it is prepared to do so by assessing different facets of fair trial breaches "in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6 (1) ECHR".[751]

5.21 The notion that individuals should be empowered to challenge administrative sanctions sounds a bit trite from a contemporary perspective (as access to a court and judicial proceedings are currently almost taken for granted even in countries not faring especially well when it comes to the rule-of-law) but it took some time for the question to vanish from the ECtHR's docket. In fact, previously, all sanctioning proceedings used to be subsumed by administrative authorities alone, citing their minor nature. This tendency was especially visible in post-socialist states where access to the courts was replaced with the recourse to *procuratura*, which was capable of serving the dual function of governmental administration and the initiation of criminal prosecution.[752] As hinted at earlier, the former institution of *procuratura* had proven itself to be inefficient in contrast to other non-judicial control institutions such as ombudsmen, prevalent in the Nordic countries (cf. MN. 5.19), because it used to belong to the same executive branch. In addition, the *procuratura* was higly 'politicized', i.e. serving to impress upon all concerned the absolute necessity of observing the laws. Moreover, its decisions were impossible to enforce and its staff were not only untrained for the demanding supervisory tasks but often virtually uneducated.[753]

5.22 The ECtHR made it unequivocally clear that such a practice was untenable. Currently, the cases touching upon judicial redress appear to have become more nuanced although they still raise pertinent questions about the boundaries permitted between administrative procedure and court proceedings. The study of the control of legality will thus start with the exploration of the development of discarding the denial of a tribunal in administrative sanctioning and continue by dissecting what constitutes effective access to a tribunal, according to the ECtHR. This will be followed by delving into the concrete procedural safeguards and hallmarks of the said tribunal together with the scope and intensity of its review in compliance with the case law of the ECtHR. The section will conclude by discussing the specific question of granting the right to appeal to a higher court in matters concerning administrative sanctions.

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751 See, e.g., *Bachmaier v Austria* (77413/01) 2 September 2004 ECtHR (dec.).

752 Harris/O'Boyle/Bates/Buckley (n. 706), p. 229.

753 For more analysis and critique see Morgan (n. 350), pp. 183; 187–188; 249.

5.4.1. The Lack of a Tribunal

5.23 The indispensability of a tribunal within the punitive realm became established in a thicket of cases. Its inception can be traced back to a few cases in 1998 against Slovakia concerning minor offences in which the right to apply to a court was precluded by domestic procedural provisions. For example, in the case of *Lauko v Slovakia*,[754] a fine of 300 Slovakian korunas (SKK) was imposed on the applicant by the local police office for causing a nuisance to his neighbours. The applicant appealed the respective decision to the police district office and subsequently requested that it be reviewed by an independent and impartial tribunal. His complaint was dismissed by the Slovak Constitutional Court on the grounds that the minor offence at issue could not be examined by a court. This was so because the domestic legal framework established a *de minimis* rule: only where the lawfulness of administrative decisions in cases where a fine exceeding SKK 2,000 has been imposed, the exercise of a certain activity has been prohibited for a period exceeding six months or an object with a value exceeding SKK 2,000 has been confiscated in regard to minor offences can cases be reviewed by the courts. The fine at issue, for its part, was deemed too minor to grant access to judicial review by domestic authorities.

5.24 The ECtHR did not perceive the derisory size of the fine as validating the course of the proceedings taking place exclusively before the local police office since it was under the control of the executive and lacked the safeguards of impartiality and independence as required by Article 6 (1) ECHR. However, the outcome of the case could well have been different: one of the (alternative) *Engel* criteria is severity and the ECtHR could have dismissed the applicability of 'criminal charge' and its safeguards altogether due to the lack thereof (cf. MN. 4.14). However, the aforementioned prominence of the right to a fair trial in a democratic state must have prevented the ECtHR from doing so. Opening the gates for administrative punishment to be completely subjugated to the executive branch appeared to be a risky enterprise. The said domestic provisions preventing ordinary courts from reviewing administrative decisions on minor offences were amended by the respondent State[755] but the saga continued well into 2004

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754 See the case of *Lauko v Slovakia* (26138/95) 2 September 1998 ECtHR. See in a similar vein the case of *Kadubec v Slovakia* (5/1998/908/1120) 2 September 1998 ECtHR where a failure to assign a lawyer as required *ex lege* obstructed an applicant's opportunity to put his claim before a tribunal.

755 The Czech Republic appears to have gone through a similar transformation in administrative penal law caused by the external pressure of Article 6 ECHR. The lack of review of the proportionality and appropriateness of administrative penalties was declared unconstitutional by the Czech Constitutional Court, see more in Z. Kühn/J. Staša, "Deference to the Administration in Judicial Review in the Czech Republic" in Zhu (n. 749), pp. 133–156 (pp. 144–145).

and 2009 as reflected by the cases *Čanády v Slovakia*, in which a soldier was fined for misdemeanours against civic propriety by his military superiors. The same piece of legislation (Minor Offences Act 1990 of Slovakia) had once again disrespected the applicant's right to a hearing by substituting it with a hearing at the Ministry of Defence.[756]

5.25 The foregoing cases represent an outright and complete denial of a tribunal, which impairs the very essence of the right to access judicial review. They allude to the post-socialist legacy in which the role of the courts in controlling administrative activity was minor and the authorities often turned to extrajudicial agencies to exercise repression (cf. MN. 3.59). However, the situation can be viewed differently if the replacement of a tribunal is partial, since the right to access courts is not absolute, e.g., by means of the summary proceedings, if they maintain respect for the essence of this right. The ECtHR had the opportunity to express its view on this matter in a string of 'Slovenian' cases. For example, in the case of *Suhadolc v Slovenia*,[757] the applicant was fined and given penalty points for traffic violations, i.e. drinking under the influence and speeding. The applicant argued that he had been charged and convicted by the same body, namely the police, and that the judicial review of the process had been inadequate because the summary proceedings were in place. This meant that he had to apply for a judicial review. An application for such a review had to be dealt with by a single judge at a court handling minor offences, which was normally a local court. In other words, judicial review was available but not automatically granted depending on the circumstances of the case. In this particular case, the judicial review was denied because the applicant could not put forward any credible arguments as to why a hearing was indispensable and the sanctioning proceedings undertaken by the police unlawful. The ECtHR has in principle upheld such a system considering the minor character of the impugned measures and showing deference to all of the values that expediting the processing of less serious offences stand for: efficiency, reducing the workload of the judiciary and minding the requirement of reasonable time, to name but a few. The same legal framework was, however, assessed differently in the case of *Flisar v Slovenia*,[758] when the applicant managed to provide cogent arguments in minor offences proceedings as to why a judicial hearing was necessary but the courts still rejected them in a

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756 *See Čanády v Slovakia* (53371/99) 16 November 2004 ECtHR and *Čanády v Slovakia (no. 2)* (18268/03) 20 October 2009 ECtHR.

757 *Suhadolc v Slovenia* (57655/08) 17 May 2011 ECtHR (dec.). See further on the acceptability of summary proceedings *Berdajs v Slovenia* (10390/09) 27 March 2012 ECtHR (dec.).

758 *Flisar v Slovenia* (3127/09) 29 September 2011 ECtHR.

'mechanistic' manner, i.e. without a real exchange of arguments having taken place and relying solely on the documents provided by the police.

5.26 Another type of limitation barring effective access to courts may appear in the form of *ex lege* procedural handicaps,[759] as was vividly demonstrated by the *Paykar Yev Haghtanak Ltd v Armenia* case.[760] In this case concerning the imposition of tax surcharges, the applicant – a private small-scale trading company – was denied access to a court due to her failure to pay the court fee, which was a prerequisite to apply to a court. The applicant company justified this failure as being due to financial difficulties, but the relevant domestic provision flatly prohibited the exemption of private businessmen and commercial entities (as opposed to natural persons) from payment of a court fee and, as a consequence, the domestic court failed to examine the applicant company's request in this regard. The ECtHR has declared that whilst in general the requirement to pay court fees *per se* cannot be equated to the denial of a tribunal, in this particular case such a blanket and inflexible prohibition on granting court fee exemptions raised an issue under Article 6 (1) ECHR.[761]

5.27 Apart from *ex lege* limitations impacting access to judicial review, more flexible solutions obstructing the ability to turn to a tribunal may be adopted by the Member States. The ECtHR had an opportunity to express its view regarding one of them, namely, the waiver of the right to access a court. In the pivotal case of *Deweer v Belgium*,[762] a friendly settlement was offered by the Belgian authorities to a butcher who had allegedly violated price regulations in exchange for him waiving his right to have the case dealt by a tribunal. This meant that the butcher consented to pay a somewhat lowered monetary fine for his economic offences and pledged to forgo the judicial review and all of its guarantees, even if he harboured doubts about his actual transgressions. Had he not opted for such a 'friendly settlement' with the authorities, a provisional closure of his shop would have occurred. Moreover, such a closure would have lasted for a period of months – until the judicial proceedings were finished – depriving him of income accruing from his trade.

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759 Examples of these handicaps are the requirement to be represented, immunities and the like provided that they impair the very essence of the right to access a court. See in a general context on this right and the scope of its limitations that ought not to be interpreted in a way of altering their ultimate aim *Golder v The United Kingdom* (4451/70) 21 February 1971 ECtHR (Plenary). See more in Lemmens (n. 682), pp. 302–303; Seel also Barkhuysen/Van Emmerik/Jansen/Fedorova (n. 559), pp. 552–560, *inter alia*, claiming that the margin of appreciation afforded to the national authorities and courts in this domain is narrow.

760 *Paykar Yev Haghtanak Ltd v Armenia* (21638/03) 20 December 2007 ECtHR.

761 *Paykar Yev Haghtanak Ltd v Armenia* (21638/03) 20 December 2007 ECtHR at [49].

762 *Deweer v Belgium* (6903/75) 27 February 1980 ECtHR.

5.28 The ECtHR has found that such waivers, in principle, do not offend the Convention. However, it went on to evaluate the specific circumstances of the case and did not treat a waiver to forfeit access to a court lightly. Put otherwise, the ECtHR invoked a 'knowing and intelligent waiver standard', as is usually required in such cases.[763] It noted that presented with a choice between exercising the right to a fair trial and facing the closure of his shop or a milder solution, more flexible and less burdensome than closure, the applicant was clearly tempted to opt for the latter. Such a combined effect, however, was deemed to be 'tainted by constraint' by the ECtHR as it had put the applicant in a position not free from pressure.[764] A violation of Article 6 (1) ECHR was therefore declared. Although the case took place in a very specific context, it surely bears wider implications for administrative punishment as friendly settlements with the State are becoming more prevalent, e.g., in the taxation or any other domain in which the authorities do not want to run the risk of failing to meet the necessary evidentiary threshold in a judicial forum but harbour enough suspicion to not be willing to let the transgressors easily 'off the hook'.[765]

5.4.2. Safeguards of a Tribunal: Legality, Impartiality and Independence

5.4.2.1. General Considerations

5.29 The previous section examined the absolute or partial lack of a tribunal in administrative punishment. However, nowadays, such cases are rare, and in practice more often than not some kind of a tribunal does exist. However, 'any kind' of tribunal does not suffice as it should be defined by the parameters stemming from the very text of Article 6 (1) ECHR: "everyone is entitled to a fair and public hearing … by an *independent* and *impartial* tribunal established by law". Hence, legality, impartiality and independence are key for a tribunal to be considered fully compliant with the Convention. Adhering to these safeguards is crucial in order to induce and maintain trust in society – a value that is especially important in punitive proceedings.

5.30 The ECtHR has had multiple opportunities to expound and flesh out these parameters of a 'tribunal' in its case law. The main idea is that a 'tribunal' is characterised in the substantive sense of the term by its judicial function; that is to say, determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed

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763 Barkhuysen/Van Emmerik/Jansen/Fedorova (n. 559), p. 637.

764 *Deweer v Belgium* (6903/75) 27 February 1980 ECtHR at [54].

765 See, also in a comparative context, for a prevalence of voluntary self-disclosure programmes in order to avoid criminal prosecution, Seer/Wilms (n. 502), p. 4. and for administrative surcharge reliefs for cooperative behaviour pp. 16–17.

manner.[766] The legality of a tribunal is the most clear-cut requirement presupposing that the legislative basis emanating from the Parliament and conferring power to issue binding decisions in the area in question should be in place.[767] Non-judicial bodies should be precluded from interfering with the binding force of a decision.[768] The said power to have the final say in the adjudicated matter is also included in the broader notion of independence. The latter serves as a safeguard against political abuse of power and is generally perceived as freedom of action from the executive and other outside pressures as indicated by the manner of appointment of its members and the duration of their term of office, the existence of institutional guarantees and the question whether the body presents an appearance of independence.[769] The sole fact that the members of a tribunal were appointed by the executive, however, does not automatically lead to calling into question their independence – as this is the standard procedure that is prevalent in certain Member States.[770] Independence, in its 'qualitative' dimension, also means that a tribunal, when called upon to adjudicate on administrative offences, has to assess the subject matter on its own account and not rely solely on or replicate standardised documents submitted by the executive.[771]

5.31 Impartiality, for its part, is the most opaque concept: whereas the requirement of independence denotes the ties of the courts to other arms of the State, which are relatively easier to ascertain, the requirement of impartiality deals with the former being in one way or the other connected with the parties to the dispute as well as yielding to the 'popular feeling' surrounding

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766 See for a leading authority *Sramek v Austria* (8790/79) 22 October 1984 ECtHR (Plenary) at [36].

767 See more in *Campbell and Fell v the United Kingdom* (7819/77; 7878/77) 28 June 1984 ECtHR; *Coëme and Others v Belgium* (32492/96, 32547/96, 32548/96, 33209/96 and 33210/96) 22 June 2000 ECtHR at [98].

768 See *Van de Hurk v the Netherlands* (16034/90) 19 April 1994 ECtHR in which the Crown and the Minister had a right to conjointly deprive a judgment of the Industrial Appeals Tribunal of its effect in order to safeguard general interests – a practice deemed not to be compliant with the ECHR.

769 This idea is in line with the famous quote that "justice must not only be done, but it must also be seen to be done". See, e.g., *Albert and Le Compte v Belgium* (7299/75; 7496/76) 10 February 1986 ECtHR (Plenary) at [55]; *Campbell and Fell v the United Kingdom* (7819/77; 7878/77) 28 June 1984 ECtHR at [78].

770 *Campbell and Fell v the United Kingdom* (7819/77; 7878/77) 28 June 1984 ECtHR at [79]; *Galstyan v Armenia* (26986/03) 15 November 2007 ECtHR at [62].

771 See *Starkov and Tishchenko v Russia* (54424/14 and 43797/16) 17 December 2019 ECtHR; *Belikova v Russia* (66812/17) 17 December 2019 ECtHR; *Anghel v Romania* (28183/03) 4 October 2007 ECtHR and *Frumkin v Russia* (74568/12) 5 January 2016 ECtHR cases in which relying exclusively on the administrative offence record and statements made by the police officers to find the applicant guilty of a traffic violation was deemed to breach the principle of fair trial. See, *a contrario, Nicoleta Gheorghe v Romania* (23470/05) 3 April 2012 ECtHR and *Ioan Pop v Romania* (40301/04) 28 June 2011 ECtHR (dec.) cases in which the applicants themselves were unable to rebut the official reports, cf MN. 5.93 et seq.

the case.[772] Hence, the ECtHR is implying 'subjective metrics' in this regard, namely, the absence of prejudice and bias among judges. Alongside the subjective test, a supplementary approach is also invoked by the ECtHR: an adjudicating body has to offer 'structural guarantees' that are sufficient to exclude any legitimate doubts that may arise in respect of impartiality as appearances also matter.[773] These guarantees shall be assessed objectively, i.e. not only from the applicant's point of view but bearing a wider perspective in mind. In the specific context of administrative punishment, an example of a breach of 'structural impartiality' is the deposition of administrative fines into the budget of an administrative body, from which the salaries of its employees are paid (cf. MN. 3.103).[774] The requirement of impartiality is also marked by its links with the presumption of innocence in the punitive domain as adjudicating bodies should not start out with a preconceived idea of the applicant's guilt (cf. MN. 5.88). In any event, the ECtHR usually examines the latter two aspects together since they are tightly connected.[775]

5.32 The aforementioned cases of *Lauko* and *Kadubec*[776] presented a conspicuous case of a lack of independence – the manner of appointment of the local and district polices officers together with the lack of any guarantees against outside pressures clearly disqualified them from performing a proper judicial review within the meaning of Article 6 (1) ECHR. A more nuanced situation came to the fore in the case of *Belilos v Switzerland*.[777] Here the applicant was fined 200 Swiss francs for taking part in an unauthorised demonstration. She was prosecuted and punished by the Lausanne Police Board, which consisted of a single municipal servant, who was referred to as both a 'municipal' and 'administrative' authority in the case. The applicant claimed that she did not receive a fair trial (her right to be present in the hearing was breached, among other violations) at the municipal level. Furthermore, she could not enjoy the subsequent control by the judiciary because its power of review was highly restricted in the present matter

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772 Barkhuysen/Van Emmerik/Jansen/Fedorova (n. 559), pp. 599–600; 602.

773 See, e.g., for a two-trier test of impartiality *Kyprianou v Cyprus* (73797/01) 15 December 2005 ECtHR [GC] at [118] and the case law indicated therein.

774 As it happened in the case of *Sigma Radio Television Ltd v Cyprus* (32181/04 and 35122/05) 21 July 2011 ECtHR at [147]; [150].

775 Leanza/Pridal (n. 521), pp. 128–129.

776 *Lauko v Slovakia* (26138/95) 2 September 1998 ECtHR and *Kadubec v Slovakia* (5/1998/908/1120) 2 September 1998 ECtHR.

777 *Belilos v Switzerland* (10328/83) 29 April 1988 ECtHR (Plenary). See also (in a general context) *De Cubber v Belgium* (9186/80) 26 October 1984 ECtHR in which officers of the criminal investigation police later sat in judicial proceedings thereby hereby violating Article 6 (1) ECHR.

under Swiss law and it only performed a check against arbitrariness and a declaration of nullity (*recours en nullité*).

5.33 The respondent State, for its part, presented a number of considerations as to why such handling of minor offences did not violate the ECHR. They claimed that the appointed member of the Police Board was a lawyer from the police headquarters who, despite being a municipal civil servant, sat in a personal capacity and was not subject to any orders in the exercise of his powers. What is more, he took a different oath from the one taken by policemen, although the requirement of independence did not appear in the text of it, and in principle he could not have been dismissed during his term of office, which lasted four years. All in all, he enjoyed a large measure of independence in his duties.[778] The ECtHR was not convinced by these arguments and did not endorse transferring judicial functions to the police boards and empowering them to make a final determination in minor offences proceedings even if additional guarantees were introduced. The ECtHR gave more weight to appearances in this case: it claimed that a senior civil servant was still liable to return to other departmental duties and was by and large perceived as a member of the police force who was subordinate to his superiors and loyal to his colleagues by the ordinary citizen.[779]

5.34 A further example of the significance of appearances and the lack of impartiality was furnished in the aforementioned *Demicoli v Malta* case (cf. MN. 4.25).[780] Here the applicant was punished under a charge of defamatory libel against the Maltese House of Representatives by its Members. More precisely, the two Members of the House whose behaviour in Parliament was criticized in the article published by the applicant and who raised the breach of privilege in the House participated throughout in the proceedings against the accused, including the finding of guilt and (except for one of them who had died in the meantime) the sentencing. This did not sit well with the ECtHR and led it to declare a violation of Article 6 (1) ECHR. In fact, such a grave *judex in causa sua* type of violation alone compromised the impartiality of the adjudicating body in the proceedings and justified the applicant's fear of not receiving a fair trial in the particular case.[781]

5.35 All in all, the ECtHR has time and again stood by its 'qualitative requirements' for a tribunal. In order to exercise a 'fair trial', which is so crucial in a contemporary society, a tribunal has to

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778 *Belilos v Switzerland* (10328/83) 29 April 1988 ECtHR (Plenary) at [63]; [66].

779 *Belilos v Switzerland* (10328/83) 29 April 1988 ECtHR (Plenary) at [67].

780 *Demicoli v Malta* (13057/87) 27 August 1991 ECtHR.

781 *Demicoli v Malta* (13057/87) 27 August 1991 ECtHR at [41].

adhere to the (elevated) standards pertaining to its personnel and *modus operandi*. Legality, independence and impartiality are key in this regard. Not only should a tribunal be operating within strictly defined legal boundaries but it should also enjoy freedom from external as well as internal factors of influence. Indeed, a tribunal needs to have full independence from the executive and may not be replaced by police officers and municipal servants in adjudicating on administrative sanctions even if they are garnished with (illusory) guarantees. Even more so, no inner prejudice, bias or prior involvement in the matter to be adjudicated are accepted. Here again perceptions among the public matter – a logical corollary of the trust and legitimacy needed in order for decisions adopted by tribunals to be accepted at a later stage.

5.4.2.2. The Institutional 'Fuzz' of Powers

5.36 The 'institutional safeguards' of a tribunal within the meaning of Article 6 ECHR also encompass the necessity to separate the investigative and the decision-making stages. This is crucial in order to avoid the so-called 'prosecutorial bias', i.e. the proclivity of the persons carrying out an investigative phase into an offence to hold on to their initial views.[782] Instead, 'a fresh mind' to examine the situation is more suitable. This question became relevant when the ECtHR was confronted with the sanctioning practices of the so-called independent administrative authorities.[783] A failure to draw clear lines between the investigative and punitive functions was established in the aforementioned case of *Grande Stevens and Others*, in which heavy financial penalties and temporary bans on administering, managing and controlling companies were imposed on the applicants for market abuse.[784] In this case the ECtHR had to primarily assess the procedure that had taken place before the Italian National Companies and Stock Exchange Commission (*Commissione Nazionale per le Società e la Borsa* – 'the CONSOB') – a body entrusted with overseeing the stock markets –- as the applicants, among other things, claimed that it had taken place in secret and an adversarial confrontation of the witnesses had not been granted.

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782 G. Forwood, "Introductory Note to the European Court of Human Rights: Dubus S.A. v France", (2009) 48 *International Legal Materials* 6, pp. 1455–1487 (p. 1456).

783 See also on this concept *Menarini Diagnostics S.R.L. v Italy* (43509/08) 27 September 2011 ECtHR at [25].

784 *Grande Stevens and Others v Italy* (18640/10) 4 March 2014 ECtHR [GC]. See further on this topic, including the repercussions and the relevant legal amendments on the domestic level in "Administrative penalties: market manipulation (case comment)", (2014) *European Human Rights Law Review*, pp. 404–414; M. Ventoruzzo, "When Market Abuse Rules Violate Human Rights: Grande Stevens v. Italy and the Different Approaches to Double Jeopardy in Europe and the US", (2015) *European Business Organization Law Review* 16, pp. 145–165; Mateo (n. 17), pp. 323–324.

The ECtHR, on the one hand, endorsed the factual independence of the CONSOB from extraneous pressure (especially from the executive) by its actual organizational autonomy and the manner and conditions of appointment of the members of its decision-making body (the Commission) and the sufficiency of the safeguards in place. More precisely, the members forming the Commission were independent persons who had specific skills and moral qualities and were not permitted to exercise any other professional or business activities or to hold any other public office.[785] The CONSOB, for its part, was independent from any other authority and could use its budget autonomously and adopt resolutions concerning the career and conditions of employment of its staff.[786]

5.38 On the other hand, the ECtHR found the division of powers within the CONSOB structure problematic. Even though the functions were formally separated - the Commission as a decision-making body was separate from the investigative bodies (namely, the Insider Trading Office and Administrative Sanctions Division responsible for formulating the accusation and proposing penalties) - they were still branches of the same administrative body acting under the authority and supervision of a single chairman. This, according to the ECtHR, was tantamount to the consecutive exercise of investigative and judicial functions within one body – a fact alluding to a lack of objective impartiality, as required by Article 6 (1) ECHR.[787] These deficits, however, could be remedied by a judicial body with full jurisdiction on whose assessment the ECtHR later embarked (cf. MN. 5.45 et seq.). Nonetheless, they remained significant and corrosive towards other safeguards, such as 'defence rights' and the presumption of innocence, as the blur between supervisory and punitive functions may be misused to take advantage of the supervised person's legal obligations to inform and cooperate with the administrative authority.[788] The issue of the confusion between the prosecutorial and decision-making functions is acute in other contexts as well, e.g., in disciplinary sanctioning proceedings,[789] and the discussion of its implications has spilt over into EU law, especially regarding the powers of the European Commission in antitrust proceedings.[790]

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785 *Grande Stevens and Others v Italy* (18640/10) 4 March 2014 ECtHR [GC] at [127].

786 *Grande Stevens and Others v Italy* (18640/10) 4 March 2014 ECtHR [GC] at [128].

787 *Grande Stevens and Others v Italy* (18640/10) 4 March 2014 ECtHR [GC] at [136], [137].

788 See more in the Partly Concurring and Partly Dissenting Opinion of Judges Karakaş and Pinto de Albuquerque in *Grande Stevens and Others v Italy* (18640/10) 4 March 2014 ECtHR [GC] at [5].

789 See, e.g., *Dubus S.A. v France* (5242/04) 11 June 2009 ECtHR and its comment in Forwood (n. 789); M. Ribble, "I Don't Trust Your Judgment: The European Convention on Human Rights Meets the European Union on New Grounds?", (2010) 29 *Penn State International Law Review* 211, pp. 211–232.

790 Ribble (n. 789), pp. 226 et seq.

5.4.3. Fair and Public Hearing

5.39 Having surveyed the institutional guarantees, it is now time to transition into the most rudimentary 'qualitative guarantees' of a tribunal's work or, put otherwise, guarantees that the procedure of such a tribunal should afford by itself. In this regard, two parameters of the said procedure shall be distinguished: fairness and publicity. It goes without saying that the latter enables the former, which is an extremely broad concept (and is even dubbed a 'residual obligation' by some authors),[791] and the ECtHR avoids enumerating its criteria in the abstract.[792] In fact, it could *in abstracto* be claimed to encompass all of the safeguards covered by this chapter dealing with procedural protection in administrative punishment. The value of such an open-ended concept is beyond doubt, not only for the individual concerned but also for the ECtHR, as it helps to tie different normative requirements together, thereby allowing for making an assessment of proceedings 'taken as a whole' and depending on the particular circumstances of the case[793] as well as for deriving some of the general principles of due process not explicitly encapsulated in the ECHR, such as the equality of arms (cf. MN. 5.61) or even the right to remain silent (cf. MN. 5.101 et seq.). Due to such elasticity of 'fairness' as a concept, which clearly goes beyond the scope of this thesis, this part will focus on the remaining requirement to conduct a hearing in public with regard to administrative punishment.

5.40 It should be stated upfront that publicity of a hearing is not always tantamount to the right to have an oral hearing in regard to which the ECtHR has demonstrated a somewhat lax approach (cf. MN. 4.44). The ECtHR recognized the value and the paramount importance of this principle early on, by noting that the "publicity requirement is certainly one of the means whereby confidence in the courts is maintained" as well as "whereby the public is duly informed and the proceedings, where issues of guilt and innocence are determined can be publicly observable".[794] The principle of an open trial, for its part, is also not absolute and there are explicit as well as implicit limitations thereof – the first category deriving from the very wording of Article 6 (1) ECHR and the second category being accepted in the case law of the ECtHR and necessitated by the need to ensure the effective administration of justice. These limitations notwithstanding,

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791 Harris/O'Boyle/Bates/Buckley (n. 706), p. 231.

792 Barkhuysen/Van Emmerik/Jansen/Fedorova (n. 559), p. 561.

793 As put by the ECtHR itself: "While the right to a fair trial under Article 6 is an unqualified right, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case", *O'Halloran and Francis v the United Kingdom* (15809/02 25624/02) 29 June 2007 ECtHR [GC] at [53].

794 *Jan-Åke Andersson v Sweden* (11274/84) 29 October 1991 ECtHR (Plenary) at [24]; [27] and *Fejde v Sweden* (12631/87) 29 October 1991 ECtHR at [28]; [31].

this principle can still be said to have the function of being a primary bulwark against miscarriages of justice. The most blatant violation of this requirement is the holding of a hearing in private, i.e. without the attendance of the applicant, thus annihilating her ability to organize the defence.[795] Another example would be refusing to pronounce the reasoning that led the court to adopt a particular judgment, thus depriving the public of the possibility of being able to verify its lawfulness and soundness.

5.41 The violations of this principle may, however, come in other guises too – especially when it comes to holding a hearing in an unusual place or at an inconvenient time. An example thereof was established in *Luchaninova v Ukraine* case[796] in which the applicant was accused of petty theft and received a fine that was later replaced with a reprimand. The main issue here was the fact that the judge held the hearing in the room at the clinic where the applicant was taking care of her grandson, as she failed to appear before a court multiple times, claiming that she had faced various medical emergencies. The applicant protested against this way of conducting the proceedings but remained in the room together with the lawyer appointed by the judge to defend the applicant and four witnesses. It transpired from the facts of the case that the domestic courts were in a rush to hold a hearing in the clinic in order to ensure that the applicant, whose presence was obligatory under Ukrainian law, was tried within the two-month time-limit set by the Ukrainian Code on Administrative Offences. The ECtHR did not find this to be a valid reason for squandering the requirement to hold the court hearing in public.

5.42 Instead the ECtHR recalled the fundamental importance of this requirement, as stipulated by Article 6 (1) ECHR, even if it remains subject to restrictions. In this concrete case, the ECtHR came to the conclusion that, although public access to the hearing at issue was not formally excluded, the circumstances in which the hearing was held constituted a clear obstacle to its public character. This was so because, firstly, the hearing was held in a clinic with restricted access and, secondly, the trial court did not allow persons other than those participating in the proceedings to remain in or enter the room in which it was held. Barring access to a place where a hearing is occurring is clearly a breach of the condition of publicity of a trial, as it ought to be

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795 See, e.g., *Ziliberberg v Moldova* (61821/00) 1 February 2005 ECtHR and *Russu v Moldova* (7413/05) 13 November 2008 ECtHR in which the applicants were not summonsed in due time for a court hearing in administrative offence proceedings. See also *Grande Stevens and Others v Italy* (18640/10) 4 March 2014 ECtHR [GC].

796 *Luchaninova v Ukraine* (16347/02) 9 June 2011 ECtHR.

easily accessible to the public.[797] Finally, it did not appear that there was any information about the date and place of the hearing available to the public.[798]

5.43 The ECtHR pointed out that the obligatory presence of the applicant before a trial court could have been ensured with the assistance of the police. Therefore, holding the court hearing at the medical clinic was not a strictly necessary measure. As mentioned above, holding a hearing at an inconvenient time may as well eviscerate the guarantee of an open trial of its meaning. Although not conclusively confirmed by the ECtHR, this issue came to the fore in the case of *Galstyan v Armenia*,[799] where a hearing regarding a minor contravention was chosen to be held in camera in the judge's office at 23:00 h – a fact that *prima facie* defies the logic of making trials accessible to the public.

5.44 Another example of a lack of publicity in sanctioning proceedings was furnished in the case of *Vernes v France*.[800] This case is significant in that it demanded publicity from the 'bottom' level of sanctioning. Here the applicant's company was penalized for mismanagement of the financial assets of third parties by placing a professional ban on the French Stock Exchange Commission (*Commission des opérations de bourse*), which was an independent administrative authority at the time.[801] The applicant claimed that he could not request a public hearing before the Commission because such a possibility was not stipulated in the relevant provisions, nor was he aware of the identities of its members who were taking part in the sanctioning procedure. He *a fortiori* claimed that this procedural defect could not have been remedied at a later stage of the proceedings because, firstly, the Commission was not subject to any hierarchical power and, secondly, its decisions were highly respected before the French Council of State due to the complex and technical nature of the impugned matter. The ECtHR sided with the applicant and concluded that the failure to disclose the identities of the Commission members who had placed a very serious sanction on him breached the requirement of publicity in that it was impossible

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797 See, *mutatis mutandis*, *Riepan v Austria* (35115/97) 14 November 2000 ECtHR at [29].

798 *Luchaninova v Ukraine* (16347/02) 9 June 2011 ECtHR at [56].

799 The ECtHR, given the lack of evidence, could not verify whether the disputed hearing actually took place at such a late hour, however, the general stance of the ECtHR regarding this question could still be deduced, see *Galstyan v Armenia* (26986/03) 15 November 2007 ECtHR at [80] – [81]. See for a similar problem *Ashughyan v Armenia* (33268/03) 17 July 2008 ECtHR.

800 *Vernes v France* (30183/06) 20 January 2011 ECtHR.

801 It is not fully clear whether the case dealt with administrative or disciplinary sanctions. The ECtHR highlighted the ability of the Commission to act in both capacities but did not go into great lengths to explicate on the nature of the impugned sanction. In any case, the expansive application of the criminal limb of Article 6 ECHR was made.

to question their impartiality.[802] The respondent State appeared to have acknowledged the mistake itself by subsequently modifying the contested procedure by introducing the possibility of gaining cognizance of the identities of the members of the Commission and requesting their disqualification.[803]

5.4.4. Full Jurisdiction

5.45 As noted above, entrusting administrative authorities with administrative punishment is compliant with the ECHR as long as they are subjected to a subsequent control by a "judicial body that has full jurisdiction". Put otherwise, one should be able to put an administrative decision imposing a sanction to a judicial review that can have a 'curative effect', i.e. *ex post* compensation, over its earlier shortcomings.[804] This is closely connected to the notion that – eventually – it is the courts, as the most independent vessels of the State power, that hold the proverbial 'public sword' and exercise the punitive function (cf. MN. 2.08). Thus, the key question here is how the ECtHR defines the notion of 'full jurisdiction' considering the heterogeneity of administrative law institutions and approaches to judicial review on the European plane (cf. MN. 5.20). Does it abide to the (acceptable) contours of judicial review drawn by other normative sources of the CoE?[805] If not, then what jurisdictional functions and guarantees are considered to be enough to provide the individual with a real and not illusory control of administrative sanctions? In fact, the discussion on the 'sufficient' scope of judicial review is a logical corollary of the question of the effectiveness of judicial review[806] and also takes place on the domestic level.[807]

5.46 The ECtHR has not shied away from this question and has explicated its position with regard to both the 'civil' and 'criminal' limbs of Article 6 ECHR, when an administrative measure is at play. The required intensity of review in the first category (e.g., disputes concerning welfare benefits) is less stringent; however, the ECtHR still expects a respective judicial body to be able

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802 *Vernes v France* (30183/06) 20 January 2011 ECtHR at [42].

803 *Vernes v France* (30183/06) 20 January 2011 ECtHR at [43].

804 Allena/Goisis (n. 212), p. 289.

805 See to this effect, e.g., Recommendation Rec(2004)20 of the Committee of Ministers on judicial review of administrative acts of 15 December 2004 stipulating that "the tribunal should be able to review any violation of the law, including lack of competence, procedural impropriety and abuse of power" as the 'standard' scope of judicial review.

806 Bernatt (n. 749), p. 2.

807 Cf. *Le recours pour excès de pouvoir* and *le recours de plein contentieux* in the French doctrine, the latter embracing not only the control of the competence, form, and procedure of the imposition of a sanction; but also the impartiality of the administrative authority, the respect for adversariality of proceedings, as well as, the duty to reason the decisions, the possible errors in law and fact and the like, see more in Delmas-Marty/Teitgen-Colly (n. 230), pp. 122–124.

to determine the primary issue in the dispute and refer the question to the administrative authority, if necessary.[808] The guarantee of a fair trial shall in this domain be balanced against the danger of "emasculating administrative action by virtue of its 'over-judicialization'".[809] The more power of appraisal that the administration wields, however, the more importance the review of adherence to the procedural guarantees as an effective means to counterbalance the administrative discretion should gain.[810] In the category of the criminal limb, by contrast, the level of judicial scrutiny ought to intensify even further as the full ability to determine all legal and factual matters of the case is required by the ECtHR and the deference afforded to the administrative authorities therefore shrinks – sometimes even *ad nihilum*. This is in line with the graver consequences that administrative sanctions usually, though not always, may bring about for the individual concerned. 'Full jurisdiction', however, should not automatically be equated with the complete overhaul or substitution of the impugned decision, as it may well also be exercised by a court that (erroneously or not) agrees with the position expressed by the administration.[811]

5.47 The first consideration to this effect appeared in a string of 'Austrian cases' dealing with the limited review exercised by administrative courts. This was the result of Austria's former idiosyncratic conception of administrative justice based on full participation in administrative procedures and the diminished importance of the *ius reformandi* of administrative courts.[812] For example, in the case of *Schmautzer v Austria,* the applicant was fined by the federal police authority for not wearing a safety belt and sought to bring the matter before an independent and impartial tribunal.[813] He was only allowed to do so under Austrian law before a regional

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808 Cf. See for various factors that the ECtHR evaluates whilst deciding whether the review was sufficient in *Sigma Radio Television Ltd v Cyprus* (32181/04 and 35122/05) 21 July 2011 ECtHR at [154]. See further *Zumtobel v Austria* (12235/86) 21 September 1993 ECtHR; *Bryan v the United Kingdom* (19178/91) 22 November 1995 ECtHR; *Tsfayo v the United Kingdom* (60860/00) 14 November 2006. See further on the respective differences in R. Tinière, "La notion de «pleine juridiction» au sens de la Convention européenne des droits de l'homme et l'office du juge administrative", (2009) *Revue française de droit administrative*, pp. 729–740.

809 Allena/Goisis (n. 212), p. 305.

810 Schwarze (n. 216), pp. 94–95.

811 M. Allena, "Art. 6 ECHR: New Horizons for Domestic Administrative Law", (2014) *Ius-Publicum Network Review*, pp. 1–32 (p. 31).

812 Eventually Austria abided to the European pressure and reformed its system by introducing the so-called *Verwaltungsgerichtsbarkeits-Novelle* in 2012; see further in A. Balthasar, "The Perception of the Council of Europe With Particular Regard to Administrative Law" in Stelkens/Andrijauskaitė (n. 7), pp. 330–352 (MN. 12.15; 12.33).

813 *Schmautzer v Austria* (15523/89) 23 October 1995 ECtHR. See in a similar vein *Umlauft v Austria* (15527/89) 23 October 1995 ECtHR; *Gradinger v Austria* (15963/90) 23 October 1995 ECtHR; *Pramstaller v Austria* (16713/90) 23 October 1995 ECtHR; *Pfarrmeier v Austria* (16841/90) 23 October

government (*Amt der Landesregierung*), which upheld the decision but reduced the fine. The applicant subsequently sought to attain a judicial review by the Constitutional and Administrative Courts of Austria but his appeal was declined by the first court due to the lack of prospect of success and by the second court due to the non-fulfilment of the formal requirements. The ECtHR thus had to decide whether the applicant had had access to a "judicial body that has full jurisdiction".

5.48 The ECtHR pointed out that the defining characteristic of such a body is "the power to quash in all respects, on questions of fact and law, the decision of the body below".[814] In this particular case, neither of the two courts held such power because they were significantly limited in their jurisdictional function. The administrative courts were bound by the administrative authorities' findings of fact, except for a limited number of gross procedural defects. They were therefore not empowered to take evidence themselves, or to establish the facts, or to take cognisance of new matters. What is more, in the event of the quashing of an administrative measure, the court was not entitled to substitute its own decision for that of the administrative authority concerned, but always had to remit the case to that authority. All in all, the court's review was confined exclusively to questions of law, and the review of the Constitutional Court was confined to assessing the impugned proceedings only from the point of view of their conformity with the Constitution, which did not enable it to examine all the relevant facts.[815] No access to a tribunal was hence granted to the applicant, breaching his right under Article 6 (1) ECHR.

5.49 The contrary conclusion was made in the already mentioned cases of *Janosevic* and *Västberga Taxi Aktienbolag and Vulic v Sweden* (cf. MN. 5.15 et seq.).[816] Here the jurisdiction of the Swedish administrative courts was also put into question by the applicants, who claimed that they did not qualify as 'tribunals' within the meaning of Article 6 (1) ECHR as they were not authorised to deal with criminal matters (tax surcharges in this particular case). The ECtHR noted that the Swedish administrative courts had jurisdiction to examine all aspects of the matters before them; they were not restricted to points of law but could also examine factual issues, including the assessment of evidence. If they disagreed with the findings of the Tax Authority, they had the power to quash the decisions that were being appealed against. For these

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1995 ECtHR; *Palaoro v Austria* (16718/90) 23 October 1995 ECtHR. See also *Steininger v Austria* (21539/07) 17 April 2012 ECtHR for a limited judicial review regarding parafiscal charges.

814 *Schmautzer v Austria* (15523/89) 23 October 1995 ECtHR at [36].

815 *Schmautzer v Austria* (15523/89) 23 October 1995 ECtHR at [32]; [35].

816 *Janosevic v Sweden* (34619/97) 23 July 2002 ECtHR and *Västberga Taxi Aktiebolag and Vulic v Sweden* (36985/97) 23 July 2002 ECtHR.

reasons, the ECtHR found that the review had been conducted by courts that afforded the safeguards required by Article 6 (1) ECHR.[817] The broadness of the powers of the domestic courts was furthermore confirmed in the case of *Segame*, which also dealt with tax surcharges.[818] Here again, the ability to assess all of the elements of fact and law, to quash, uphold or change the impugned administrative decision and to lower the tax penalties or exempt the applicant from liability altogether was deemed to be a key element for fulfilling the 'full jurisdiction' requirement.[819]

5.50 Further explications of "the power to quash in all respects" with regard to sanctioning were given in the landmark cases of *Menarini Diagnostics S.R.L.* (2011) and *Grande Stevens* (2014). The latter case emphasized the need for a court performing a judicial review to have the ability to delve into and modify the very substance of sanctions.[820] Here the ECtHR was assessing the 'exhaustiveness' of the jurisdiction of domestic courts (concretely – the Court of Appeal in Turin) after it has been established that the procedural guarantees at the administrative level were not sufficient. It went on to observe that the domestic courts at issue had "jurisdiction to rule, in respect of both law and fact, on whether the impugned offence had been committed, and were authorised to set aside the decision taken by the administrative authority (CONSOB). They were also called upon to assess the proportionality of the imposed penalties to the seriousness of the alleged conduct. In fact, they reduced the amount of the fines and the length of the ban on exercising their profession imposed on certain of the applicants … and examined their various factual or legal allegations … Thus, their jurisdiction was not merely confined to reviewing lawfulness."[821]

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817 *Janosevic v Sweden* (34619/97) 23 July 2002 ECtHR at [82] and *Västberga Taxi Aktiebolag and Vulic v Sweden* (36985/97) 23 July 2002 ECtHR at [94].

818 *Segame SA v France* (4837/06) 7 June 2012 ECtHR.

819 For a contrasting interpretation in a tax case see *Silvester's Horeca Service v Belgium* (47650/99) 4 March 2000 ECtHR, in which the domestic courts had no possibility to remit the decision to the tax authorities and could only verify whether the commission of the offences took place and the legality of the fines but not their proportionality.

820 *Grande Stevens and Others v Italy* (18640/10) 4 March 2014 ECtHR [GC]. See for a critique that the courts were only undertaking a *pro forma* review, and not a genuine re-examination of the case as they heard no witnesses, questioned none of the applicants, and collected no expert opinions in Partly Concurring and Partly Dissenting Opinion of Judges Karakaș and Pinto de Albuquerque given in this case at [11]. However, it could equally be argued that performing such a profound analysis of the judgments passed by domestic courts would be tantamount to the ECtHR acting as a 'fourth-instance'.

821 *Grande Stevens and Others v Italy* (18640/10) 4 March 2014 ECtHR [GC] at [149]. See, for a very similar reasoning, *Menarini Diagnostics S.R.L. v Italy* (43509/08) 27 September 2011 ECtHR at [57]–[67]. See also *Göktan v France* (33402/96) 2 July 2002 ECtHR at [54], in which the size of administrative penalties was reduced as an important indicator of the courts exercising 'full jurisdiction'.

The domestic courts, however, even if they were deemed to have 'full jurisdiction', had breached the requirement to hold a public hearing in this particular case (cf. MN. 5.40). The upshot of the foregoing case-law is that the domestic courts shall be enabled to evaluate both the 'qualitative' (legality and reasonableness) and the 'quantitative' (size and proportionality) parameters of sanctions as the 'full' jurisdiction presupposes basing their judgment on real verifications instead of assumptions served by the administrative authorities.[822] The courts should remain unabridged in their jurisdictional capacity save for substantive limitations stemming *ex lege*.

5.4.5. The Duty to Give Reasons

5.52 The duty to give reasons is not explicitly enshrined in the wording of Article 6 ECHR and yet it serves as the general rule to protect individuals from arbitrary practices. Its saliency can be claimed for a number of reasons. For one, the duty to give reasons is a classical administrative safeguard (used even in the times of absolutism by various rulers who felt obliged to provide reasons in the long preambles of their edicts), contributing to the accountability and legitimization of administrative will as well as enabling the person concerned to decide whether it is worth judicially challenging an administrative act and on what grounds.[823] Furthermore, the duty to give reasons is like a 'binding agent' towards the remaining procedural safeguards analysed in this chapter. The due reasoning of a judicial decision furnishes the possibility to verify not only the lawfulness and soundness thereof but also whether the punitive proceedings were 'fair' and how a tribunal responded to various submissions, arguments and evidence put forward by the parties to the case. This, in turn, allows one to gauge the 'fullness' of the jurisdiction as well as the regard given to the exercise of 'defence rights'.

5.53 In other words, the reasoning of a decision demonstrates to the parties that they have been heard by indicating why the relevant submissions were accepted or rejected.[824] The extent of this duty is variable as the courts have no duty to fastidiously respond to irrelevant or outlandish arguments and, thus, should always be determined in the light of the circumstances of the case.

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822 See also in this regard *Produkcija Plus storitveno podjetje d.o.o. v Slovenia* (47072/15) 23 October 2018 ECtHR at [58], in which the Slovenian Supreme Court made no reference to any other evidence apart from the impugned decision to impose fines on the applicant for obstructing the inspection in competition law proceedings.

823 See also in a general administrative context, e.g., *Jehovah's Witnesses of Moscow v Russia* (302/02) 10 June 2010 ECtHR at [174]–[175]. See further Council of Europe (n. 8), pp. 344–345.

824 Cananea (2010, n. 4), p. 181. For a general rationale of this duty see, e.g., *Ullens de Schooten and Rezabek v Belgium* (3989/07 and 38353/07) 20 September 2011 ECtHR at [57]–[59]; *Baydar v the Netherlands* (55385/14) 24 April 2018 ECtHR at [39].

It is hard to tell in abstract terms what these circumstances might be but the content of the measure, the nature of the reasons given, and the interest of the parties in obtaining explanations should come into question.[825] The hallmarks of administrative punishment described above, such as efficiency and speed, entice various actors to largely diminish or at times completely abandon this requirement, in contrast to criminal proceedings, in the strict sense. The practice of the courts 'rubberstamping' police reports that have been hastily drawn up by omitting any objections put forward by the applicant, without adding any new arguments, is not a rare occurrence, especially in cases concerning 'post-socialist' states (cf. MN. 5.93 et seq.).[826] However, regardless of how 'minor' a case might appear, this is hardly tenable with due process and, in fact, makes nothing but a mockery of it.

5.54 A blatant violation of the duty to give reasons with regard to administrative offences was established in the case of *Fomin v Moldova*.[827] Here the applicant claimed that the domestic courts had failed to give reasons for her conviction for having insulted another person. More precisely, these courts had not given any grounds for their decision, such as witness statements or indeed anything other than the statements of the insulted person and her husband. The ECtHR sided with the applicant and remarked that the domestic courts – acting as a first as well as an appellate instance – had already started their judgments by stating that the applicant had committed the offence and no other reason was given either for finding the applicant guilty or for dismissing her arguments aimed at challenging the version of events as told by her opponent. They furthermore totally dismissed crucial arguments made by the applicant as to the exact location where the administrative offence had been committed as there were glaring inaccuracies regarding this information.[828] Strikingly, the relevant domestic provision of the Code of Administrative Offences prescribing in detail which circumstances needed to be clarified during the examination of the case concerning administrative offences was equally ignored by the courts.[829] Given these circumstances, it was concluded by the ECtHR that the applicant could not have enjoyed the benefit of fair proceedings.

5.55 The foregoing case exemplifies a complete failure to specify the reasons. However, such a failure may also take on a more fragmented form. This means that a judgment might indicate

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825 Schwarze (n. 216), p. 93.

826 See *Galstyan v Armenia* (26986/03) 15 November 2007 ECtHR as a telling example of such pernicious practice.

827 *Fomin v Moldova* (36755/06) 11 October 2011 ECtHR.

828 *Fomin v Moldova* (36755/06) 11 October 2011 ECtHR at [26]–[28].

829 *Fomin v Moldova* (36755/06) 11 October 2011 ECtHR at [33].

some arguments but not motivate the rejection of procedural requests or submissions essential to the outcome of the case as a whole: for example, it might remain silent regarding a request to summon witnesses, which, as applicants may claim, could be "the only means of establishing innocence" (cf. MN. 5.78). Moreover, the motivation on claims that may lead to the so-called absolute grounds of nullity of a decision (e.g., the claim that the proceedings are time-barred) or the request for a preliminary ruling from the CJEU shall be yielded. The latter was exemplified in the already mentioned *Baltic Master Ltd* case concerning customs tax surcharges.[830] Here the court of last resort dismissed the applicant company's request to seek a preliminary ruling from the CJEU, in which she claimed that the relevant EU customs law was inconsistent, by stating that the national superior court had no obligation to seek a preliminary ruling from the CJEU if the application of the EU law was obvious. No specific legal grounds as to why the relevent national court considered the application of the EU law to be so obvious that no doubts could arise were indicated. Instead the court made a single reference to its own case law, in which it held that there was no obligation for the courts to turn to the CJEU if applicants failed to indicate specific uncertainties and why the referral was neccessary.[831]

5.56 The ECtHR has juxtaposed this refusal to request a preliminary ruling with its well-established case law allowing national courts to dismiss such requests by mere reference to the relevant legal provisions, if the matter raises no fundamentally important issue or is clearly unsubstantiated or formulated in very broad and abstract terms.[832] Such a summary reasoning, however, was not appropriate in the present case because the applicant company's request to seek a preliminary ruling from the CJEU was very specific and included six questions, none of which was properly adressed. Unfortunately, this case represents a larger issue of overreliance on the ECtHR's well-established dictum that Article 6 (1) ECHR cannot be understood as requiring a detailed answer to every argument put forward by the parties to the case.[833] While unburdening the judiciary of the need to respond to clearly unreasonable or excessive claims, it does not give carte blanche to the courts to ignore them altogether out of convenience. Regrettably, the superior national court had thus misinterpreted the ECtHR's case law in order to facilitate its own purposes rather than advancing the rights of the parties in this case.[834]

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830 *Baltic Master Ltd. v Lithuania* (55092/16) 16 April 2019 ECtHR.

831 *Baltic Master Ltd. v Lithuania* (55092/16) 16 April 2019 ECtHR at [16]; [43].

832 See, e.g., *Baydar v the Netherlands* (55385/14) 24 April 2018 ECtHR at [42] and the references therein.

833 Among which, *Van de Hurk v the Netherlands* (16034/90) 19 April 1994 ECtHR appears to be the most well-known authority; see also *Baydar v the Netherlands* (55385/14) 24 April 2018 ECtHR at [16].

834 Cf. Stelkens/Andrijauskaitė (n. 7), MN. 30.38.

5.4.6. The Right of Appeal to a Higher Court

5.57 As noted above, the right to have one's conviction or a sentence reviewed by a higher tribunal in criminal matters is stipulated by Article 2 of Protocol No. 7 to the ECHR. Interestingly, this provision does not in itself stipulate a right to appeal on the merits of a judgment, although it has been interpreted as being capable of encompassing any right of appeal that a State in its discretion decides to grant to the applicant.[835] The limitations of this provision should also be kept in mind at all times: this right may be subject to exceptions with regard to offences of a 'minor character', as prescribed by law, and to situations in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal. As has often been stated, the ECHR itself does not require the Contracting States to set up courts of appeal or of cassation. However, where such courts do exist, the proceedings before them must, as a matter of principle, comply with the guarantees of Article 6 ECHR to enable the applicants to gain an effective right of access to the courts as well as to reinforce the protection afforded to them.[836]

5.58 Procedural (admissibility) requirements and the leave for appeal are, in principle, allowed as long as they do not impair the very essence of this right.[837] As an impairment, for example, the immediate enforcement of a penalty (without waiting for the time-limit to submit an appeal to elapse) could be indicated, if it oversteps 'reasonable boundaries' (cf. MN. 5.95 et seq.). The ECtHR has deemed such a lack of any suspensive effect of an appeal against administrative sanctions to be a 'structural issue' that ought to be tackled in national legal systems.[838] Also some derogations or less 'intensity of the guarantees' are acceptable at more advanced stages of proceedings (e.g., the requirement to hold an oral hearing and the right to be present in person) in view of the procedural economy and the 'special features of these proceedings' but the general sense of a fair trial should be upheld at all times.[839] In regard to punitive matters,

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835 Harris/O'Boyle/Bates/Buckley (n. 706), p. 749.

836 See for the leading authority *De Cubber v Belgium* (9186/80) 26 October 1984 ECtHR at [32]. See also for a more recent interpretation *Andrejeva v Latvia* (55707/00) 18 February 2009 ECtHR [GC] at [97].

837 See, e.g., *Peterson Sarpsborg AS and Others v Norway* (25944/94) 27 November 1996 ECtHR (dec.), in which the lack of prospect of success of the applicant's claim was accepted by the ECtHR as a justification not to grant the appeal.

838 As it happened in the case of *Shvydka v Ukraine* (17888/12) 30 October 2014 ECtHR, where administrative detention for committing an offence of petty hooliganism was put in effect immediately. The ECtHR failed to see how the subsequent review would have been able to effectively cure the defects of the lower court's decision at that stage. See also *Martynyuk v Russia* (13764/15) 8 October 2019 ECtHR at [40].

839 See in this regard *Jan-Åke Andersson v Sweden* (11274/84) 29 October 1991 ECtHR (Plenary) at [27] and *Fejde v Sweden* (12631/87) 29 October 1991 ECtHR at [33], dealing respectively with penalties imposed for a minor road-traffic infraction and for owning a rifle without a license, in which the ECtHR stated that the appeal did not raise any questions of fact, or questions of law which, could not be adequately resolved

having a separate provision clearly enunciating the right to appeal is beyond doubt a logical upshot to round off the control of legality. The repercussions of a potentially wrongful conviction here are usually higher for the individual than in 'run-of-the-mill' administrative proceedings. Thus, it is in the interest of all of the Member States abiding to the rule of law to develop efficient appeal systems in order to double-check and minimize the probability of making such grave mistakes.

5.59 In the case law dealing with the right to appeal to a higher tribunal, the ECtHR – as elsewhere – has been assessing the term 'minor character' within the meaning of paragraph 2 of Article 2 of Protocol No. 7 autonomously, thus allowing some administrative sanctions to fall within the remit of this provision. For example, in a string of cases against Bulgaria, the ECtHR declared this article to be applicable to the offences of hooliganism and disturbing public order, which were 'administrative' under the domestic laws.[840] In more concrete terms, the applicants in these cases had committed various misdemeanors against law enforcement agents (prosecutors, police officers and court clerks) and been convicted under the Bulgarian 1963 Decree on Combating Minor Hooliganism by relevant district courts. Their convictions were not subject to any appeal and resulted in the immediate enforcement placing the applicants under detention ranging from 5 to 15 days. The ECtHR acknowledged that the '1963 Decree' had been designed to attain speed and efficiency in tackling antisocial behaviour and yet found that having no possibility to challenge a conviction leading to a custodial sentence under domestic law breached Article 2 of Protocol No. 7. The ECtHR held the possibility of imprisonment in the present case to be a criterion that could not be ignored when deciding whether the particular offences were of a 'minor character'.[841]

5.60 A contrary conclusion was reached in the already-quoted case of *Luchaninova v Ukraine*, in which the applicant was convicted for a petty theft and (eventually) received an administrative reprimand for her behaviour (cf. MN. 4.39; 5.41 et seq.).[842] Here the fact that the applicant's conduct was not punishable by imprisonment led the ECtHR to declare that it was of a 'minor character' and thus fell within the exceptions permitted by the second paragraph of Article 2 of Protocol No. 7. The ECtHR, however, did tacitly criticize the practice of the Member States to

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on the basis of the case-file alone and found no violation in the fact that no public hearing was held at the appeal stage. See for a contrasting approach in *Stepanyan v Armenia* (45081/04) 27 October 2009 ECtHR.

840 See *Zhelyazkov v Bulgaria* (11332/04) 9 October 2012 ECtHR; *Kamburov v Bulgaria* (31001/02) 23 April 2009 ECtHR; *Stanchev v Bulgaria* (8682/02) 1 October 2009 ECtHR.

841 Quite in line with Point 21 of Explanatory Report to the Protocol 7 to the ECHR of 24 November 1984.

842 *Luchaninova v Ukraine* (16347/02) 9 June 2011 ECtHR.

bare a direct access for the individuals to courts, as in this case the applicant's appeal ended up being examined by the President of the Ukrainian Supreme Court in the course of an extraordinary review of the case initiated by a prosecutor.[843] Whilst it is true that Contracting States have a wide margin of appreciation in determining how the right secured by Article 2 of Protocol No. 7 is to be exercised, excluding applicants from the appeal procedure and only granting it to other 'privileged' third parties (such as prosecutors) cannot be viewed as compatible with the requirements of the said article. Moreover, the principle of legal certainty becomes extremely vulnerable within that review procedure as the said 'privileged' actors are not usually restrained by any time-limits to submit their 'appeal in disguise'.[844] Indeed, the aforegoing can be said to reflect the post-communist punitive tradition discussed above (cf. MN. 3.59), of infusing non-judicial actors with adjudicatory powers, and represents a serious deficit of checks and balances.

5.5. Defence Rights

5.61 Another set of guarantees that are paramount to the punitive domain are the so-called defence rights.[845] These rights are enlisted in Article 6 (3) ECHR and form (together with Article 6 [2] ECHR and Article 2 of Protocol No. 7 to the ECHR) the core of the 'enhanced protection' – a term often referred to in this thesis (cf. MN. 1.12). It has been stated on multiple occasions in the case law of the ECtHR that these guarantees are specific aspects of the right to a fair trial in criminal proceedings (as interpreted autonomously).[846] The list thereof is non-exhaustive as only 'minimum rights' are laid down in the said article (cf. MN. 1.12).[847] Considering the primordial place that the right to a fair administration of justice holds in a democratic society, any limitations to these rights should be assessed in a strict manner.[848] Defence rights are furthermore tightly connected to two fundamental principles of punitive proceedings – equality of arms and adversarial process (that also form part of a 'fair hearing' within the meaning of Article 6 (1) ECHR).[849]

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843 *Luchaninova v Ukraine* (16347/02) 9 June 2011 ECtHR at [70]–[73].

844 See for the same problem *Gurepka v Ukraine* (61406/00) 6 September 2005 ECtHR; *Khristov v Ukraine* (24465/04) 19 February 2009 ECtHR.

845 These rights also exist in purely administrative domain, see, e.g., Schwarze (n. 216), pp. 91–99.

846 See, e.g., *Steel and Others v the United Kingdom* (24838/94) 9 April 1997 CHR (dec.) at [92].

847 See, e.g., *Deweer v Belgium* (6903/75) 27 February 1980 ECtHR at [56].

848 Barkhuysen/Van Emmerik/Jansen/Fedorova (n. 559), p. 642.

849 The term 'adversiarial proceedings' closely related to 'equality of arms' used here has an autonomous meaning in the case law of the ECtHR and should be understood as such: "the opportunity for the parties to have knowledge of and comment on all evidence adduced or observations filed with a view to

5.62 In fact, the former principle enables the latter by requiring each party to be given a reasonable opportunity to present her case under conditions that do not place her at a substantial disadvantage *vis-à-vis* her opponent.[850] This in turn creates an equilibrium between the parties and allows them to gain cognizance of, and comment on, all of the evidence adduced or observations filed with a view to influencing the court's decision.[851] The actual (or 'material') influence on the outcome of the judicial proceedings of such observations is, however, non-consequential for the enjoyment of the said guarantee because it is for the parties to decide whether or not a document calls for their comments.[852] The crucial thing here is that such a document touches upon the vital arguments as advanced by the opposing party. Importantly, the equality of arms and adversarial proceedings should be maintained in the administrative phase of sanctioning, as it is precisely then that the initial information gathered determines the nature and extent of further prosecution.[853]

5.63 Moreover, these rights should enable the applicants to organize their defence in an appropriate way and without restriction when it comes to putting all of the relevant defence arguments before the trial court and, thus, to influence the outcome of the proceedings. The eventual aim here is to have an opportunity to acquaint oneself with the material on which the charges are based and to defeat them.[854] The regulatory content of these rights has already been outlined (cf. MN. 5.09; 5.10); therefore the following section will be dedicated to discussing their concrete manifestations and implications in the case law of the ECtHR as well as their significance with regard to administrative punishment. It will begin by exploring the primary element that is essential for unlocking all other defence rights – access to the case file in which the relevant information is stored. It will then continue with a discussion on representation, participatory and, lastly, language rights.

5.5.1. Access to the Case File

5.64 As hinted at above, in order to have a viable opportunity to prepare for one's defence, the applicant firstly has to gain access to all of the information relevant to her case. Granting such

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influencing the court's decision", see *Brandstetter v Austria* (11170/84; 12876/87; 13468/87) 28 August 1991 ECtHR at [67]. See more in Arslan (n. 15), pp. 47–48; Leanza/Pridal (n. 521), pp. 124–128.

850 See, among many other authorities, *Nideröst-Huber v Switzerland* (18990/91) 18 February 1997 ECtHR at [23].

851 See, among many other authorities, *Lobo Machado v Portugal* (15764/89) 20 February 1996 ECtHR [GC] at [31].

852 See, *mutatis mutandis*, *Hrdalo v Croatia* (23272/07) 27 September 2011 ECtHR.

853 *Messier v France* (25041/07) 30 June 2011 ECtHR at [41].

854 See, e.g., *Kornev and Karpenko v Ukraine* (17444/04) 21 October 2010 ECtHR at [66].

access serves the twofold guarantee embedded in the text of Article 6 (3) a) and b) ECHR: to be informed about the nature and cause of the accusation and have adequate time and facilities to prepare for the defence.[855] The notification of the charge should be done 'as soon as possible'[856] with an appropriate degree of diligence[857] from the side of the relevant authorities as time can be crucial in order to exercise the defence rights properly. The exact scope of the information that ought to be communicated to the applicant will depend upon what she can already be presumed to know from her direct involvement in the (ongoing) investigation and the circumstances of the case.[858] In a later stage of the proceedings, the general rule is that the applicant should, in good time, be granted access to all of the materials relevant for her case except for the ones relating to judicial deliberations or made in bad faith, as will be demonstrated below.

5.5.1.1. Granting 'Full' Access to the Case File

5.65 The significance of this precinct has been demonstrated in multiple cases. For one, it was highlighted in a string of cases concerning the intervention of the so-called members of the national legal service, who exercise an advisory function in judicial proceedings.[859] The ECtHR has made it clear that the right to adversarial proceedings discussed above (cf. MN. 5.61; 5.62) also encompasses the opportunity for the parties to have knowledge of, and comment on, all evidence and observations brought to the court's attention by such third party interveners.[860] The general rule is that nothing should be kept secret from the applicant save for the content of judicial deliberations. The 'litmus' test here should focus on the potential of a document to impact the decision of a court: if this is established, then the non-disclosure of such a document will be deemed a faulty procedural behaviour unless there are convincing justifications.

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855 See more on this in a general punitive context in L. Schuldt, "Das Informationsrecht des Beschuldigten nach Art. 6 Abs. 3 lit. a EMRK, insbesondere sein Recht auf Information in seiner Sprache", (2017) *Studentische Zeitschrift für Rechtswissenschaft Heidelberg – Wissenschaft Online* 1, pp. 62–97.

856 See, e.g., *Anghel v Romania* (28183/03) 4 October 2007 ECtHR at [55].

857 See how even in a non-punitive context where a denial to provide access to administrative documents in connection with the applicant's employment without compelling reasons was deemed unacceptable, *Loiseau v France* (46809/99) 28 September 2004 ECtHR.

858 Harris/O'Boyle/Bates/Buckley (n. 706), p. 308.

859 They were neither party to the proceedings nor the ally or adversary of any party. See more, on their role in the French legal context, *Kress v France* (39594/98) 7 June 2001 ECtHR [GC]. See in a similar vein on the time-honoured institution of *avocat général* in the Belgian legal context in *Borgers v Belgium* (12005/86) 30 October 1991 ECtHR (Plenary).

860 *Lobo Machado v Portugal* (15764/89) 20 February 1996 ECtHR [GC] at [31].

An example thereof came to the fore in the case of *Lilly France v France*,[861] concerning sanctions imposed on the applicant company for her alleged abuse of her dominant position in the pharmaceutical sector. Here a crucial report prepared by the rapporteur advisor in the course of the judicial proceedings before the French Court of Cassation and the conclusions of the Advocate General were withheld from the applicant company. The ECtHR, while noting that albeit some part of the report definitely formed part of the judicial deliberations (a sort of draft judgment), and, hence, was privileged from disclosure,[862] the other part – containing a statement of the facts, the procedure and the means of appeal – should have been communicated under the same condition to the parties and to the Advocate General.[863] There were no reasonable grounds to keep this information shrouded in secrecy and a violation of Article 6 (1) ECHR had accordingly been committed. In another case, *J.J. v the Netherlands*,[864] the applicant – a freelance tax consultant disputing fiscal penalties imposed on him – did not receive a copy of the advisory opinion prepared by the advocate-general until the final judgment was adopted in his case. Such a practice of withholding crucial documents was also deemed to infringe the adversariality of proceedings as it was impossible for the applicant to comment on this opinion, while it still made sense.

5.5.1.2. Adequate Time and Facilities

5.67 The latter line of reasoning, that access to the case file has to be efficient, in order to grant the applicant adequate time and facilities to develop viable legal strategies, has reverberated in a few more cases. Moreover, if the 'adequate time and facilities' to prepare for one's defence are not granted, then the probability of faltering with regard to other Convention rights also grows: for example, if she does not have enough time, the applicant may fail to indicate the names of the witnesses she wants to call.[865] As a prime example, the case of *Galstyan v Armenia* could be indicated,[866] which dealt with an administrative contravention of minor

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861 *Lilly France v France* (53892/00) 14 October 2003 ECtHR. See also *The Fortum Corporation v Finland* (32559/96) 15 July 2003 ECtHR, in which a crucial memorandum had not been communicated to the applicant company in antitrust proceedings by the Finnish Supreme Administrative Court without indicating any reasons, thus depriving her of the right to comment.

862 See also *Morel v France* (54559/00) 3 June 2000 ECtHR [dec.], in which the submission presented orally by the insolvency judge, whose role in the proceedings was similar to that of a judge rapporteur in a collegiate court, was deemed to form part of judicial deliberations and, thus, could be kept confidential.

863 *Lilly France v France* (53892/00) 14 October 2003 ECtHR at [25].

864 *J.J. v the Netherlands* (21351/93) 27 March 1998 ECtHR.

865 This instance happened in the case of *Borisova v Bulgaria* (56891/00) 21 December 2006 ECtHR.

866 *Galstyan v Armenia* (26986/03) 15 November 2007 ECtHR. See also for hasty administrative offence proceedings annihilating the applicant's right to have 'adequate time and facilities' for his defence in *Gafgaz Mammadov v Azerbaijan* (60259/11) 15 October 2015 ECtHR.

hooliganism. More precisely, the applicant was charged for obstructing traffic and behaving in an anti-social way at a demonstration organized by the Armenian opposition at that time – a case that had clear political undertones. The punitive proceedings for minor offences of such a kind were to happen very hastily. *In abstracto*, the relevant provision of the Code of Administrative Offences stipulated that cases concerning administrative offences shall be examined within one day. No possibilities of adjournment were available for the applicant either in law or in fact. *In concreto*, this also meant that the applicant was given only a few hours to craft his defence: as the facts of the case show, he was detained at 17:30 h by the police officers and the hearing took place already at 19:30 h. During the pre-trial time the applicant was either in transit to the court or was being kept at the police station without any contact with the outside world. Furthermore, during his short stay at the police station, the applicant was subjected to a number of investigative activities, including questioning and a search. Such circumstances led the ECtHR to the conclusion that the applicant had not been given sufficient time to prepare for his defence, regardless of the fact that the responding government claimed that the case was a simple one and the applicant had made no procedural submissions or queries.[867] This example reflects the pernicious practice of dispersing public demonstrations that are a direct threat to the Party and sanctioning their participants with utmost efficiency, which stems from socialist times, as indicated above (cf. MN. 3.59).

5.68 The question of furnishing the applicant with adequate time and facilities for her defence was furthermore intimated in another (rather specific) case, that of *Matyjek v Poland*,[868] which dealt with repression-related lustration proceedings (cf. MN. 3.33). In this case, the applicant technically had access to all of the relevant documents but it was severely curtailed. In more precise terms, the applicant could only acquaint himself with his file in the secret registry of the lustration court; he was not allowed to make any copies, to take the notes made in the registry away with him, to show the notes to anyone or to use them at the hearings. Thus, he could only rely on his memory in order to prepare for his defence. The ECtHR found such features of the lustration proceedings to be a clear violation of Article 6 (1) and (3) ECHR as they put the lustrated person at a clear disadvantage against the State represented by the Commissioner of the Public Interest, who had all of the technical and financial means to examine the necessary materials as well as the final say on the possible lifting of their confidentiality. The 'sensitivity' of the matter was not accepted as a justification for such hindered access because a considerable

867 *Galstyan v Armenia* (26986/03) 15 November 2007 ECtHR at [86]–[87].

868 *Matyjek v Poland* (38184/03) 30 May 2006 ECtHR (dec.).

amount of time had elapsed since documents possibly dealing with 'State secrets' had been produced and this fact alone in general ought to enable their disclosure to the concerned persons.[869]

5.5.1.3. Limitations

5.69 The access to the case file is nonetheless subject to limitations. These limitations usually serve to protect public authorities from vexatious or excessively burdensome requests for information. For example, in the *Bendenoun v France* case[870] concerning tax surcharges, the applicant claimed that he did not have access to the whole of the file compiled by the customs authorities. This in turn prevented him from identifying exculpating facts as well as calling the anonymous informer as a witness. The ECtHR recalled that the concept of a fair trial may entail an obligation on administrative authorities to supply the applicant with certain documents from the file or even with the file in its entirety but did not side with the applicant in this particular case. According to the ECtHR, the applicant should – at the very least – be able to provide brief, specific reasons for his request to access the case file. In his case, he had failed to do so even though he was seeking the production in full of a fairly bulky file. Moreover, he admitted to having committed customs offences during the (parallel) criminal investigation in which he had access to the complete case file and did not reason as to why he could not counter the subsequent administrative charge of tax evasion without having a copy of that file.

5.70 The limited nature of the ability to gain access to the case file was confirmed in a few more cases: in *Messier v France*,[871] where the applicant sought to gain access to an exceptional volume of documents amounting to thousands of (mostly irrelevant) pages, gathered during an administrative investigation, but failed to indicate how these documents could assist his defence, and in *Plåt Rör och Svets Service i Norden AB v Sweden*,[872] where the production in full of an ongoing criminal investigation concerning several suspects was not granted to the applicant, as she had failed to put forward any detailed arguments as to why she should be allowed to receive a copy of the entire investigation file.

5.5.2. Representation Rights

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869 *Matyjek v Poland* (38184/03) 30 May 2006 ECtHR (dec.) at [62].

870 *Bendenoun v France* [12547/86] 24 February 1994 ECtHR. See in a very similar vein *Plåt Rör och Svets Service i Norden AB v Sweden* (12637/05) 26 May 2009 ECtHR (dec.).

871 *Messier v France* (25041/07) 30 June 2011 ECtHR.

872 *Plåt Rör och Svets Service i Norden AB v Sweden* (12637/05) 26 May 2009 ECtHR (dec.).

The right to be represented is enshrined in Article 6 (3) c) ECHR and ensures that in addition to the possibility to defend oneself in person, one can do so through legal assistance of one's own choosing or, if one does not have sufficient means to pay for legal assistance, one will be given it free when the interests of justice so require. The phrase 'of one's own choosing' implies that the State should not 'dictate' which type and of what qualification of lawyers the applicants ought to choose because they should be able to organize their representation efficiently.[873] This right, however, can be waived, if this is done in an unequivocal manner and in attendance with the minimum safeguards commensurate with its importance; and without an improper compulsion coming from the side of the authorities. In fact, any 'rewards' to that effect, such as promising a less severe penalty, or 'pressurizing statements', such as that the case has already been decided by the superiors, will be viewed critically by the ECtHR.[874]

5.72 Apart from that, it is – quite predictably – the final limb of this article that is the main bone of contention in the context of administrative punishment. On the one hand, the effects of administrative sanctions can be debilitating and leave the individual concerned in a very vulnerable position, calling for an efficient system of legal aid to be in place. On the other hand, the incentive to dilute this requirement and optimise public resources is also pressing since this is an 'alternative' forum of punishment that also deals with a high volume of 'trivial' situations. In fact, even for criminal measures, free legal assistance is not granted in all cases, as the Contracting States have expressed their readiness to do so only when the applicant cannot afford it.[875]

5.73 The balance of these countervailing forces is here – as elsewhere – found in looking at the concrete circumstances, i.e. the severity of the penalty at issue and the complexity of the case that one is dealing with.[876] Importantly, the requirement to furnish legal aid should not be executed *pro forma* as the mere nomination of a lawyer by the authorities does not automatically ensure effective legal assistance.[877] At the same time, the limitations embedded in the text of Article 6 (3) c) ECHR and the deviations from this provision allowed for in the case law of the

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873 See in this regard *Černius and Rinkevičius v Lithuania* (73579/17 and 14620/18) 18 February 2020 ECtHR at [70], in which the claim by the respondent State that the applicants should have chosen to be represented by a lawyer of a 'lesser calibre' than an advocate, in order to to mitigate the costs, found no endorsement by the ECtHR.

874 See, for these examples, although not conclusively, *Galstyan v Armenia* (26986/03) 15 November 2007 ECtHR. See for *a contrario* result *Tsonyo Tsonev v Bulgaria* (no. 2) (2376/03) 14 January 2010 ECtHR.

875 The preliminary idea to assign it free of cost regardless of the financial situation of the individual was quickly discarded, see Preparatory Work on Article 6 ECHR (n. 707), p. 11.

876 See, in a general context, *Quaranta v Switzerland* (12744/87) 24 May 1991 ECtHR at [32] – [38].

877 See, e.g., *Kamasinski v Austria* (9783/82) 19 December 1989 ECtHR at [65].

ECtHR[878] lead to a claim that free legal assistance should – in certain situations – be granted in a trial only. There is nothing to suggest that States ought to secure it at the administrative level, regardless of how high the stakes are for the individual concerned.

5.74 In cases where a deprivation of liberty is at stake, the ECtHR – yet again – has proved to be willing to uphold the requirement to secure free legal aid for sanctioned persons.[879] This is the most salient factor that will indicate that the 'interests of justice' test stemming from the final limb of Article 6 (3) c) ECHR has been met. The case of *Benham v the United Kingdom*[880] demonstrated this point quite well: here the applicant had failed to pay a community charge of £325 and was committed to prison. More precisely, he was facing a maximum penalty of three months' imprisonment, and was in fact ordered to be detained for thirty days. The applicant was not represented by a lawyer before the magistrates who had no legal education themselves. This fact is significant because the applicable law was not straightforward as the magistrates had to establish whether there was 'culpable negligence' – a factor requiring a degree of value judgment – on the applicant's part. The relevant legal aid scheme under English law, for its part, in committal to prison proceedings provides either two hours' worth of advice and assistance from a solicitor or the discretionary appointment of a solicitor by the magistrates, if one happens to be in court. Hence, no full representation involving all questions of guilt or innocence was available to the applicant and he could not receive a fair hearing before the magistrates. The same line of reasoning was followed in the already discussed case of *Mikhaylova v Russia*, which concerned a small fine being imposed on the applicant for taking part in an unauthorized gathering but with a possibility of detention (cf. MN. 4.57).

5.75 Apart from situations of systemic failures to address the need to provide legal aid to the applicants in cases where their liberty is put at risk, there are other malicious practices negating their representation rights. For example, the case of *Ezeh and Connors v the United Kingdom*[881] presented above (cf. MN. 4.27) was not about the failure of the State to provide free legal aid but concerned the refusal to allow the applicants to be legally represented at all. In particular, the applicants, who were sanctioned for having committed offences against prison discipline,

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878 E.g., the ECtHR does not require to grant free legal aid to those claims which lack a 'reasonable prospect of success', see, to this effect, in a general context *Del Sol v France* (46800/99) 26 February 2002 ECtHR at [23].

879 See, *a contrario*, *Galstyan v Armenia* (26986/03) 15 November 2007 ECtHR at [91] in which the ECtHR was not convinced that "the maximum administrative penalty of 15 days required a mandatory legal representation".

880 *Benham v United Kingdom* (19380/92) 10 June 1996 ECtHR.

881 *Ezeh and Connors v the United Kingdom* (39665/98 and 40086/98) 9 October 2003 ECtHR [GC].

requested legal representation, *inter alia*, for the hearing before the prison governor. This was refused by the governor because he considered it unnecessary in accordance with English law. In concrete terms, the relevant law conferred power on the governor to decide whether to grant, or to refuse, a prisoner legal representation at an adjudication hearing. The case law specified that this power should be exercised whilst considering factors like the seriousness of the charge and of the potential penalty; whether any points of law were likely to arise; the capacity of the particular prisoner to present his own case; procedural difficulties; the need of the prison authorities for reasonable speed in making their adjudications; and the need for fairness between prisoners and between prisoners and prison officers. The rationale of this limitation appeared to be aimed at protecting adjudication hearings from unnecessary delays as well as from wasting money contrary to the public interest.[882] The following considerations did not persuade the ECtHR and it held that such a denial of the right to be legally represented violated Article 6 (3) c) ECHR, given what was at stake for the applicants, i.e. additional days of custody. It remains open to dispute, however, whether the said rationale to turn the granting of the right to be represented into a discretionary decision would be endorsed by the ECtHR in a less severe punitive context, for example, in sanctioning proceedings dealing with traffic violations, where no deprivation of liberty is at issue.[883]

5.76 Finally, another case that has already been discussed, that of *Luchaninova v Ukraine*[884] (cf. MN. 4.39; 5.41 et seq.), illustrates how not adhering to other safeguards of a fair trial may render the right to be represented nugatory. Here the authorities surprised the applicant by holding a court hearing in a medical clinic where she was taking care of a relative. The applicant was not informed about that hearing because the authorities were in a rush to hold it in order not to miss the statutory limitation and this resulted in her having no time to prepare to take part in it. Moreover, she requested free legal assistance and the domestic court granted it and appointed a lawyer to defend her. However, she was not informed about that decision before the actual hearing and, thus, could not use the lawyer's assistance to prepare her defence. The ECtHR – again considering the potential of sanctions to lead to a deprivation of liberty in the concrete case – came to the conclusion that the applicant was not given the opportunity to organize her defence and effectively benefit from the assistance of a lawyer, despite the fact

882 *Ezeh and Connors v the United Kingdom* (39665/98 and 40086/98) 9 October 2003 ECtHR [GC] at [61] – [62].

883 The issue of the lack of free legal aid during traffic violation proceedings was raised in the case of *Starkov and Tishchenko v Russia* (54424/14 and 43797/16) 17 December 2019 ECtHR but remained unexamined.

884 *Luchaninova v Ukraine* (16347/02) 9 June 2011 ECtHR.

that the disputed 'surprise' hearing was held in the presence of a court-appointed lawyer, who was appointed to defend the applicant.

5.5.3. Participatory Rights

5.77 Another set of guarantees intended to enable applicants to put forward a defence can be described by using the umbrella term 'participatory rights'. Their normative basis is encapsulated in Article 6 (3) d) ECHR enshrining the right to examine or have examined witnesses against oneself as well as the right to obtain the attendance and examination of witnesses on one's behalf under the same conditions as witnesses against oneself. Importantly, these rights should be effective and granted both at the pre-trial stage and during the open trial.[885] The transfer of the examination of witnesses to the executive level will not be accepted.[886] Furthermore, the indications stemming from the case law of the ECtHR lead to a claim that participatory rights are, in fact, much broader than the mere possibility to examine witnesses and also encompass various rights to put forward inquiries and requests related to the examination of evidence that may be submitted during the sanctioning proceedings. This is so because the ECtHR treats the guarantees set out in Article 6 (3) ECHR as constituent elements of the right to a fair trial, which is 'conceptually open-ended'.[887] The diversity of judicial review across Europe should, however, be kept in mind at all times whilst assessing these rights: different legal systems perceive a different role of the judge in proceedings as well as a different operationalization of certain procedural principles (inquisitorial versus adversarial), and thus a degree of deference will inevitably be granted by the ECtHR in this regard (cf. MN. 5.20). The same goes for assessing the admissibility of evidence: it is a primary matter for regulation by national law and courts and the ECtHR's only concern is to examine whether the proceedings have been conducted fairly.[888]

5.78 The most recurring complaint in such cases is the absence of witnesses at a trial, which deprives the applicant of the possibility to cross-examine them. The ECtHR has no conclusive answer as to whether such absence in itself leads to a lack of fairness of the proceedings. The

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885 See more what constitutes an effective participation, in a general context, *Güveç v Turkey* (70337/01) 20 January 2009 ECtHR at [124].

886 See *Atyukov v Russia* (74467/10) 9 July 2019 ECtHR and *Belikova v Russia* (66812/17) 17 December 2019 ECtHR cases in which the ECtHR found it unacceptable that the court has asked the police to question crucial witnesses in traffic violation cases and prepare their written statements.

887 See, in a general context, *Colozza v Italy* (9024/80) 12 February 1985 ECtHR at [26].

888 *Buliga v Romania* (22003/12) 16 February 2021 ECtHR at [45]; *Negulescu v Romania* (11230/12) 16 February 2021 ECtHR at [43].

general rule is that there must be a good reason for the non-attendance of a witness.[889] A complete silence on the request to summon witnesses will clash with the duty to give reasons and no doubt indicate a violation of Article 6 ECHR (cf. MN. 5.55).[890] Dismissing the need to question witnesses quoting the expediency and triviality of administrative proceedings, especially if the witnesses are literally waiting outside the court's house, and instead relying too readily on the submissions made by the police will do the same.[891]

5.79 Sometimes the non-attendance of a witness may be compensated through enabling the accused to gain cognizance of the content of the testimony as well as the possibility to challenge it.[892] The more crucial the testimony or evidence held by the witnesses is for the determination of the case, the greater the weight that is attached to their presence and examination. In addition, the need to establish counterbalancing factors able to compensate for defence handicaps (e.g., the possibility to examine or have witnesses examined at the administrative level) intensifies along with the greater importance of the evidence in order for the proceedings as a whole to be considered fair despite the absence of witnesses.[893] By following these rules, the courts may gain a multi-sided view relating to the key facts underlying the charge and, thus, properly exercise their adjudicatory function.

5.80 The already discussed case of *Chap Ltd v Armenia* concerning tax surcharges furnishes a clear example of how the right to question witnesses was upheld by the ECtHR (cf. MN. 4.52 et seq.).[894] In this case, the applicant company – a regional television channel – was fined for underreporting its tax liability by hiding income earned from advertising. The company disputed the factual findings of the tax authorities, which were based on documents provided by the head of the National Television and Radio Commission ('NTRC') and the tax records of companies and individual businessmen who claimed not to have received properly-documented services from the applicant company. The Administrative Court of Armenia, which was the only court to examine the case on its merits, refused to grant the applicant company's application to summon all of these witnesses. Furthermore, a request by the applicant company

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889 *Frumkin v Russia* (74568/12) 5 January 2016 ECtHR at [162].

890 See, in a general context, *Vidal v Belgium* (12351/86) 22 April 1992 ECtHR.

891 *Kasparov and Others v Russia* (21613/07) 3 October 2013 ECtHR.

892 *Gauthier v France* (61178/00) 24 June 2003 ECtHR (dec.).

893 *Buliga v Romania* (22003/12) 16 February 2021 ECtHR at [47]; *Negulescu v Romania* (11230/12) 16 February 2021 ECtHR at [45].

894 *Chap Ltd v Armenia* (15485/09) 4 May 2017 ECtHR. See in a similar vein, *Atyukov v Russia* (74467/10) 9 July 2019 ECtHR and *Starkov and Tishchenko v Russia* (54424/14 and 43797/16) 17 December 2019 ECtHR.

to obtain and examine the tax records of the companies that had advertised on the applicant's TV channel was rejected.

5.81 The interpretation of the ECtHR given in this particular case touched upon two noteworthy aspects: first, the ECtHR had to assess whether the head of the NTRC was a 'witness' within the meaning of Article 6 (3) d) ECHR as he had never made any oral or written statements in relation to the applicant company and had only provided the relevant documents in his official capacity upon the request by the tax authorities. The ECtHR recalled the fact that the term 'witness' has an 'autonomous' meaning in the Convention system. With regard to the head of the NTRC, the ECtHR noted that the documents provided by him – even if in an official capacity – were still used against the applicant company in the tax report with a view to establishing its tax liability and were later referred to in the Administrative Court's judgment. Secondly, the ECtHR found both the refusal to question other witnesses as well as the applicant company's request to examine the tax records of companies and individual businessmen who claimed not to have received properly-documented services from the applicant company, which could have allowed for assessing the credibility of their statements, to be incompatible with the ECHR. In this regard, the ECtHR noted that it could not side with the Administrative Court's finding that this evidence was not relevant as the very same evidence was later relied on in its judgments. All of the above breached Article 6 (1) ECHR read in conjunction with Article 6 (3) d) ECHR.

5.82 The notion of participatory rights going beyond the 'literal' interpretation of the right stipulated by Article 6 (3) d) ECHR and encompassing the right to effectively question the evidence put forward in the proceedings was furthermore furnished in the case of *Balsytė-Lideikienė v Lithuania*.[895] This right, as a part of adversarial proceedings, becomes especially significant in cases where the solution to a case is predicated on specialized knowledge, i.e. knowledge falling outside the judges' wheelhouse.[896] In this case, the applicant was reprimanded and a number of undistributed copies of the calendar published by her were confiscated as they were seen to pose a danger to the society in accordance with the Lithuanian Code on Administrative Law Offences. The latter action was triggered by the finding that the applicant's calendar entitled "Lithuanian calendar 2000" contained violations of ethnic and racial equality provisions as established by the officers of the State Security Department with the help of two experts from Vilnius University, who were history and political science

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895 *Balsytė-Lideikienė v Lithuania* (72596/01) 4 November 2008 ECtHR.

896 See also, in general, on the necessity to furnish a possibility for the parties to effectively comment on the main piece of evidence in *Mantovanelli v France* (21497/93) 18 March 1997 ECtHR.

professors. Later on, another examination in this regard by four experts was commissioned by the first instance court. At no point in time during the judicial proceedings were these experts questioned by the applicant despite her active efforts to do so, i.e. she questioned the refusal to summon the experts at the appeal court, asked the court to postpone the hearing due to their repeated absence, etc. The Supreme Administrative Court of Lithuania, which reviewed the case on appeal, noted that the Lithuanian Code on Administrative Law Offences provides for a possibility to summon experts but in this particular case there was no need for them to explain the conclusions that they had presented. The ECtHR did not agree with this conclusion: it took the active (procedural) behaviour of the applicant into consideration as well as the fact that the expert report was a precondition for finding a violation and held that it was necessary to furnish a possibility for the applicant to question the experts "in order to subject their credibility to scrutiny or cast any doubt on their conclusions".[897] By failing to do so, the respondent State had breached Article 6 (1) ECHR.

5.5.4. Language Rights

5.83 Last but by no means least, the right to have the free assistance of an interpreter if the applicant cannot understand or speak the language used in court as stipulated by Article 6 (3) e) ECHR shall be included in the 'package' of defence rights. This is so because this right facilitates not only the fairness of the trial in abstract terms but also another concrete right embedded in Article 6 (1) a) ECHR – to be informed promptly, in a language that one understands and in detail, of the nature and cause of the accusation made. Only someone who understands the accusation and has enough other relevant information coming from the side of the prosecution can stage an effective defence. Even though Article 6 (3) e) ECHR specifically enunciates the right to the free assistance of an interpreter in court, it is safe to deduce that the imperative of the effectiveness of the defence also calls for granting this right at the administrative level in order for the accused to obtain all of the relevant prosecutory information as early as possible and not undermine her defence strategy. It is debatable whether the interpreting should happen in a written or oral form as the circumstances in which it is needed may differ greatly. The potential shortcomings of protection in regard to leaving some documentary evidence untranslated was highlighted in the drafting phase of the provision.[898] However, the main rule is that the accused should be able to "consciously and fully understand

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897 *Balsytė-Lideikienė v Lithuania* (72596/01) 4 November 2008 ECtHR at [66].

898 Preparatory Work on Article 6 ECHR (n. 707), p. 31.

the specific accusation made as well as its implications"[899] or, as expressed by the ECtHR itself, "the general thrust of what is said in court" should be understood.[900] There do not seem to be many cases dealing with 'language rights' in the context of administrative punishment, as this was 'settled' in the early days of the ECtHR's confrontation with administrative punishment, i.e. in the milestone case of *Öztürk,* as described below. The saliency of this right leads to a claim that despite the dearth of specific cases, its modalities should be derived from the general case law dealing with criminal punishment.

5.84 As noted above, in the case of *Öztürk v Germany*, the services of an interpreter in the proceedings concerning a minor road traffic contravention were not denied *per se* but the applicant had to bear the costs incurred through recourse to these services as ordered by the domestic court. The applicant was a Turkish citizen and he claimed that the domestic court had acted in breach of Article 6 (3) e) ECHR by ordering him to pay the interpreter's fees. Interestingly, he relied directly on the ECHR and the Commission's report of 18 May 1977 in the case of *Luedicke, Belkacem and Koç*. on the domestic level but to no avail, as the domestic appeal court noted that "unlike a judgment of the ECtHR; it was not binding on the States".[901] The German Government, for its part, focused so much on claiming that Article 6 ECHR was inapplicable to the system of *Ordnungswidrigkeiten* (cf. MN. 3.07 et seq.) in this case that it actually raised no substantive arguments as to why the applicant was wrong (except for the tautological claim that the obligation to bear the interpreter's fees was grounded in the relevant provision of the German Code of Criminal Procedure). The ECtHR supported the grievance put forward by the applicant and found it unacceptable to request from him payment of the costs for services that ought to serve the very fundamental need to understand the 'nature and cause of the accusation made' against him, no matter how 'trivial' the looming punishment may be.[902]

5.6. Burden of Proof and Presumption of Innocence

5.85 This part intends to deal with two related issues at once: the burden of proof (which in the context of administrative punishment merits an additional focus as this rule is not always perceived with full clarity, in contrast to the criminal procedure) and the presumption of

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899 Schuldt (n. 855), p. 67.

900 *Güveç v Turkey* (70337/01) 20 January 2009 ECtHR at [124].

901 *Öztürk v Germany* (8544/79) 21 February 1984 ECtHR at [15].

902 See for further comments T. Vogler, "Das Recht auf unentgeltliche Beiziehung eines Dolmetschers (Art. 6 Abs. 3 Buchst. e EMRK) – Anmerkungen zum Dolmetscherkosten-Urteil des Europäischen Gerichtshofs für Menschenrechte", (1979) *Europäische GRUNDRECHTE-Zeitschrift*, pp. 640–647; N. Wingerter, "Unentgeltliche Beiziehung eines Dolmetschers im Ordnungswidrigkeitenverfahren", (1985) *Neue Juristische Wochenschrift*, pp. 1273–1275.

innocence. The former can concomitantly be said to be a constituent element of the latter. As noted above, Article 6 (2) ECHR stipulates that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law and thereby forms the so-called 'enhanced protection' specific to the criminal limb of the same article (cf. MN. 1.12). The wording of this provision allows for a tacit deduction that it is for the side of the prosecution to 'prove [someone] guilty', or, expressed in terms more suitable to administrative punishment, to 'prove that the offence has been committed' by means of a procedure and standards of proof prescribed by law. If the 'proving of one's guilt' is still pending in the courts, then premature conclusions should be avoided by other courts adjudicating cases that bear a connection to the 'primary' offence.[903]

5.86 The reversal of this burden to the detriment of the defendant would, for its part, breach the presumption of innocence.[904] Only when a solid case based on objective evidence is made can this burden be reversed to the detriment of the applicant and explanations with regard to the (suspected) administrative transgression from her side be required.[905] As noted above, this is *a fortiori* confirmed by Principle 7 of Recommendation No. R (91) 1, clearly enshrining that the onus of proof shall be on the administrative authority and the pertinent case law of the ECtHR (cf. MN. 5.11).[906] The ECtHR – yet again deferring to the versatility of the European legal tradition – does not specify what these standards of proof should be; however, it does require that the accusation be based on 'sufficiently strong' evidence and interprets every doubt to the benefit of the accused (*in dubio pro reo*).[907] Put otherwise, the 'beyond reasonable doubt' standard is not required in all cases and in some contexts (e.g., tax law) the 'probable' level of proof has been deemed to be accepted by the ECtHR.[908] The burden of proof cannot be shifted

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903 See *Kangers v Latvia* (35726/10) 14 March 2019 ECtHR, in which administrative courts did not wait for the outcome of the applicant's appeal and predicated their judgments on the fact that he has committed 'a repeated administrative offence', thus, clearly in breach of the presumption of innocence.

904 See in a general context *John Murray v the United Kingdom* (18731/91) 8 February 1996 ECtHR at [54].

905 See in a general context *Telfner v Austria* (33501/96) 20 March 2001 ECtHR, where a reversal of the burden of proof when prosecuting authorities were speculating only who was the driver of a car involved in a traffic accident was not allowed by the ECtHR.

906 See *Janosevic v Sweden* (34619/97) 23 July 2002 ECtHR at [97]: "The burden of proof is on the prosecution, and any doubt should benefit the accused"; See also *Peterson Sarpsborg AS and Others v Norway* (25944/94) 27 November 1996 ECtHR (dec.): "The State shall bear the general burden of establishing the guilt of an accused".

907 See in a general context *Barberà, Messegué and Jabardo v Spain* (10590/83) 6 December 1988 ECtHR at [77].

908 See *Lucky Dev v Sweden* (7356/10) 27 November 2014 ECtHR at [66] and the case law indicated therein.

to a tribunal because that would seriously upset the procedural balance and clash with the impartiality requirement as a lynchpin of a fair trial (cf. MN. 5.31).[909]

5.87 The rationale of the presumption of innocence, which is an integral part of the European legal tradition in punitive matters,[910] lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities, which tend to wield more power, thereby compensating for this asymmetry and contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 ECHR.[911] The more serious the consequences, the higher the need to define the burden of proof. It is a normative concept delineating how an individual 'charged with the offence' should be treated in the administration of justice in whose absence the whole idea of defence rights would be nugatory.[912] Given the meta-rationale of punishment (cf. MN. 1.02), it is, thus, preferable for a State, guided by the rule-of-law, to allow a guilty party to go free than to condemn an innocent party.[913]

5.88 The scope of this presumption can be said to include several variants: firstly, the 'external' dimension requiring the public authorities to refrain from issuing statements that may prematurely cast doubt on the applicant's guilt as well as that judicial bodies do not start out with the preconceived idea that the accused has committed the offence with which they are charged[914] and, secondly, the 'internal' dimension presupposing the right to silence (the so-called *nemo tenetur se detegere* rule).[915] The requirement to steer clear of using incriminating expressions is directed not only towards judges but also towards a broader circle of public servants, such as prosecutors and members of Government, and applies equally prior to, and

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909 See to this effect *Karelin v Russia* (926/08) 20 September 2016 ECtHR, in which the judge went as far as to modify the administrative charges made against the applicant. See also *Elvira Dmitriyeva v Russia* (60921/17 and 7202/18) 30 April 2019 ECtHR.

910 Raschauer/Granner (n. 17), pp. 197; 199. The presumption of innocence is also gaining salience in the EU law and was recently explicitly included into administrative proceedings, where the latter can lead to sanctions, such as proceedings relating to competition, trade, financial services, road traffic, tax or tax surcharges, and investigations by administrative authorities in relation to such proceedings. See Recital 11 of the Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

911 See e.g., *Saunders v United Kingdom* (19187/91) 17 December 1996 ECtHR [GC] at [68].

912 Mickonytė (n. 449), pp. 15–18.

913 M. Bronckers/A. Vallery, "No Longer Presumed Guilty: The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law", (2011) 34 *World Competition: Law and Economics Review* 4, pp. 535–570 (p. 550).

914 See, e.g., *Barberà, Messegué and Jabardo v Spain* (10590/83) 6 December 1988 ECtHR at [77]. See also *Fomin v Moldova* (36755/06) 11 October 2011 ECtHR.

915 See for an enumeration of the constitutive elements of Article 6 (2) ECHR as perceived by the ECtHR itself in, e.g., *Kapetanios and Others v Greece* (3453/12, 42941/12 and 9028/13) 30 April 2015 ECtHR at [82].

after the relevant proceedings.[916] However, indications found in the case law of the ECtHR allow for the claim that judges will be subjected to stricter scrutiny in this regard.[917] Common-sense inferences, where the prosecution has established a solid case against the applicant, which calls for explanations, will, for their part, generally not be regarded as the above-mentioned incriminating expressions.[918]

5.89 Apart from these two main strands, there are also other questions pertaining to the use of this presumption within the chosen context, as will be explicated in the following parts of this sub-section. What remains outside the scope of the following study is, however, the (in) compatibility of Article 6 (2) ECHR guarantee with the so-called 'dual track' enforcement, i.e. the prosecution of the applicant by means of criminal and administrative sanctions. At times the latter ostensibly clashes with the presumption of innocence, for example, if administrative proceedings are opened after an acquittal in a criminal case for the very same offence.[919] However, at other times, there is no friction, if the different sanctions tackle different aspects of the violated legal norm, as will be explicated below (cf. MN. 6.22 et seq.). A simple claim that administrative proceedings have failed to take the lack of criminal proceedings into account, however, will have no bearing on the presumption of innocence.[920] A more comprehensive study is in any case provided in the section dealing with the *ne bis in idem* principle in Chapter 6.

5.6.1. The Validity of Presumptions

5.90 In order to understand the full reach of the presumption of innocence, one has to juxtapose this principle with its direct antipode, i.e. presumptions of liability or presumptions of falsity[921] which operate in every legal system. As indicated above, the ECtHR makes use of presumptions itself, assuming, for example, that Article 6 ECHR applies in the case of doubt (cf. MN. 5.19)

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916 See more in S. E. Jebens, "The scope of the presumption of innocence in Article 6 § 2 of the Convention especially on its reputation-related aspects" in L. Caflisch et al (eds.), *Liber amicorum Luzius Wildhaber* (2017), pp. 207–227 (pp. 209–210).

917 See, *mutatis mutandis*, in the criminal context *Pandy v Belgium* (13583/02) 21 September 2009 ECtHR at [43].

918 *Telfner v Austria* (33501/96) 20 March 2001 ECtHR at [17].

919 See to this effect, e.g., *Kapetanios and Others v Greece* (3453/12, 42941/12 and 9028/13) 30 April 2015 ECtHR.

920 Otherwise it would be virtually impossible to conduct administrative proceedings in the absence of criminal proceedings, see for the rejection of this argument in *Mamidakis v Greece* (35533/04) 11 January 2007 ECtHR.

921 For the latter, see the specific case of *Kasabova v Bulgaria* (22385/03) 19 April 2011 ECtHR.

or that a judge is impartial unless proven to the contrary.[922] The tension between various presumptions came to the fore in the case of *Salabiaku*.[923] The applicant in this case had picked up a parcel at Paris airport that he believed to contain African food sent to him by his relatives from Zaire. The parcel was unidentified and the applicant was warned by the customs officials that it might contain prohibited goods. The applicant took possession of the parcel nevertheless, and passed through the 'green channel' of customs intended for passengers who have nothing to declare. He was detained by customs officials a bit later on and 10 kg of herbal and seed cannabis was discovered inside the parcel. The applicant then claimed not to have known about the illegal substances within the parcel. Another package bearing the name of the applicant containing victuals arrived two days later in Brussels. The applicant was charged both with a criminal offence (unlawful importation of narcotics) and a customs offence (smuggling prohibited goods).

5.91 The applicant was acquitted with regard to the criminal offence of illegal importation of narcotics as his guilt could not be sufficiently proven. But he remained charged with the customs offence of smuggling prohibited goods and a fine of 100,000 French francs (FF) was imposed on him as a consequence. The conviction of the applicant was based on the presumption embedded in Article 329 (1) of the French Customs Code that "any person in possession (*détention*) of goods which he or she has brought into France without declaring them to customs is presumed to be legally liable unless he or she can prove a specific event of *force majeure* exculpating him or her …". The ECtHR had to consider whether this presumption was compatible with Article 6 (2) ECHR and went on to note that – in general – the Convention does not prohibit presumptions of law and fact. It does not, however, view them with indifference, requiring that the Contracting States instead remain within certain limits, which take into account the importance of what is at stake and maintain the rights of the defence in this respect as regards criminal law.[924] Put differently, this meant that the French authorities had remained within the reasonable boundaries of the disputed presumption as the law allowed for claiming *force majeure* in order to exculpate oneself. The domestic courts also did not automatically resort to the presumption laid down in Article 329 (1) of the French Customs Code but exercised their power of assessment on the basis of the evidence at hand. Hence, the

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922 *Galstyan v Armenia* (26986/03) 15 November 2007 ECtHR at [79].

923 *Salabiaku v France* (10519/83) 7 October 1988 ECtHR. See also *Lucky Dev v Sweden* (7356/10) 27 November 2014 ECtHR at [67], where the presumption that "inaccuracies found during a tax assessment are due to an inexcusable act attributed to the taxpayer and that it is not manifestly unreasonable to impose tax surcharges as a penalty for that act" was also accepted by the ECtHR.

924 *Salabiaku v France* (10519/83) 7 October 1988 ECtHR at [28].

presumption at issue was not of an irrefutable nature. Moreover, the applicant did not provide any counter-evidence as to why the offence could not be attributed to his conduct in the particular case, raising doubts about his good faith.

5.92 Another question that is pertinent to the acceptable limits of various presumptions further arose in a string of cases against Romania dealing with administrative contraventions, as indicated below (cf. MN. 5.92). It is quite common that objective evidence is scarce in such cases and courts are faced with 'his word against mine' type situations. Usually, one of these proverbial 'words' is uttered by the police, who are entrusted with investigating minor offences. Despite being of an official nature, police reports should not be assessed without giving consideration to all of the circumstances, as most of the time administrative offences occur without the direct presence of police officers. This means that they should be treated only as 'bills of indictment' or as 'evidence relating to establishing factual elements', which the applicant should be able to efficiently contest.[925] Moreover, sometimes the saying that police officers do not have any 'vested interest' does not even hold water, especially in cases dealing with, for instance, minor contraventions in public gatherings in young democracies or autocracies.[926] Hence, these official reports are also, for lack of a better word, derivative evidence and the status of police officers should be perceived as being different from that of a 'disinterested witness or a victim'.[927] If, however, the domestic courts choose to rely on them despite the above-mentioned evidentiary limitations, then they ought to reason why they hold the police reports to be more objective and reliable than those of the applicants.[928]

5.93 The cases of *Nicoleta Gheorghe*, *Anghel*, and *Ioan Pop*[929] concerning minor contraventions, such as disturbance of public order, differed in their factual circumstances, but they all bore the same question: is the sole reliance on the police reports drawn up *in situ* of the administrative offence compatible with the presumption of innocence? This question was exacerbated by a special clause embedded in the Romanian legal framework: Article 1169 of the Code of Civil

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925 *Karelin v Russia* (926/08) 20 September 2016 ECtHR at [66]. See also *Martynyuk v Russia* (13764/15) 8 October 2019 ECtHR at [26].

926 See regarding the 'overreliance' on the reports prepared by the police and the statements given by police officers in *Bayramov v Azerbaijan* (19150/13 and 52022/13) 6 April 2017 ECtHR at [54]; *Bayramli v Azerbaijan* (72230/11 and 43061/13) 16 February 2017 ECtHR at [61] and *Gafgaz Mammadov v Azerbaijan* (60259/11) 15 October 2015 ECtHR at [85].

927 Harris/O'Boyle/Bates/Buckley (n. 706), p. 324.

928 *Gafgaz Mammadov v Azerbaijan* (60259/11) 15 October 2015 ECtHR at [85].

929 See *Nicoleta Gheorghe v Romania* (23470/05) 3 April 2012 ECtHR; *Anghel v Romania* (28183/03) 4 October 2007 ECtHR and *Ioan Pop v Romania* (40301/04) 28 June 2011 ECtHR (dec.). See also for the same issue in the context of dispensing with an oral hearing *Berdajs v Slovenia* (10390/09) 27 March 2012 ECtHR (dec.) and *Flisar v Slovenia* (3127/09) 29 September 2011 ECtHR cases.

Procedure, which is used with respect to such proceedings and prescribes that the one who files a request must prove his allegations (*actori incumbit onus probandi*). This provision, according to the applicants, symbolised a reversal of the burden of proof. In general, the latter was not deemed to pose a problem by the ECtHR as "it was not surprising that the domestic courts had expected the applicants to rebut the presumption of lawfulness and validity of the police report in respect of contraventions having regard to the general principles of procedural law applicable in respect of legislation concerning contraventions".[930]

5.94 The overall answer to the question of whether the reliance on police reports is compatible with the presumption of innocence turned out to be contingent upon the particular behaviour of the domestic courts. Whereas in the case of *Nicoleta Gheorghe* and *Ioan Pop*, it was established that the applicants themselves had failed to ask the courts to examine the evidence or hear witnesses,[931] in the case of *Anghel*, the applicant was conversely proactive in his defence. The domestic courts, however, did not consider the arguments made in favour of the applicant's claim at all and rejected his request for witnesses' confrontation, thus overrelying on the police report.[932] They did not exercise their power of assessment by reasoned decisions on the basis of the evidence adduced and did not grant the adversariality of the proceedings to the accused (cf. MN. 5.61). The reasonable limits set out by Article 6 (2) ECHR had been overstepped in this way. In sum, the ECtHR confirmed in these cases the basic tenet developed in *Salabiaku,* that presumptions 'streamlining' a legal system are allowed as long as it does not become impossible for the accused to reasonably rebut them. It is allowed to base one's conviction solely on the police report, provided that there is a lack of counter-evidence and the probative value of the report is not exaggerated and viewed uncritically (cf. MN. 5.93 et seq.).

5.6.2. The Immediate Execution of Sanctions in the Light of the Presumption of Innocence

5.95 Another domain in which various questions regarding the presumption of innocence crop up is the so-called immediate execution of administrative penalties. This occurs in legal systems that do not grant the suspensive effect in relation to the administrative act under challenge, e.g., with regard to decisions in tax or competition law matters. On the one hand, there are strong public interests that call for securing the efficiency of remedies in the form of early execution,

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930 *Anghel v Romania* (28183/03) 4 October 2007 ECtHR at [58]–[59] and *Ioan Pop v Romania* (40301/04) 28 June 2011 ECtHR (dec.) at [30].

931 *Nicoleta Gheorghe v Romania* (23470/05) 3 April 2012 ECtHR at [8] and *Ioan Pop v Romania* (40301/04) 28 June 2011 ECtHR (dec.) at [35].

932 *Anghel v Romania* (28183/03) 4 October 2007 ECtHR at [62]; [64].

as the economic entities under suspicion may become insolvent or otherwise try to evade the liability. The ECtHR has acknowledged in its case law that "the financial situation of the individual concerned is a justified criteria in examining a request for a stay of execution".[933] On the other hand, however, the individuals are *de facto* being sanctioned and have to endure severe damage before going through an independent and impartial trial – everything that Article 6 ECHR unquestionably stands for. *In extremis*, one could claim that they are presumed to be 'guilty' on the basis of decisions adopted by administrative authorities alone, which might have their own calculus in enforcing offences that have not yet been ultimately proven (cf. MN. 3.70). In fact, an early execution of penalties is also a powerful (legal policy) tool to dissuade applicants from appealing administrative decisions in the first place. The ECtHR was confronted with this conundrum of conflicting interests in the cases of *Janosevic* and *Västberga Taxi Aktiebolag and Vulic*, studied above, with regard to the reasonable time requirement (cf. MN. 5.15 et seq.).[934]

5.96 Both of these cases concerned protracted proceedings in tax matters, which hence failed to grant effective access to the courts to the applicants. Among other issues raised in these cases, the immediate execution of tax debt and surcharges was especially acute given the faulty procedural behaviour of the respondent State itself. The applicants requested a stay of execution in this regard but that was not granted unconditionally, either by the Tax Authority or by the domestic courts. The ECtHR once again emphasized the importance of keeping presumptions confined within reasonable limits, and thus striking a fair balance between the interests involved, including the possibility to effectively rebut the said presumptions. It came to the conclusion that neither Article 6 ECHR nor, indeed, any other provision of the Convention can be seen as excluding, in principle, enforcement measures taken before decisions on tax surcharges have become final.[935]

5.97 At the same time, the ECtHR differentiated between the immediate execution of taxes and tax penalties. Whereas the collection of the former is vital to securing the financial interests of the State, the immediate enforcement of the latter is "open to criticism and should be subjected to strict scrutiny" as they are not intended as a separate source of income but designed to exert

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933 *Manasson v Sweden* (41265/98) 8 April 2003 ECtHR (dec.).

934 *Janosevic v Sweden* (34619/97) 23 July 2002 ECtHR and *Västberga Taxi Aktiebolag and Vulic v Sweden* (36985/97) 23 July 2002 ECtHR.

935 *Janosevic v Sweden* (34619/97) 23 July 2002 ECtHR at [106] and *Västberga Taxi Aktiebolag and Vulic v Sweden* (36985/97) 23 July 2002 ECtHR at [118].

pressure on the taxpayers to comply with their duty to pay taxes.[936] Moreover, if considerable tax surcharges are enforced immediately, it may not be possible to fully compensate the taxpayer later on. Implicitly, this calls for additional safeguards to be in place in order not to impose too great a burden on the taxpayer. Bearing this in mind, the ECtHR went on to examine whether the early execution of tax surcharges was in fact irreconcilable with the guarantee under Article 6 (2) ECHR in the particular cases. Interestingly, it turned to the yardstick usually invoked in matters dealing with the provisional court protection, namely, the ability to restore the *status quo ante*, i.e. the reimbursement of any amount paid with interest.[937]

5.98 The conceptual kinship of the two legal institutions invoked here makes sense as both of them seek to guard the individual from 'convenient' shortcuts employed by the public hand that are able to lead the situation to the point of no return for the former. The ECtHR seemed content with the existing possibility under Swedish law to go back to the original legal position by reimbursing the applicant any amount paid with interest in the event of a successful appeal against the decision to impose tax surcharges but did not go into a deeper analysis as the factual circumstances of the case showed that no amount was actually recovered from the two applicants; only a minor amount, which was far from covering the tax debt as such, was recovered from the third applicant. What is more, two out of the three applicants in these cases would have been declared bankrupt on the basis of the tax debt alone. No violation of Article 6 (2) ECHR could thus be established.

5.6.3. Procedural Costs and the Presumption of Innocence

5.99 The ECtHR was confronted with the question regarding the workings of the presumption of innocence falling outside the ambit of criminal law in the strict sense very early on in the case of *Lutz*.[938] Here the ECtHR had to decipher whether or not the burden of procedural costs imposed on the applicant infringed the said guarantee. In addition, the burden of procedural costs may also impinge upon the general right to access a court, if there is an *ex post facto* refusal to reimburse legal costs in cases where the administrative proceedings were successful.[939] More precisely, in this case the applicant was refused the reimbursement of the

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936 *Janosevic v Sweden* (34619/97) 23 July 2002 ECtHR at [108] and *Västberga Taxi Aktiebolag and Vulic v Sweden* (36985/97) 23 July 2002 ECtHR at [120].

937 See for the test whether such protection should be granted in CoE's Recommendation No. R (89) 8 on provisional court protection in administrative matters of 13 September 1989.

938 *Lutz v Germany* (9912/82) 25 August 1987 ECtHR.

939 In the case of *Černius and Rinkevičius v Lithuania* (73579/17 and 14620/18) 18 February 2020 ECtHR in which such a refusal left the applicants in a worse situation than they were before the litigation as their legal costs were greater than the administrative fines at issue.

necessary costs and expenses by the German Treasury after the proceedings dealing with an alleged road traffic offence committed by him were stayed due to the fact that he 'most probably' or 'almost certainly' would have been convicted – remarks made by both the Treasury and the national courts. The applicant, for his part, complained that the order to pay his share of the procedural costs was tantamount to a 'conviction in disguise' and breached the presumption of innocence.

5.100 The ECtHR firstly remarked that, in a similar vein to the *Öztürk's* authority (cf. MN. 4.18 et seq.), Article 6 (2) ECHR was applicable even to petty cases of punishment like the present one and went on to reiterate a rule formulated in the case of *Minelli v Switzerland*:[940] a decision refusing reimbursement of the accused's necessary costs and expenses following termination of the proceedings may raise an issue under Article 6 (2) ECHR, if the supporting reasoning, which cannot be dissociated from the operative provisions, amounts in substance to a determination of the accused's guilt without him having previously been proved guilty according to law and, in particular, without him having had an opportunity to exercise the rights of the defence.[941] However, in the present situation, this was not the case: the applicant was ordered to pay solely his own expenses as there was still a reasonable suspicion that he had committed an administrative offence. Drawing from indications found in the general case law of the ECtHR, one could claim that no such strong suspicion would be accepted if the situation revolved around compensation claims by a person who had already been acquitted and not around the termination of a trial on procedural grounds.[942] The order to the applicant to bear his own procedural costs, according to the ECtHR's view, in the case of *Lutz*, could not be regarded as a penalty or a measure that could be equated with a penalty but rather was a mere refusal to finance the litigation out of the public funds.[943]

5.6.4. The Right to Remain Silent

5.101 As noted above, apart from the extrinsic dimension requiring that the behaviour of authorities tasked with the prosecution or adjudication does not undermine the presumption of innocence, there is an intrinsic dimension thereto – the one allowing for not incriminating oneself. The latter statement is, however, derivative, as the ECtHR does not generally adjudicate claims relating thereto under Article 6 (2) ECHR but under Article 6 (1) ECHR,

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940 Concerning a private prosecution for defamation, see *Minelli v Switzerland* (8660/79) 25 March 1983 ECtHR.

941 *Lutz v Germany* (9912/82) 25 August 1987 ECtHR at [60].

942 Jebens (n. 916), p. 227.

943 *Lutz v Germany* (9912/82) 25 August 1987 ECtHR at [63].

enshrining the general notion of a fair trial (cf. MN. 5.39). Although the Member States have refrained from including this guarantee in the letter of the ECHR in the past,[944] it touches the very core of the – almost visceral – sense of justice whereby we should not be forced to be the 'hangmen' in our own conviction (cf. MN. 2.08) and is a basic element of a general notion of a fair procedure aimed at preventing 'miscarriages of justice', thereby fulfilling the aims of Article 6 ECHR.[945]

5.102 Perhaps that is the reason why the ECtHR perceives this right rather broadly, i.e. as capable of encompassing any kind of statements by the accused, as will be demonstrated below. However, there are legitimate reasons that serve as limitations to this right: for example, the request to disclose the identity of a driver directed towards a registered keeper of a vehicle in service of road safety. These limitations are acceptable under ECHR law, as long as they are kept within reasonable bounds of coercion (the 'modesty' of a penalty incurred for non-disclosure will be indicative here and the possibility of imprisonment as *per Saunders* [cf. MN. 5.64] especially alarming) and the very essence of the right to remain silent is not extinguished. In fact, the above-mentioned obligation to provide information to the authorities is seen as an implicit derivative of the fact of having accepted certain responsibilities and obligations as part of the regulatory regime relating to motor vehicles[946] – a sort of duty to cooperate rather than a means of incriminating oneself.

5.103 Moreover, self-incriminatory statements issued by a person who has been 'charged' within the autonomous meaning of the ECHR should be differentiated from physical evidence that exists independently, which might allude to her culpability, i.e. existing *a priori* to a concrete investigation, or evidence obtained by way of a warrant falling outside the scope of this privilege.[947] This caveat also finds relevance in the context of administrative contraventions – as the acceptance and credibility of evidence obtained through devices such as breath analysers, tachographs or road cameras tend to be vehemently disputed by the applicants. At the same

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944 Namely, it was not added to the rights of the accussed in the Seventh Protocol to the ECHR, see Harris/O'Boyle/Bates/Buckley (n. 706), p. 259.

945 *John Murray v the United Kingdom* (18731/91) 8 February 1996 ECtHR at [45]. See also *Weh v Austria* (38544/97) 8 April 2004 ECtHR and *Rieg v Austria* (63207/00) 24 March 2005 ECtHR, in which a request to state a simple fact who had been the driver of the car at the time when the traffic offence has been committed, was not perceived to be in itself self-incriminating by the ECtHR.

946 See *O'Halloran and Francis v the United Kingdom* (15809/02 25624/02) 29 June 2007 ECtHR [GC] at [57]. See in a similar vein on the duty to reveal tax information: "The obligation to make disclosure of income and capital for the purposes of the calculation and assessment of tax is indeed a common feature of the taxation systems of Contracting States and it would be difficult to envisage them functioning effectively without it" in *Allen v the United Kingdom* (76574/01) 10 September 2002 ECtHR (dec.).

947 Mickonytė (n. 449), p. 70.

time, the situation regarding documents obtained by means of coercion in defiance of the will of the individual (and not pursuant to a warrant) is different and the accused must not be forced to serve the authorities with this type of documentary evidence, which is capable of leading to her conviction, during the fact-finding administrative enquiries on pain of receiving fines.[948] However, if there is no improper compulsion and the applicant, of her own free will, decides to disclose the relevant information to the authorities, she cannot subsequently make a valid claim that the right to silence was breached, even if the said disclosure indeed led to the opening of punitive proceedings.[949]

5.104 The case of *Saunders*[950] furnishes further valuable insights into the right to silence and its (protected) scope in the context of administrative punishment. Although criminal sanctions were eventually imposed in this case and the applicant was running the risk of committal to prison for a period of up to two years, the investigation of the offence was administrative. More precisely, the British Secretary for Trade and Industry appointed inspectors to investigate the unlawful share-support operation in the Guinness company's takeover of a third company and the applicant's - who was the chief executive of Guinness at the time - involvement in this affair. The functions performed by the inspectors under the British Company Act were essentially investigative in nature and they did not adjudicate either in form or in substance. However, the material gathered during the investigation was used to construct a criminal case as it was forwarded to the Prosecutor's Office and the transcript of the answers given by the applicant ended up being read to the jury by the counsel for the prosecution over a three-day period despite objections by the applicant. Importantly, according to English law, the applicant could not refuse to respond to the questioning as he was facing either fines or committal to prison in the case of non-cooperation.

5.105 The ECtHR had to grapple with the question of whether such an incriminating resort to the transcripts of the applicant's answers was allowed given his will to remain silent. It went on to underscore that a preparatory investigation should not be subject to the guarantees of a judicial procedure as set forth in Article 6 (1) ECHR because the role of the inspectors was limited to discovering whether there were facts that may have resulted in others taking action. Indeed, administrative investigations determine neither a civil right nor a criminal charge –

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948 See in this regard *Funke v France* (10828/84) 25 February 1993 ECtHR and *J.B. v Switzerland* (31827/96) 3 May 2001 ECtHR. In both of these cases a violation in the exercise of administrative compulsory powers seeking to force the applicants to submit incriminating documentary evidence was found.

949 See in this regard *Allen v the United Kingdom* (76574/01) 10 September 2002 ECtHR (dec.).

950 *Saunders v United Kingdom* (19187/91) 17 December 1996 ECtHR [GC].

preconditions necessary for Article 6 ECHR to begin operating. If it were interpreted otherwise, according to the ECtHR, the effective regulation in the public interest of complex financial and commercial activities would be unduly hampered.[951] Subsequently, the ECtHR also turned to explicating the scope of the right to remain silent as the Government claimed that the applicant's statements that were used in court were not self-incriminating and, thus, were not covered by the guarantee in question. The ECtHR dissented and noted that "bearing in mind the concept of fairness in Article 6 ECHR, the right not to incriminate oneself cannot reasonably be confined to statements of admission of wrongdoing or to remarks which are directly incriminating".[952] Moreover, the right not to incriminate oneself applies "in respect of all types of criminal offences without distinction from the most simple to the most complex".[953] Hence, the right to remain silent was perceived in broad terms and, given the fact that the transcripts of the applicant's answers, whether directly self-incriminating or not, were used in the course of the proceedings in a manner that sought to incriminate the applicants, the ECtHR concluded that the applicant had been deprived of a fair hearing in the present case.

5.6.5. Legal Persons and the Presumption of Innocence

5.106 Most of the foregoing cases have dealt with the application of the presumption of innocence towards natural persons. Nonetheless given the tendencies visible on the EU level – especially in competition law proceedings where dawn raids have the potential to turn into 'fishing expeditions' with the aim of trying to collect as much evidence as possible[954] – an additional question should be tackled. Namely, is the presumption of innocence, which has clear dignitarian undertones, also applicable to legal constructs? If so, then to what extent can companies incriminate themselves through the actions or statements of their employees? Does this apply to any kind of employee or only to those of the top executive rank? This issue is especially pressing given the fact that in some legal systems (e.g. the Italian and German ones) administrative punishment is the only means to impute punitive liability to the legal persons (*societas delinquere non potest*, cf. MN. 3.69 et seq.). The ECtHR has not had the 'perfect

951 *Saunders v United Kingdom* (19187/91) 17 December 1996 ECtHR [GC] at [47]; [67].

952 *Saunders v United Kingdom* (19187/91) 17 December 1996 ECtHR [GC] at [71].

953 *Saunders v United Kingdom* (19187/91) 17 December 1996 ECtHR [GC] at [74].

954 See more on this phenomenon and its 'invasive' potential in M. Michałek, "Fishing Expeditions and Subsequent Electronic Searches in the Light of the Principle of Proportionality of Inspections in Competition Law Cases in Europe", (2014) 7 *Yearbook of Antitrust and Regulatory Studies* 10, pp. 130–157.

opportunity' to provide conclusive answers to these questions; however, one can still derive some significant indications from its case law.

5.107 The general rule appears to be that fundamental rights are applicable to legal persons save for a few exceptions that are inimical to natural persons (e.g., the prohibition of torture).[955] This thesis itself has also catered for numerous examples showing how companies under punishment may benefit from the ECHR's protection. The said caveat, which is 'inimical to natural persons', however, casts doubt on the potential to apply the right to remain silent or the presumption of innocence in its entirety to legal constructs. As was demonstrated previously (cf. MN. 3.69 et seq.), sanctioning legal persons involves tricky questions about their 'moral agency' as well as their ability to be blameworthy. The presumption of innocence is inextricably linked with blame (the antipode of 'innocence') and therefore doubts arise about its application in full when it comes to legal constructs. In the fact, legal persons are still explicitly excluded from the latter guarantee within the legal framework of the EU.[956] The right to remain silent, for its part, is a 'personal' right guided by the dual-rationale of respecting the free agency and dignity of the individual as well as the quest to establish the 'objective truth' when it comes to breaches of law; thus, its scope of application to 'artificial entities' inevitably shrinks. This is so because even before opening up, these entities are confronted with multiple administrative requirements and duties to provide various documents. They ought to consider these lawful requirements the price for doing business. In this regard, it is false to claim that every request made by public authorities to serve information in connection to a possible violation of law neccesarily breaches the *nemo tenetur* principle. Quite the opposite: undertakings ought to answer factual questions and provide documents. What is inacceptable, however, is to coerce legal entities to explicitly disclose their transgressions.[957]

5.108 The only case so far in which this issue with regard to legal persons, as a part and parcel of the presumption of innocence, was directly raised was that of *Peterson Sarpsborg AS and Others.*[958] In a similar vein to the *Saunders* case (cf. MN. 5.64), in this case inspections occasioned by tip-offs about unlawful collaboration over prices were conducted by the relevant

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955 See more in M. Emberland, *The Human Rights of Companies* (2006).

956 See e.g., Article 2 of the Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. See also for a restrictive approach of the CJEU towards acknowledging the full scope of this guarantee with regard to undertakings in *Orkem v Commission of the European Communities* (C-374/87) 18 October 1989 CJEU.

957 See more on the logic of this distinction in Ransiek (n. 56), pp. 357–361.

958 *Peterson Sarpsborg AS and Others v Norway* (25944/94) 27 November 1996 ECtHR (dec.).

price authorities under the Norwegian Prices Act and Regulations Enforcement Act at the applicants' companies premises and statements were taken from the managing directors of the companies and from other employees. They supplied the required information under penalty of the law and the price authorities reported three applicant companies to the Oslo police as a result of these inspections. This resulted in charges being filed against the applicant companies for violating the prohibition on competitive restraint through various forms of pricing. In this connection, they complained that these statements were subsequently used during the criminal proceedings, thus breaching the privilege against self-incrimination.

5.109 The ECtHR, however, noted that the domestic courts had ruled that the disputed statements could not be used as documentary evidence in the criminal proceedings but only, if necessary, in order to confront a witness or the accused while giving oral evidence in court. As the factual circumstances revealed, none of the applicants was actually confronted with the statements made to the price authorities in this case. Consequently, no appearance of a violation could be disclosed and the ECtHR deemed the complaint inadmissible. At the same time, this decision shows that the ECtHR is willing to examine complaints alleging breaches of the privilege against self-incrimination by legal persons. In fact, there is nothing in the wording of the relevant provisions militating in favour of a reverse conclusion. What is more, the application of other articles of the ECHR touching upon very similar grievances has been extended to legal persons.

5.110 For example, in the case of *Bernh Larsen Holding AS and Others*,[959] the applicant company complained that Article 8 ECHR had been breached by an over-invasive inspection by the tax authorities of its computer server. This action, aside from compromising sensitive personal data of the employees of the applicant company, clearly had the potential to undermine its right to silence. The ECtHR did not shy away from dealing with the merits of this complaint in a comprehensive manner and found the interference to be proportionate to the aim sought in the particular case, as there were effective and adequate safeguards against abuse in place, such as the presence of a representative of the applicant company during the tax authorities' review and the possibility to seal the documents until the complaint regarding their use had been decided by a court. However, only time will conclusively tell us the extent to which the ECtHR is ready to protect this right with regard to legal persons. Currently, it is evident that, firstly, as noted in the *Peterson Sarpsborg AS and Others* case, the right to remain silent is not unqualified and,

959 *Bernh Larsen Holding AS and Others v Norway* (24117/08) 14 March 2013 ECtHR. See also in a similar vein, *Wieser and Bicos Beteiligungen GmbH v Austria* (74336/01) 16 October 2017 ECtHR.

secondly, the fact that the measure is aimed at legal persons means that a wider margin of appreciation could be applied than that concerning the situation of an individual.[960]

5.7. Conclusion

5.111 The inquiry into procedural rights has revealed that the 'innovative potential' of the Member States to deny a tribunal in administrative punishment matters shall not be underestimated, be it through subjugating punishment to the executive bodies alone or through a plethora of *ex lege* procedural handicaps barring access to courts. In the former category, tribunals have been replaced by all sorts of actors, including those belonging to other branches of public power – police officers, ministerial clerks, and even Members of Parliament. The ECtHR, for its part, has made it clear that it will not tolerate punishment and trial by the executive hand only (*justice hors du juge*), i.e. without granting a possibility of judicial review. This stance can be attributed to the lack of necessary safeguards of independence and impartiality of the said actors and the fact that they may be riddled with 'prosecutorial bias' due to the 'institutional fuzz' of the functions prevalent within executive bodies (cf. MN. 5.36). It has, thus, transpired that administrative authorities cannot be equated with judicial bodies even in 'trivial' cases of sanctioning. When it comes to introducing procedural hurdles to access courts, the balance has to be sought: the ECtHR accepts 'filtering' systems (helping to sort out which cases shall be adjudicated and serving other legitimate aims) as well as *ex lege* procedural requirements, if a modicum of flexibility to the individual is granted and 'excessive formalism' is avoided. In this way, the requirements of efficiency and expediency in administrative punishment are endorsed by the ECtHR. Blanket, inflexible or unclear provisions impairing the very essence of applying to a court – in contrast – shall not be accepted.

5.112 Moreover, the ECtHR requires procedural quality and propriety whilst imposing administrative sanctions: the often invoked triviality of the matter cannot, for example, justify a 'mechanistic' punishment, yielding the notion of a fair trial nothing but an empty shell. *A fortiori*, neither rubberstamping documentation already prepared by the administrative authorities (cf. MN. 5.53 et seq.), nor transferring vital elements of adjudication, such as interviewing the witnesses, to these bodies, will be accepted by the ECtHR in view of Article 6 ECHR (cf. MN. 5.77). The adversariality of proceedings should at all times be granted in order to compensate for the asymmetry of power between the actors involved as well as to ensure that the defence rights, among which participatory rights hold an unquestionable place, are exercised in a proper and efficient manner by the individual. Various presumptions of liability,

960 *Bernh Larsen Holding AS and Others v Norway* (24117/08) 14 March 2013 ECtHR at [159].

streamlining a legal system as such, cannot, for their part, be viewed uncritically by judicial bodies but have to be proved in terms of their reasonableness (cf. MN. 5.90 et seq.).

5.113 When it comes to the scope and substance of the concrete procedural guarantees, the intertwinement between the judicial and 'classical' administrative safeguards is evident. At times the latter are integrated into the former by the ECtHR. More precisely, the ECtHR views sanctioning as an 'organic', multi-pronged system and admits that the lack of safeguards at the administrative level may be compensated through a body with full jurisdiction that is able to quash sanctions in their (factual and legal) entirety (cf. MN. 5.45). The actions of administrative authorities as the principle agents of punishment are also not inscrutable even if the letter of the ECHR is silent in this regard. However, the enunciation of procedural safeguards in this category remains underdeveloped because the ECtHR, in its case law, as a matter of principle and in congruence with the prominent place ascribed to judicial review in a modern-day society, is concerned not so much with proceedings before administrative authorities as such but with providing access to courts and granting a fair trial.[961] This is tellingly demonstrated by the missing references to Recommendation No. R (91) 1, whose scope goes beyond 'judicial-like' guarantees. And yet the requirements discussed below lead to the conclusion that the ECtHR is evaluating and developing procedural safeguards applicable to administrative authorities in a piecemeal fashion.

5.114 The attention that the ECtHR dedicates to the protection of different administrative safeguards is – as could have been anticipated – variable. In cases where they overlap with the 'very basic' and unbending and explicit requirements of a fair trial, the equivalent behaviour is expected from the administrative authorities. The publicity of sanctioning is the most prominent example, as the ECtHR has made it clear that administrative authorities cannot hold hearings or keep the identity of persons involved in sanctioning shrouded in secret (cf. MN. 5.44). A reverse conclusion would set them on a path to arbitrariness. So is the duty to inform of the accusations and grant access to the case file (cf. MN. 5.64) because their denial at the administrative level may sometimes also mean that the individual would not even be able to put his claim under judicial review. In other words, the defence rights would be annihilated from the very bottom. If, however, the text of the ECHR itself provides some leeway for certain rights (e.g., free legal aid, cf. MN. 5.71 et seq.) or does not explicitly mention them (e.g., the duty to hold an oral hearing, cf. MN. 4.44), then it is unlikely that their fulfilment at the administrative level will be expected.

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961 Balthasar (n. 812), MN. 12.14.

5.115 Furthermore, behaviour that is concomitant with elements of the principle of 'good administration' – a notion that has recently been spreading like wildfire in the administrative law scholarship[962] and that was introduced by the ECtHR (under the term of 'good governance') into its case law a couple of decades ago – is expected (also in sanctioning matters):[963] for instance, the reasonable time requirement applies equally to both administrative and judicial bodies (cf. MN. 5.13 et seq.). The same holds true for the duty to give reasons (cf. MN. 5.52): it is hardly acceptable that in a State guided by the rule of law any type of sanctioning could happen without adhering to this bedrock standard of administrative action and providing any motivation. Out of all of the domains in which the administration can exercise its powers, punishment is definitely the one in which adhering to the good administration standards matters the most, even if at times it is hard to identify its precise scope due to the open-endedness of this notion and its manifold normative sources.[964]

5.116 At the same time, when it comes to guarantees that lie closer to the 'criminal core' and are, thus, more detached from the general principles of a fair trial or good administration, the ECtHR's position becomes unclear. On the one hand, for example, the ECtHR perceives the right to remain silent broadly and applies it even in the case of minor contraventions (cf. MN. 5.101 et seq.), but, on the other hand, it has also stated that the full extension of this guarantee to administrative investigative procedures would hamper efficiency and other public interests, such as road safety (cf. MN. 5.102). By allowing this trade-off, not only does the ECtHR make concessions to pressing social needs, it also yields to the (usually) lesser reproach and consequences suffered in connection with administrative transgressions. One is also left to wonder whether the presumption of innocence is valid on the administrative level, e.g., would a premature declaration that an administrative transgression (not qualifying for 'criminal charge' under the ECHR in an autonomous fashion) has been committed breach this presumption? Or, similarly, would a post-trial declaration that an administrative transgression has been committed despite a 'positive' decision as regards the applicant run afoul of it? Is the term 'innocence' – ingrained in the very core of this guarantee – even appropriate here given the lack of moral opprobrium of some administrative sanctions (cf. MN. 4.43) and the fact that

962 For a justification of this vivid claim see Andrijauskaitė (n. 214).

963 In addition to the duty to act promptly, this principle introduced by *Beyeler v Italy* (33202/96) 5 January 2000 ECtHR [GC] onwards in the ECtHR's case law requires from the public authorities to be consistent, transparent, and act with an 'utmost scrupulousness' in their dealings with an inidividual, see more in Andrijauskaitė (n. 214).

964 Within the context of the CoE, see also Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration of 20 June 2007 shaped as a "a single, comprehensive, consolidated model code of good administration".

Recommendation No. R (91) 1 does not enunciate these rights? The normative architecture of the ECHR prevents us from obtaining a conclusive answer, since such situations are unlikely to land in the ECtHR's docket. The declaration of a violation, however, should not be completely ruled out either, as the ECtHR might chose to guard it in another guise (e.g., through trying to thwart off the ruinous effects the above-mentioned statements may have on one's reputation or business life by using other rights found in the ECHR).

5.117 The above-mentioned position of the ECtHR, not to ascribe the full force of the guarantee embedded in Article 6 (2) ECHR, sounds legitimate given its 'enhanced' nature but one can conversely claim that failures and other procedural deficits at the administrative level will eventually have to be remedied by the courts and, hence, should be better integrated into administrative procedures. The contradiction highlighted by the ECtHR is furthermore questionable because it is for the Contracting States as unitary entities to vindicate fundamental rights (Article 1 ECHR) and their varied application between different branches of public power may only erode trust among those on the receiving end of administrative punitive sanctions. Moreover, paradoxically, high regard for efficiency given at the administrative level may lead to its (overall) wastage in the case of judicial review. Thus, instead of lingering on (false) dichotomies for too long one ought to follow a more holistic approach.

CHAPTER 6
NE BIS IN IDEM: THE ISSUE OF MULTIPLE PUNISHMENT

"In idem flumen bis descendimus et non descendimus"

Heraclitus

6.1. Introduction

6.01 The principle of *ne bis in idem* or the protection against double jeopardy is a classical criminal justice principle that has ancient roots and whose significance in recent years has been growing. Although the versatility of (the interpretation of) this principle is striking,[965] usually nowadays European countries tend to perceive it as a broad, general ban on the accumulation of punitive sanctions.[966] Some of these countries operationalize this perception through the implementation of the so-called '*una via*' principle (endorsed by the ECtHR itself, cf. MN. 6.27) commanding the State organs to coordinate their action and prosecute the offenders in one set of proceedings only – something which has to be agreed upon at an early stage of the investigation.[967] Within the context of EU law, the principle of *ne bis in idem* has even been converted into a fundamental right by means of Article 50 CFR[968] and both apex courts of the two European legal systems remain engulfed in a judicial dialogue, which so far has resulted in a remarkable example of convergence.[969] At least this was the trend before the endorsement of a dual-track enforcement by which the two courts started gliding towards a downward competition (cf. MN.

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965 See for the multiplicity of variations within the European legal tradition P. Oliver/T. Bombois, "« *Ne bis in idem » en droit européen : un principe à plusieurs variantes*", (2012) *Journal de droit européen*, pp. 266–272.

966 Van Kempen/Bemelmans (n. 16), p. 216.

967 See to this effect the 'Belgian solution' adopted in the tax domain stipulating a rigorous and mandatory procedure, whose main rule is that if one set of proceedings (be it administrative or criminal) becomes finite, it automatically discontinues the other set, Marino (n. 16), p. 160. See also the Finnish approach towards solving this problem (cf. MN. 6.26).

968 J. Varvaele, "*Ne Bis In Idem*: Towards a Transnational Constitutional Principle in the EU?", (2013) 9 *Utrecht Law Review* 4, pp. 211–229 (p. 213). This principle predicated upon the free movement rationale is also significant in the Schengen *acquis*, see in this regard articles 54-58 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany, and the French Republic, on the gradual abolition of checks at their common borders.

969 See, for a discussion, M. Vetzo, "The Past, Present and Future of the *Ne Bis In Idem* Dialogue between the Court of Justice of the European Union and the European Court of Human Rights: The Cases of *Menci, Garlsson* and *Di Puma*", (2018) 11 *Review of European Administrative Law* 2, pp. 55–84. See further M. Luchtman, "The ECJ's recent case law on *ne bis in idem*: Implications for law enforcement in a shared legal order", (2018) 55 *Common Market Law Review* 6, pp. 1717–1750. See for this convergence as reflected in the case law *Grande Stevens and Others v Italy* (18640/10) 4 March 2014 ECtHR at [229]; *Kapetanios and Others v Greece* (3453/12, 42941/12 and 9028/13) 30 April 2015 ECtHR at [73].

6.27 et seq.).[970] In general, the rationale of this principle is tightly linked with the notion of *res judicata* and its preclusive effect hindering further litigation once a matter has been finally settled as well as shielding an individual from the State's excessive abuse of its *ius puniendi*, thereby subjecting her to "embarrassment, expense and ordeal and compelling her to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that, even though innocent, she may be found guilty".[971] Safeguarding *ne bis in idem*, thus, creates legal certainty that repressive incursions by the State will be kept to a minimum for the individual and the incentive for the State to reduce administrative costs and be procedurally diligent whilst performing its punitive function.[972]

6.02 This well-settled rule of preserving the respect for and the finality of judgments in the ECtHR's case law can be traced back to the Explanatory Report to Protocol No. 7, which itself refers back to the European Convention on the International Validity of Criminal Judgments, stipulating that a "decision is final 'if, according to the traditional expression, it has acquired the force of *res judicata*. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have allowed the time-limit to expire without availing themselves of them'". [973] The emphasis here lies on the 'finality' of the proceedings (the so-called *Erledigungsprinzip*): if another prosecution commences, whilst the first one is still pending, the applicant is, thus, faced with two concurrent sets of proceedings rather than a 'double prosecution'. The latter are not prohibited *per se* (cf. MN. 6.27 et seq.).

6.03 As can be seen above, the finality of a decision is defined by three parameters: no further ordinary remedies should be available or the parties should have exhausted such remedies or have allowed the time-limit to expire without availing themselves of them. Thus, the applicant should not remain passive regarding the (possible) preclusion of double jeopardy.[974] The

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970 G. Lasagni/S. Mirandola, "The European *ne bis in idem* at the Crossroads of Administrative and Criminal Law", (2019) *The European Criminal Law Associations' Forum* 2, pp. 126–135 (p. 132). See also for a complicated relationship of ECtHR and CJEU regarding *ne bis in idem* rule in Groussot/Ericsson (n. 369), pp. 62 et seq.

971 See *A and B v Norway* (24130/11 and 29758/11) 15 November 2016 ECtHR [GC] at [89]; See also C. Wong, "Criminal sanctions and administrative penalties: the *quid* of the *ne bis in idem* principle and some original sins" in Galli/Weyembergh (n. 1), pp. 219–246 p. 222).

972 Yomere (n. 377), pp. 32–38.

973 See Explanatory Report to the Protocol No. 7 (n. 841) at [22].

974 See, e.g., *Häkka v Finland* (758/11) 20 May 2014 ECtHR, in which the ECtHR was confronted with *lis pendens* situation and found that the applicant himself failed to prevent double jeopardy by not seeking rectification. See in a similar vein *Kiiveri v Finland* (53753/12) 10 February 2015 ECtHR and *Hanna Riikka Alasippola v Finland* (39771/12) 27 January 2015 ECtHR (dec.).

outcome of the final settlement (conviction or acquittal) is, for its part, immaterial in deciphering whether a duplication of proceedings has occurred (cf. MN. 6.05); the respondent State, however, should deny that it has prosecuted the applicant on multiple occasions. If, on the other hand, the State expressly acknowledges that an erroneous duplication of proceedings has occurred and takes steps towards ensuring a redress on the national level, e.g., by way of discontinuing one set of proceedings automatically or furnishing the possibility to have a previous conviction erased for the applicant, then the victim status of the latter becomes questionable.[975] Such a redress, of course, has to be efficient; a simple reference to another set of proceedings made by domestic courts or a sheer statement that they have taken place will not suffice in this regard.[976] Annulling an administrative penalty imposed previously in accordance with the law only to 'legitimise' a subsequent set of criminal proceedings, however, will not be accepted by the ECtHR.[977]

6.04 Given that the ECtHR interprets the notion of 'penal procedure' in the text of Article 4 of Protocol No. 7 to the ECHR autonomously, i.e. in the light of the general principles concerning the words 'criminal charge' and 'penalty' found in articles 6 and 7 ECHR respectively,[978] administrative sanctions can also fall (and many times do fall) within the scope of its application, bringing many pressing questions in their wake. However, if one of the sanctions is not of a 'punitive and deterrent' nature but only 'compensatory', 'preventive' or 'disciplinary' (cf. MN. 4.36 et seq.), then, logically, it will also not come within the ambit of Article 4 of Protocol No. 7 to the ECHR, as such petitions will be deemed to be inadmissible by the ECtHR.[979] In fact, the range of factors that the ECtHR applies whilst determining whether a final decision on a 'criminal' matter was adopted within the meaning of Article 4 of Protocol No. 7 to the ECHR is wider than that of the *Engel* criteria. Apart from them, the ECtHR will also look at the nature and purpose of the measure imposed and whether it was done following a conviction for a criminal offence and the procedures involved in the making and implementation of the measure.[980] The 'mechanistic' transfer of a 'criminal charge' and the

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975 See, e.g., *Zigarella v Italy* (48154/99) 3 October 2002 ECtHR (dec.). See further *Ščiukina v Lithuania* (19251/02) 5 December 2006 ECtHR (dec.).

976 *Sergey Zolotukhin v Russia* (14939/03) 10 February 2009 ECtHR [GC] at [116]–[117].

977 *Šimkus v Lithuania* (41788/11) 13 June 2017 ECtHR.

978 See, e.g., *Sergey Zolotukhin v Russia* (14939/03) 10 February 2009 ECtHR [GC] at [52].

979 See, e.g., *Storbråten v Norway* (12277/04) 1 February 2007 ECtHR (dec.), in which one of the sanctions imposed was considered to be 'preventive'. See further *Haarvig v Norway* (11187/05) 11 December 2007 ECtHR (dec.), in which one of the sanctions imposed was 'disciplinary'.

980 See in this regard *Nilsson v Sweden* (73661/01) 13 December 2005 ECtHR (dec.).

Engel criteria without the ECtHR providing proper reasoning to an allegedly different context has been criticized by some authors;[981] however, it is hard to imagine how a reverse solution would ensure consistency of interpretation of such a key notion within the fabric of the Convention. All in all, multiple punishment is the area in which the consequences of the thin buffer zone separating punitive administrative measures from criminal sanctions are best observed:[982] a shift in *actus reus* and the (perception of the) seriousness of the breach of a legal provision that it represents may easily turn an administrative transgression into a criminal offence (cf. MN. 4.46; 6.16 et seq.).

6.05 Within our chosen normative framework, the principle of *ne bis in idem* – despite bearing a strong (logical) connection with the 'due process' maxim and, being its component in the wide sense - is protected not under Article 6 ECHR *per se* but under Article 4 (1) of the Protocol No. 7 to the ECHR enshrining that:[983]

> "No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State"

From the wording of this provision, it becomes clear that, unlike its counterpart under EU law, the principle of *ne bis in idem* under ECHR has a national dimension only[984] and does not deal with the recognition of foreign judicial decisions having gained the power of *res judicata*. However, in general there is nothing in the letter of the ECHR to preclude a prosecution happening in two states.[985] Article 4 (2) of Protocol No. 7 to the ECHR also gives leeway to the institution of extraordinary remedies. Namely, it allows the reopening of a case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there was a fundamental defect in the previous proceedings, which could affect the outcome of the case. The requirement to base a reopening of proceedings on law and

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981 Claiming that the rationale of 'fair trial' guarantees is quite different from the rationale of the principle of *ne bis in idem*, see Wong (n. 971), p. 231.

982 Weyembergh/Joncheray (n. 15), p. 204.

983 "The principle of *non bis in idem* is embodied solely in Article 4 of Protocol No. 7; the other provisions of the Convention do not guarantee compliance with it either expressly or implicitly", see *Ponsetti and Chesnel v France* (36855/97 41731/98) 14 September 1999 ECtHR (dec.) at [6]. Cf. *Nikitin v Russia* (50178/99) 20 July 2004 ECtHR at [54] claiming that "Article 4 of Protocol No. 7 … is in itself one aspect of a fair trial."

984 The ECtHR has explicitly denied any transnational application thereof, see recent case law to this effect, e.g., *Krombach v France* (67521/14) 20 February 2018 ECtHR (dec.).

985 See in a general criminal context *S. v Germany* (8945/80) 13 December 1983 ECtHR (dec.).

penal procedure is a safeguard against arbitrary decisions to re-try individuals.[986] Finally, paragraph 3 of the same article states that, again - unlike in the EU law where a possibility for limiting this principle is built into the text of the CFR - no derogations are allowed from this article either in times of war or during public emergencies under Article 15 of the same protocol.

6.06 The ECtHR has had multiple opportunities to interpret Article 4 of Protocol No. 7 to the ECHR in its case law and to draw the boundaries on the use of multiple punishment. The analysis provided in this section will mostly track the evolution of the principle of *ne bis in idem* as the earlier case law of the ECtHR lacked legal certainty and predictability. In fact, it was far from being a scholarly example of clarity and guidance.[987] This chapter will thus be structured as follows, also in view of the constituent elements of the *ne bis in idem* principle: the first section will deal with the early developments of this principle in the case law of the ECtHR, which resulted in different interpretations of the *idem* element, and discuss the attempt to harmonize these approaches and refine the latter element through the landmark case of *Zolotukhin*. This will be followed by the second part, which will aim at dissecting the *bis* element, as elaborated by the early case law and eventually refined by the *A and B* authority. By discussing the critique attached to this judgement, the possible pitfalls of this refinement will furthermore be identified, enabling the gauging of its credibility. Needless to say, the bifurcation of the *idem* and *bis* is largely theoretical but – at the same time – conducive for gaining clarity and structure of the complex use of the *ne bis is in idem* principle, as the existence of both of these elements needs to be verified in order to declare a violation and this is also usually how the ECtHR itself structures its analysis. The chapter will conclude with an evaluation of the approaches found in the ECtHR's case law and an outlook on the future regarding double jeopardy and its relationship with administrative punishment.

6.2. The *Idem* Side: Early Case Law and Harmonization Efforts

6.07 The first time that the ECtHR started to clarify the scope of the *ne bis in idem* principle in a context relevant for administrative punishment can be traced back to the already mentioned case of *Gradinger v Austria*.[988] In this case, the applicant had caused the death of a cyclist by negligence whilst driving under the influence. He subsequently received a punishment under the relevant provisions of the Road Traffic Act and the Criminal Code of Austria. The former penalty, according to the respondent State, was intended to ensure the smooth flow of traffic

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986 Harris/O'Boyle/Bates/Buckley (n. 706), p. 754.

987 Varvaele (n. 968), p. 215.

988 *Gradinger v Austria* (15963/90) 23 October 1995 ECtHR.

and the latter to penalize acts that cause death and threaten public safety. The applicant, for his part, complained that he was punished in respect of facts that were identical, as both of the said provisions in substance prohibited him from driving a vehicle with a blood alcohol level of 0.8 grams per liter or higher. The ECtHR did not go to great lengths in expounding the possible problems with multiple punishment, as it had been imposed in this particular case. It instead admitted that the designation of the offences as well as their nature and purpose differed but concluded laconically that both of the impugned decisions were based on the same conduct, in breach of Article 4 of Protocol No. 7 to the ECHR.[989] Hence, the principle of *ne bis in idem* was construed in a broad manner, i.e. excluding multiple punishment by means of criminal and administrative law for the same offences in favour of the protection of the individual.

6.2.1. *Oliveira*: The Shrinking of *Ne Bis In Idem* Rule

6.08 The successive case of *Oliveira v Switzerland*[990] took a more intricate approach to the same issue as in the case of *Gradinger*: the situation here also involved a traffic accident as the applicant had damaged other cars and caused a physical injury to another driver. In a similar vein, she was firstly punished under the Road Traffic Act for failing to control her vehicle and later under the Swiss Criminal Code for negligently causing physical injury. The fine for the former offence (CHF 200) was subsequently absorbed by the fine imposed for the latter offence (CHF 1500), thus paying heed to the so-called *Anrechnungsprinzip*, encapsulating the idea of offsetting the cumulative effect of penalties whose rationale lies within the principle of proportionality (cf. MN. 6.29). The ECtHR, contrary to the *Gradinger* line of jurisprudence, noted that the offence committed by the applicant was a typical example of a single act constituting various offences (*concours idéal d'infractions*) whose characteristic feature is that a single criminal act is split up into two separate offences.[991]

6.09 According to the ECtHR, the offence at issue was caught up by various statutory definitions and split up into the failure to control the vehicle and the negligent causing of physical injury committed by the applicant. The ECtHR found it regrettable that the penalties that resulted from the same criminal act were not passed by the same court in a single set of proceedings but emphasized that in principle nothing in this situation infringed Article 4 of Protocol No. 7 to the ECHR, especially because the second fine was eventually reduced. Later on the 'unity of the proceedings' was actually emphasized to justify the practice of multiple punishment ("a

989 *Gradinger v Austria* (15963/90) 23 October 1995 ECtHR at [55].

990 *Oliveira v Switzerland* (84/1997/868/1080) 30 July 1998 ECtHR.

991 *Oliveira v Switzerland* (84/1997/868/1080) 30 July 1998 ECtHR at [26].

single criminal court trying the same person for the same criminal conduct … gives all the more reason to transpose the precedent of *Oliveira*").[992] The scope of the *ne bis in idem* principle thus shrank to the detriment of the individual.[993]

6.2.2. *Fischer*: The Expansion of *Ne Bis In Idem* Rule

6.10 The case of *Franz Fischer v Austria* marked yet another turn in the ECtHR's case law.[994] In fact, it can be said to have been an endeavour by the ECtHR to harmonise the clearly contradictory approaches employed in *Gradinger* and *Oliveira*, described above, even before the Grand Chamber's judgment of *Zolotukhin* (cf. MN. 6.16 et seq.). The facts in the *Fischer* case were very similar to those in the *Gradinger* case: the applicant had been punished for drunk driving (under the Road Traffic Offence) and for causing death by negligence (under the Criminal Code). The ECtHR in this case undertook a more elaborate analysis than it had in the case of *Gradinger* regarding whether such an accumulation of sanctions was acceptable under Article 4 of Protocol No. 7 to the ECHR.

6.11 Put more concretely, the ECtHR fleshed out the precise meaning and scope of the *concours idéal d'infractions* rule. The ECtHR firstly noted that Article 4 of Protocol No. 7 to the ECHR does not refer to 'the same offence' but rather to trial and punishment 'again' for an offence for which the applicant has already been finally acquitted or convicted. It added that there might be cases where one act, at first sight, appears to constitute more than one offence, whereas a closer examination reveals that only one offence should be prosecuted because it encompasses all the wrongs contained in the others, while – at other times – there may be other cases where the offences only slightly overlap. Thus, where different offences based on one act are consecutively prosecuted, i.e. one after the final decision of the other, the ECtHR has to examine whether or not such offences have the same essential elements.[995]

6.12 In this particular case, it was established that the administrative and criminal offences did not differ in their essential elements.[996] Hence, a double prosecution of these offences breached the

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992 See *Göktan v France* (33402/96) 2 July 2002 ECtHR at [50], in which the applicant was punished for drug trafficking and a customs offence.

993 See for the same restrictive approach *Gauthier v France* (61178/00) 24 June 2003 ECtHR (dec.) and *R.T. v Switzerland* (31982/96) 30 May 2000 ECtHR (dec.).

994 *Franz Fischer v Austria* (37950/97) 29 May 2001 ECtHR.

995 *Franz Fischer v Austria* (37950/97) 29 May 2001 ECtHR at [25].

996 *Franz Fischer v Austria* (37950/97) 29 May 2001 ECtHR at [29]. See for a contrary conclusion *Ponsetti and Chesnel v France* (36855/97 41731/98) 14 September 1999 ECtHR (dec.), in which the failure to make tax returns and tax fraud prosecuted under administrative and criminal laws were deemed to have different constitutive elements and not relate to the same offence.

principle of *ne bis in idem*. Importantly, the order of the proceedings as well as the application of the *Anrechnungsprinzip* were deemed to be immaterial to the conclusion that the applicant was tried for what essentially was the same offence in this case. It is the relationship between the offences that is eventually decisive, which is measured by the yardstick of the 'essential elements'. This metric is valuable in that it siphons off the 'true' essence of various offences but at the same time it may incentivize the lawmakers to sidestep the double jeopardy rule by slightly twisting the elements for liability.[997] The scope of the guarantee against double jeopardy – the latter caveat notwithstanding – was thus once again broadened and the test of 'essential elements' as developed in the case of *Fischer* subsequently caught on in a string of other cases.[998]

6.2.3. Post-*Fischer* Developments of the 'Essential Elements'

6.13 Throughout the process of the above-mentioned transposition of the *Fischer* precedent, further insights and clarifications regarding the 'essential elements' test have transpired: for example, in the case of *Bachmaier* the special aggravating element (causing death by negligence in particularly dangerous conditions) as stipulated by the respective laws and attributed to one of the offences under prosecution was considered to be a distinguishing element, i.e. a factor capable of justifying two sets of proceedings.[999] In the context of taxation, the 'essential elements' between the offences were further differentiated by their criminal intent and purpose. This was clearly demonstrated in the case of *Rosenquist*, in which the applicant had to bear both tax surcharges and other penalties for tax fraud, imposed under the Swedish Taxation Act and the Tax Offences Act respectively.[1000] The ECtHR in this particular case noted that while the imposition of the tax surcharges was based on strict liability and was meant to "remind the taxpayer of her duties" to furnish correct tax information to the authorities, the imposition of the latter was only possible if culpable intent or gross neglect was established. Besides these developments, it also became clear that making a tax declaration for a company would be viewed differently than making a tax declaration in regard to personal taxation, i.e. these

997 Marino (n. 16), p. 157.

998 See for the same finding as in the *Fischer's* case, *W.F. v Austria* (38275/97) 30 May 2002 ECtHR; *Sailer v Austria* (38237/97) 6 June 2002 ECtHR.

999 *Bachmaier v Austria* (77413/01) 2 September 2004 ECtHR (dec.).

1000 *Rosenquist v Sweden* (60619/00) 14 September 2000 ECtHR (dec.). See also *Storbråten v Norway* (12277/04) 1 February 2007 ECtHR (dec.) and *Haarvig v Norway* (11187/05) 11 December 2007 ECtHR (dec.).

variations of conduct would not be considered as *idem* by the ECtHR, as there is no unity of the offender.[1001]

6.14 Furthermore, in the case of *Manasson*, the 'essential elements' test was deconstructed through different facets of the applicant's conduct. More concretely, he was convicted for a bookkeeping offence, i.e. incorrectly entering relevant business events in the books, and also had to pay tax surcharges, which were imposed for supplying incorrect information to the tax authorities for the guidance of his tax assessment. The ECtHR found that *actus reus* was not the same: the reliance on the incorrect information contained in the books by the applicant was the 'essential element' that distinguished the taxation law contravention from the criminal law offence. In fact, the applicant could have avoided the imposition of the tax surcharges by, for instance, correcting the information contained in the books or by supplying such additional information to the tax authorities that would have enabled the latter to make a correct tax assessment.

6.15 Apart from the factors depicted above, the 'essential elements' can also be differentiated through the social value being protected by a particular offence as well as the materialization of the damage. For example, in the case of *Garretta*, one penalty was imposed for the distribution of defective pharmaceutical products with the aim of combatting fraud and deception even though no concrete damage had arisen and another was imposed for causing unintentional homicide by distributing such products with the aim of protecting the lives of the victims.[1002] No overlap of the 'essential elements' was found in this particular case. Importantly, within the context of essential elements – as elsewhere –appearances can be deceptive; thus, it is important to look not (only) at the statutory labels but (also) at the reality at hand. The case of *Maresti* illustrates this point very well: at face value, the applicant was punished for two different offences under two different legal acts – for breaching public order and peace under the Minor Offences Act as well as for inflicting a physical injury on another person under the Criminal Code of Croatia.[1003] However, the ECtHR found that both penalties were based on the same police report concerning the same event that took place at the public station and both

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1001 See (post-*Zolutukhin*) cases of *Pirttimäki v Finland* (35232/11) 20 May 2014 ECtHR at [51]; *Kiiveri v Finland* (53753/12) 10 February 2015 ECtHR at [36]; *Jukka Tapani Heinänen v Finland* (947/13) 6 January 2015 ECtHR (dec.) at [37].

1002 *Garretta v France* (2529/04) 4 March 2008 ECtHR (dec.) at [88]. Cf. also the notion of 'offences of danger' and the 'offences of damage' in *Grande Stevens and Others v Italy* (18640/10) 4 March 2014 ECtHR [GC] at [48].

1003 See *Maresti v Croatia* (55759/07) 25 June 2009 ECtHR. See also for the duplication of proceedings based on the same police report with regard to possession of drugs (in the post-Zolotukhin context) *Tomasović v Croatia* (53785/09) 18 October 2011 ECtHR.

convictions included the element of [inflicting] 'bodily harm' (namely, hitting another passenger at the station) although *ex lege* the latter was reserved for the criminal offence only. The ECtHR, thus, did not buy into the declaratory arguments put forward by the respondent government that both penalties were (theoretically) pursuing different aims but saw the conviction for what it actually was and found it to be unacceptable in light of Article 4 of Protocol No. 7 to the ECHR.

6.2.4. The *Zolotukhin's* Authority: Refinement of the *Idem* Element

6.16 The foregoing study on the early developments in the ECtHR's case law demonstrates that the approaches towards double jeopardy were highly divergent, i.e. oscillating from broad to restrictive ones, and that the criteria used to define *idem* lacked coherence and clarity. Thus, some sort of harmonization was becoming inevitable, as pressure from the Member States mounted. The case of *Zolotukhin* turned out to be a 'perfect storm' in this regard because it included a series of different manifestations of the applicant's insolent behaviour and the subsequent imposition of multiple penalties in relation to this behaviour. The ECtHR thus had to ascertain whether the prosecution of the applicant resulting in such a multiplicity of penalties really stemmed from one single act.[1004] In doing so, the ECtHR chose to refine the notion of the *idem* by opting for the '*idem factum*' rather than the '*legal idem*' approach as the latter would indubitably have frustrated the multilateral legal system at issue[1005] and also seemed to be too restrictive in regard to the rights of the individual. More precisely, 'a connection in substance and time [between the offences]' as the main criterion to be taken into account was invoked.[1006] It should be noted upfront that the ECtHR did not abandon the yardsticks conceived earlier (such as the test of the 'essential elements') altogether but added a temporal dimension thereto – something that has to be present at all times and facilitates the legal certainty of the individual, even if it is not a very precise criterion *per se* (like, in fact, every assessment regarding a lapse of time, cf. MN. 5.13 et seq.), by fostering the celerity of administrative action.[1007] In fact, an impressive analysis of international law sources and the different articulations of the term 'same offence/conduct' found therein was conducted in this case and its significance was furthermore

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1004 *Sergey Zolotukhin v Russia* (14939/03) 10 February 2009 ECtHR [GC].

1005 Vetzo (n. 969), pp. 60–61.

1006 The case of *Nilsson v Sweden* (73661/01) 13 December 2005 ECtHR (dec.) foreshadowed the *Zolutkhin's* authority and the ECtHR also used the yardstick of 'connection in substance and time' between the offences, in order to answer whether a criminal conviction and the withdrawal of a driving license for the aggravated drunken driving, constituted double jeopardy.

1007 As it will transpire later on, the weaker the connection in time the greater the burden on the State to explain and justify any such delay which may be attributable to its conduct of the proceedings, see *A and B v Norway* (24130/11 and 29758/11) 15 November 2016 ECtHR [GC] at [134].

highlighted by a third-party intervener urging the ECtHR to adopt a more consistent approach for the sake of protecting the individual against double jeopardy.

6.17 The factual circumstances of the case revolved around an incident that took place at the police station where the applicant was drunk, verbally abusive towards the police officers and ignored their reprimands (i). For this reason, he was subsequently taken to the office of the head of the said police station (Major K.). The applicant continued to be aggressive and swore at the Major K., while he was drafting an administrative report in connection to the previous events (ii). Eventually the applicant was placed in a car in order to take him to another police station where he threatened to kill Major K. for bringing administrative proceedings against him (iii). The applicant was found guilty of an offence under Article 158 of the Russian Code of Administrative Offences for committing 'minor disorderly acts' (i). In addition, he was indicted on three charges in the subsequent criminal proceedings. Firstly, he was charged with 'disorderly acts' under Article 213 of the Russian Criminal Code for swearing at the police officers and breaching public order in the immediate aftermath of his arrival at the police station (i). He was eventually acquitted of this offence due to a failure to meet the criminal standard of proof. Secondly, he was charged with insulting a public official under Article 319 of the Criminal Code for swearing at Major K. in his office while the latter was drafting the administrative offence report (ii). Thirdly, he was charged under Article 318 of the Criminal Code for threats to use violence and kill Major K. when en route to the district police station (iii).

6.18 The ECtHR, after recapitulating a variety of approaches previously employed towards the interpretation of the *idem* element, started its analysis by underlining the need to focus on those facts that constitute a set of concrete factual circumstances involving the same defendant and are inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings. In this particular case, the ECtHR admitted that the prosecutions under Articles 319 and 318 of the Russian Criminal Code raised no issue because they concerned not a continuous act but rather different manifestations of the same conduct by the same applicant shown on a number of different occasions (ii and iii).[1008] However, the same logic could not be applied to the prosecution of 'minor disorderly acts' under Article 158 of the Code of Administrative Offences and the prosecution of 'disorderly acts' under Article 213 of the Criminal Code. The ECtHR went on to decipher the constitutive elements of *actus reus* embedded in the wordings of both of the pertinent provisions

[1008] *Sergey Zolotukhin v Russia* (14939/03) 10 February 2009 ECtHR [GC] at [92].

and found that the former offence did not contain any elements not captured by the latter offence.

6.19 As a matter of fact, both offences related to the same set of facts (i) and concerned the breach of public order that had been manifested either by the applicant uttering obscenities and failing to respond to the reprimands given by the police officers or by him threatening to use violence and resisting a public official. Hence, a violation of Article 4 of Protocol No. 7 to the ECHR was established. The fact that the applicant was acquitted under Article 213 of the Criminal Code was deemed irrelevant as the *ne bis in idem* principle also protects individuals from 'double prosecution' regardless of the substantive outcome of the case (*non bis vexari*) and the respondent State did not expressly acknowledge the duplication of the proceedings either (cf. MN. 6.03). What is more, the (rather tautological) argument that the proceedings somehow differed on account of the seriousness of the penalties imposed, as put forward by the respondent state, did not matter for the assessment of whether the multiple convictions were based on facts that were substantially the same.

6.20 The precedent of *Zolotukhin* caught on in another case that is significant within the context of administrative punishment, namely, the already discussed case of *Grande Stevens and Others* concerning market manipulation (cf. MN. 4.59; 5.35).[1009] The applicants in this case were in one way or another acting in the capacity of Exor, a company that was a controlling shareholder of the public limited company FIAT. FIAT, for its part, had signed a financing agreement with eight banks and agreed that, should it fail to reimburse the loan, the banks could offset their claim by subscribing to an increase in the company's capital. This concomitantly would have led to a decrease in a percentage of Exor's shares. To avoid this outcome, Exor renegotiated an equity swap contract with an English bank that allowed a share's performance to be exchanged against an interest rate, without having to advance any money. The overall interest of Exor was, thus, in retaining the controlling package of FIAT's shares and 'spinning' the public narrative in its favour. More precisely, the applicants acting in the capacity of Exor did not reveal crucial information about the equity swap contract concluded in a press release, although they were required to do so by the Italian stock market regulator (CONSOB).

6.21 In this context, the applicants were prosecuted twice: first, by CONSOB, which imposed administrative fines and professional bans on the applicants (autonomously qualified as 'criminal' by the ECtHR) for falsely depicting the situation about the equity swap contract in a

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1009 *Grande Stevens and Others v Italy* (18640/10) 4 March 2014 ECtHR [GC]. See also *Tsonyo Tsonev v Bulgaria* (no. 2) (2376/03) 14 January 2010 ECtHR.

press release under Article 187 ter § 1 of Legislative Decree no. 58 of 24 February 1998 ('Decree no. 58'); and, secondly, before the criminal courts, under Article 185 § 1 of Legislative Decree no. 58 for withholding information in order to avoid a probable fall in FIAT's share price. The ECtHR, relying on *Zolotukhin's* authority, examined at a granular level whether the applicants had been tried for the same conduct. It pointed out that in the first set of proceedings the applicants were essentially accused of having failed to mention in the impugned press release the plan to renegotiate the equity swap contract, whereas in the second set of proceedings they were accused of having stated that Exor wished to remain the reference shareholder of FIAT and that it had neither initiated nor examined initiatives with regard to the expiry of the financing contract, although the agreement amending the equity swap had already been examined and concluded.[1010] Thus, both proceedings – despite 'rhetorical' differences in their statutory labels – clearly concerned the same conduct by the same persons on the same date. The 'connection in space and time' between the offences as per *Zolotukhin* turned out to be inextricable and a violation of the *ne bis in idem* rule was established as a result, thus also delivering a 'death certificate' towards the combined use of criminal and administrative penalties.[1011]

6.4. The *Bis* Side: Early Case Law and Harmonization

6.22 The previous examples focused on what is considered to be the same conduct for which a double prosecution or punishment is prohibited. In addition to this, equally valid is the question of what exactly counts as a repetition of proceedings, given the ever-growing inventive arsenal of punitive powers exercised by the State. Whereas it became clearly settled in the ECtHR's case law that parallel proceedings involving a criminal prosecution and the pursuit of civil compensation claims[1012] or the imposition of criminal measures and disciplinary measures[1013] were allowed as they followed different rationales and standards of proof, the view was more blurred when it came to the former's relationship with administrative proceedings. This issue was particularly exacerbated by the fact that certain national constitutions explicitly prohibit the repetition of punishment by means of criminal law in regard to an ordinary meaning of the

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1010 *Grande Stevens and Others v Italy* (18640/10) 4 March 2014 ECtHR [GC] at [225]–[226].

1011 To borrow a phrase from judge Pinto de Albuquerque, see his dissenting opinion in the case of *A and B v Norway* (24130/11 and 29758/11) 15 November 2016 ECtHR [GC] at [80].

1012 However, one ought to be careful not to violate the presumption of innocence in the civil forum, see to this effect *Y v Norway* (56568/00) 11 February 2003 ECtHR.

1013 See *Vanjak v Croatia* (29889/04) 14 January 2010 ECtHR; *Luksch v Austria* (37075/97) 21 November 2000 ECtHR and *Hrdalo v Croatia* (23272/07) 27 September 2011 ECtHR.

term but remain silent when it comes to administrative sanctions.[1014] Some Member States also insisted that the same approach was embedded in the ECHR's letter: it transpired from the Explanatory Report to the Protocol No. 7 that the wording of its Article 4 was intended for criminal proceedings *stricto sensu*,[1015] especially in view of its non-derogable nature presupposing a narrower scope of application. In actuality, though, the ECtHR even ensures that no-one is found liable twice for the same administrative offence.[1016]

6.23 Dual-track enforcement, i.e. by means of both criminal and administrative sanctions, was outruled in the previous case law of the ECtHR, as will be demonstrated below, but the tension leading to the need to adopt a more conceptual view of reconciling the two did not rescind. The novel supranational tendencies commanding the States to enforce certain policies both through administrative law as well as criminal law contributed to the necessity to clarify the matter 'once and for all'.[1017] In fact, if the authority of *Zolotukhin* were to end an 'era of uncertainty' regarding the interpretation of the *idem* element of double jeopardy,[1018] then the case of *A and B v Norway* was a harmonizing endeavour with regard to its *bis* element. The ECtHR eventually cracked under the pressure of several intervening states who were keen on maintaining their system of dual-track enforcement[1019] and devised what is itself termed a 'calibrated regulatory approach' to the matter at issue, allowing proceedings to occur concurrently, provided that they follow complementary purposes by addressing different aspects of the impugned social misconduct, and meet other criteria, as will be explicated below.

6.4.1. Developments Prior to the Case of *A and B*

6.24 However, before the above-mentioned development could come to pass, there was a thicket of cases touching upon the same issue of dual-track enforcement in a variable way, i.e. depending on the 'inextricability and foreseeability' of both sanctions, some of which have been discussed previously. Most of these cases originated from the Nordic legal systems and had something to do with their idiosyncratic view of administrative sanctions – already showcased

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1014 See, e.g., Article 103 (3) of the Basic Law for the Federal Republic of Germany (*Grundgesetz*) of 8 May 1949.

1015 See, e.g., *A and B v Norway* (24130/11 and 29758/11) 15 November 2016 ECtHR [GC] at [67].

1016 See to this effect *Korneyeva v Russia* (72051/17) 8 October 2019 ECtHR.

1017 Such as the ones cropping up within the legislative framework of EU market abuse law, see for a further comment in Luchtman (n. 969), pp. 1737; 1749. See also MN. 3.65 et seq.

1018 See the Concurring Opinion of Judge Sicilianos in *Tomasović v Croatia* (53785/09) 18 October 2011 ECtHR. This is, of course, a pompous rhetoric and one may validly wonder if a single case can really mean an end to the conundrum that has been occupying the minds of many legal scholars for a long time.

1019 Vetzo (n. 969), p. 64.

on multiple occasions throughout this thesis (cf. MN. 4.44). For example, in the case of *Nilsson v Sweden,*[1020] the ECtHR was confronted with the question of whether a penalty of 50 hours' community service imposed by the District Court and the withdrawal of the driver's license for 18 months imposed by the County Administrative Board some ten months later for the same offences of aggravated drunken driving and unlawful driving was a repetition of criminal proceedings. The ECtHR observed that even though different sanctions were imposed by two different authorities in different proceedings they were nonetheless 'sufficiently closely connected in substance and in time' – a parameter which was invoked by the authority of *Zolotukhin* to define the *idem* side of the principle (cf. MN. 6.19). Thus, the withdrawal of the driver's license was a direct and foreseeable consequence stemming from the applicant's conviction and did not imply that he was "tried or punished again ... for an offence for which he had already been finally ... convicted".[1021]

6.25 The ECtHR, however, cast the same situation into stark relief in a string of cases (mostly) against Finland. For example, in the case of *Glantz v Finland,*[1022] the situation revolved around tax offences. More precisely, the applicant failed to provide information about his income in a tax declaration with the result that too low a tax assessment was made. For this, he received two sets of sanctions: administrative sanctions (tax surcharges), which became final on 11 January 2010, and criminal sanctions (a prison sentence for an aggravated tax fraud), which became final on 18 May 2011. In contrast to the *Nilsson* case, the ECtHR remarked that these two sets of proceedings were in no way connected but instead followed their own separate course and became final independently from each other. *A fortiori*, the ECtHR found it unsatisfactory that neither of the sanctions was taken into consideration by the other court or authority in determining the severity of the sanction, nor was there any other interaction between the relevant authorities. The applicant's conduct was furthermore assessed independently by different authorities, unlike in the case of *Nilsson*, where the administrative measure was predicated upon the criminal conviction.

1020 *Nilsson v Sweden* (73661/01) 13 December 2005 ECtHR (dec.). See also *R.T. v Switzerland* (31982/96) 30 May 2000 ECtHR (dec.) for a similar approach.

1021 See in a similar vein *Rivard v Switzerland* (21563/12) 4 October 2016 ECtHR.

1022 *Glantz v Finland* (37394/11) 20 May 2014 ECtHR. See for the same line of interpretation and result *Nykänen v Finland* (11828/11) 20 May 2014 ECtHR; *Kiiveri v Finland* (53753/12) 10 February 2015 ECtHR; *Rinas v Finland* (17039/13) 27 January 2015 ECtHR; *Österlund v Finland* (53197/13) 10 February 2015 ECtHR; *Lucky Dev v Sweden* (7356/10) 27 November 2014 ECtHR; *Grande Stevens and Others v Italy* (18640/10) 4 March 2014 ECtHR [GC]; *Sismanidis and Sitaridis v Greece* (66602/09 and 71879/12) 9 June 2016 ECtHR. For *a contrario* result see *Pirttimäki v Finland* (35232/11) 20 May 2014 ECtHR.

6.26 Thus, there was no close connection, in substance or in time, between the criminal and the taxation proceedings, which resulted in the applicant being convicted twice for the same matter in two separate sets of proceedings – a clear breach of the *ne bis in idem* principle. Finland, for its part, in the aftermath of these cases, modified this practice by introducing new domestic case law and by adopting The Act on Tax Surcharges and Customs Duty Surcharges Imposed by a Separate Decision No. 781/2013 in 2013, stipulating a duty of cooperation between the authorities in order to stay in line with the ECtHR's standards, whereas Sweden claimed to have undertaken similar changes already after the *Zolotukhin* judgment was adopted.[1023] However, the critique of the ECtHR's approach also persisted as – some claimed – it obliged the Member States to treat persons in equal situations unequally according to mere coincidences, i.e. depending on which set of proceedings were finalized first.[1024]

6.4.2. The Case of *A and B*: Refinement of the *Bis* Element

6.4.2.1. The Case of *A and B*: The Judgment

6.27 As is clear from the above, the ECtHR was under pressure from the Member States to harmonize the scattered case law and elucidate what it considered to be an unacceptable duplication of proceedings under Article 4 of Protocol No. 7 to the ECHR in a more systemic manner. They quoted the peculiarities of their own legal systems, the accumulated skills and expertise of administrative and general courts, the swiftness of administrative punishment and the resulting proliferation of parallel punitive proceedings in a number of administrative law areas in order to justify the narrow conception of the *ne bis in idem* guarantee and maintain the existence of the said proceedings forming a coherent whole.[1025] The harmonized interpretation was finally provided in the Grand Chamber's case of *A and B v Norway* of 2016.[1026] As has already been cursorily discussed within the context of the '*Jussila* concession' (cf. MN. 4.51), the two applicants in this case were punished by the combined means of criminal and administrative penalties. Namely, they were first subjected to tax penalties, reaching up to 30% of the taxes due (final decisions to that effect were adopted on 15 December 2008 and on 26 December 2008 respectively) and later on they were also convicted and sentenced to imprisonment for tax fraud (final decisions to that effect were adopted on 2 March 2009 and on 30 September 2009 respectively) – both measures were imposed for the same factual omission

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1023 *Lucky Dev v Sweden* (7356/10) 27 November 2014 ECtHR.

1024 See *A and B v Norway* (24130/11 and 29758/11) 15 November 2016 ECtHR [GC] at [81].

1025 See *A and B v Norway* (24130/11 and 29758/11) 15 November 2016 ECtHR [GC] at [82]; See also *Lucky Dev v Sweden* (7356/10) 27 November 2014 ECtHR at [48].

1026 *A and B v Norway* (24130/11 and 29758/11) 15 November 2016 ECtHR [GC].

in regard to declaring their income on the tax return. The applicants claimed that by not expunging the criminal proceedings once the administrative proceedings were finalized the State authorities had caused them great distress and violated the *ne bis in idem*.

6.28 The ECtHR started off its interpretation by showing deference to policy considerations voiced by the intervening States, such as efficiency and the proper administration of justice – motives that had already been invoked by the ECtHR when it wished to make concessions to other fundamental rights (cf. MN. 4.04; 4.26). It acknowledged that "the imposition of penalties under both administrative law and criminal law in respect of the same offence is a widespread practice in the EU Member States, especially in fields such as taxation, environmental policies and public safety".[1027] The ECtHR saw the merit in this practice and went on to emphasize that "it cannot be the effect of Article 4 of Protocol No. 7 that the Contracting States are prohibited from organizing their legal systems so as to provide for the imposition of a standard administrative penalty on wrongfully unpaid tax … also in those more serious cases where it may be appropriate to prosecute the offender for an additional element present in the non-payment, such as fraudulent conduct, which is not addressed in the 'administrative' tax-recovery procedure".[1028] This *a fortiori* means that the letter of the Convention does not intend to outlaw legal systems that take an 'integrated' approach to the social wrongdoing in question, and in particular an approach involving parallel stages of legal response to this wrongdoing by different authorities and for different purposes.

6.29 Given the rationale of the *ne bis in idem* guarantee, which is to shield the individual from punitive overkill emanating from public hand, the ECtHR, quite inevitably, had to define the acceptable criteria of this 'integrated' approach. Drawing on the previous case law, it once again highlighted the utmost importance of a "sufficiently close connection ... in substance and in time" between the offences under prosecution as a bedrock parameter and endorsed the *una via* model and its potential to organize the legal treatment of the conduct concerned in such a manner that is proportionate and foreseeable for the persons affected (cf. MN. 6.01). The ECtHR went on to enunciate the precise conditions that need to be satisfied in order for the 'calibrated regulatory response' to be compatible with the *bis* side of Article 4 of Protocol No. 7 to the ECHR. It needs to be verified (given the principle of subsidiary – already at the national level): (i) whether the different proceedings pursue complementary purposes and thus address, not only *in abstracto* but also *in concreto*, different aspects of the social misconduct involved;

1027 *A and B v Norway* (24130/11 and 29758/11) 15 November 2016 ECtHR [GC] at [118].

1028 *A and B v Norway* (24130/11 and 29758/11) 15 November 2016 ECtHR [GC] at [123].

(ii) whether the duality of proceedings concerned is a foreseeable consequence, both in law and in practice, of the same impugned conduct (*idem*); (iii) whether the relevant sets of proceedings are conducted in such a manner as to avoid as far as possible any duplication in the collection as well as the assessment of the evidence, notably through adequate interaction between the various competent authorities to bring about that the establishment of facts in one set is also used in the other set; (iv) and, above all, whether the sanction imposed in the proceedings that become final first is taken into account in those that become final last, so as to prevent the individual concerned from bearing an excessive burden, this latter risk being least likely to be present where there is in place an offsetting mechanism designed to ensure that the overall amount of any penalties imposed is proportionate.[1029] By implication, it should be underlined that punitive proceedings have to be complementary themselves; if one set of proceedings is initialized, after the other is finalized, then, quite clearly, there is a *bis in idem* situation. The order in which the proceedings are conducted, i.e. whether the administrative proceedings precede the criminal proceedings or *vice versa* is, for its part, immaterial.[1030]

6.30 As already mentioned, by relying on the *Jussila* concession, the ECtHR added a further indication to the test: the further away the sanctions to be imposed in the proceedings not formally classified as 'criminal' are from the 'hard-core of criminal law', the more likely it is that the combined use of sanctions will meet the required criteria of complementarity and coherence (cf. MN. 3.82; 4.43 et seq.).[1031] This appears to be a cleverly crafted line of interpretation intended to assuage the 'tricky' situation that the ECtHR finds itself in due to the 'normative architecture' of the ECHR, namely, the fact that it always has to attribute a 'criminal' label to an administrative sanction for it to even come within the remit of the ECHR's protection. Such an attribution – at least seen from a semantical point of view – causes additional friction when it comes to the application of the *ne bis in idem* rule, giving the impression that the individual is in fact burdened by the multiplicity of criminal measures and, thus, going against the grain of the national constitutional conceptions and the expectations expressed therein (cf. MN. 6.20).

6.31 All in all, this novel test of the 'calibrated regulatory approach' has coherently strung together various facets and aspirations attached to double jeopardy, already expressed in the previous

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1029 *A and B v Norway* (24130/11 and 29758/11) 15 November 2016 ECtHR [GC] at [132].

1030 Cf. the approach adopted in the EU law, which only allows the former variant, i.e., administrative proceedings preceding the criminal ones. This can be traced back to the idea that "where criminal proceedings are capable of addressing the core of the harm done to society, the necessity of subsequent administrative proceedings will be questionable", Luchtman (n. 969), p. 1735.

1031 *A and B v Norway* (24130/11 and 29758/11) 15 November 2016 ECtHR [GC] at [133].

case law of the ECtHR. It is a suitable response to the obvious truth that at certain times not all facets of the faulty conduct can be realistically addressed with a single set of punitive proceedings.[1032] Put otherwise, this response, together with other parameters, integrated reasonableness as a metric of dual-track enforcement, legal certainty and foreseeability (both in law and in practice, allowing the applicants to craft their defensive legal strategies in advance), and procedural protection from excessive prosecution by minimizing the 'procedural harassment' of the individual, as well as establishing the ideal of coordinated action by the various authorities involved and the implementation of the *Anrechnungsprinzip* to the benefit of the individual, aimed at ensuring that she does not bear an 'unjust' punishment in a substantive sense (cf. MN. 6.08).

6.32 Having set out these precise criteria, the ECtHR applied them to the particular case of *A and B* and verified whether the integrated legal response by the Norwegian authorities could be deemed compliant with the ECHR.[1033] After once again showing deference to the policy considerations of the system of dual-track enforcement, the ECtHR, drawing on the factual circumstances of the case, found it satisfying with regard to both applicants that the criminal proceedings and the administrative proceedings were conducted largely in parallel and were interconnected. Thus, a 'sufficient connection in substance and time' could be established between the proceedings. They also pursued different aims and tackled different aspects of the social misconduct, thereby responding to different needs of society and varying in their *corpus delicti*: while the tax penalties served as a general deterrent and were intended to compensate the tax authorities for carrying out checks and audits in order to identify defective tax declarations, the criminal measures also had a punitive purpose in respect of the same anti-social omission, involving the additional element of the commission of culpable fraud. Moreover, the two-track proceedings were foreseeable for the applicants, who must have known from the outset that a criminal prosecution as well as an imposition of tax penalties was possible, or even likely, given the facts of the case. Finally, an offsetting mechanism was also invoked in this particular case: the sentence imposed in the criminal trial had regard to the tax penalty. All of these considerations combined led the ECtHR to the generalization that the integral

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1032 For example, in the case of *Bajčić v Croatia* (67334/13) 8 October 2020 ECtHR, the ECtHR, while assessing the applicant's conduct drew attention to the fact that a second set of proceedings covered a faction of the applicant's conduct which only became apparent after the impugned offence took place, i.e. causing a death of a pedestrian (ii) as a result of a reckless driving (i).

1033 *A and B v Norway* (24130/11 and 29758/11) 15 November 2016 ECtHR [GC] at [135] – [154].

scheme of legal response to the failure to declare income and pay taxes at issue did not cause any disproportionate prejudice or injustice to the applicants.

6.33 The latter tenet captures the ECtHR's rather long journey towards 'hermeneutic consistency' or – at the very least – 'clarity of vision' quite well: when it comes to double jeopardy, the form, the method and the reasons behind the diversified legal response are acceptable as long as, such response does not undercut the fundamental legal goods protected by the *ne bis in idem* rule, which should always assume a central role. Administrative sanctions, for their part, are not conceived as antagonistic towards the said rule but rather as a reality enriching the law enforcement capabilities that has to be reckoned with (at the same time establishing a single-track procedure as the ideal and surest way to stay within the permissible bounds of the *ne bis in idem rule*), if they are not overburdening the individual at too high a cost.

6.4.2.2. The Case of *A and B*: The Aftermath

6.34 Inevitably, this new, efficiency-driven approach adopted by the ECtHR has attracted a fair share of criticism for ostensibly lowering the standard of such an essential guarantee as well as forging a separate path to that of the CJEU, which leaves much more latitude to the national systems in qualifying the nature of multiple sanctions.[1034] Among other things, the unpredictable and casuistic use of the criteria defined in vague terms by the *A and B* authority and the risk of automatically transferring evidence from the administrative to the criminal procedure have been singled out as clear shortcomings.[1035] The gist of the critique can be most glaringly detected in the scathing dissenting opinion given by judge Pinto de Albuquerque. In this opinion, he pleaded for the non-derogability of *ne bis in idem* and claimed that there is nothing in the wording of Article 4 of Protocol No. 7 to the ECHR to suggest that a distinction should be made between parallel and consecutive proceedings. Moreover, the non-derogable nature of this provision also means that its application must not be substantially different depending on which area of law is concerned. Such a strict (sic) *pro auctoritare* stance taken by the ECtHR and the resulting limitation of the principle's scope, according to him, is irreconcilable with the Convention requirements and has turned its rationale upside down.

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1034 See L. Milano, "*L'arrêt A et B c. Norvège, entre clarifications et nouvelles interrogations sur le principe non bis in idem*", (2018) *Revue trimestrielle des droits de l'homme* 114, pp. 467–484 (pp. 478–482). The CJEU developed its own set of criteria, which are largely similar (although not identical) to the ones found in the *A and B* authority, see to this effect *Garlsson Real Estate SA and Others* (C-537/16) 20 March 2018 CJEU; *Enzo Di Puma and Antonio Zecca* (C-596/16 and C-597/16) 20 March 2018 CJEU; *Luca Menci* (C-524/15) 27 April 2018 CJEU.

1035 Lasagni/Mirandola (n. 970), pp. 128–129.

However, while disappointment of watering down human rights is understandable, the alternative to impose absolute restriction on the duplication of punitive proceedings and discard the complementary means of administrative law in enforcement altogether is not convincing either, especially given the fact that a significant number of legal systems turn to this, cf. MN. 3.65 et seq. What is more, the very fact that *ne bis in idem* was not explicitly included in the Convention itself is an additional (even if by no means decisive) factor casting doubt on its proclaimed absolute nature, as it shows the initial reluctance among the Contracting States to give it full force.[1036] Also, this principle has only been 'marginally' applied by the ECtHR throughout the years[1037] and was marked by various reservations in the text of the Protocol No. 7 to the ECHR. Even though judge Pinto de Albuquerque is right in pointing out that there is nothing in Article 4 of Protocol No. 7 to the ECHR speaking in favour of parallel proceedings, equally valid is the fact that (interpreted literally) this provision only prohibits the duplication of proceedings in 'criminal' matters in regard to an ordinary meaning of the term, thus resonating with the national constitutional expectations outlined above (cf. MN. 6.20). As in most 'controversial' cases of law interpretation, the reading of the provision is a matter of perspective.

6.36 What is more, were a *pro persona* stance with regard to double jeopardy to be adopted by the ECtHR instead, a plethora of administrative bodies would have to 'outsource' the enforcement of various laws to the criminal procedure and that may seriously undercut the effectiveness of the fact gathering and other inquiries given the specialized 'insider' knowledge of these bodies. For example, police agents or prosecutors conducting criminal procedures would be forced to analyse complex tax databases that they may have no expertise of, as this is not their primary task. This would mark a sort of regress for administrative punishment, which historically has accompanied criminal law for centuries, as the dissection of its use in European legal systems has demonstrated (cf. MN. 3.06 et seq.). It would also not sit well with the respect for national criminal policy (perceived in a broad sense) and the fact that there is barely a convergence between the Member States in this domain.[1038] The comprehensive (if not pointillist) test, for its part, represents a balancing act struck between the two sides of the seasoned conundrum and the inherent tensions that it generates. Contrary to the impression that the dissenting opinion may convey, it does not really give *carte blanche* to duplicate punishment whenever the State

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1036 Neither is it completely absolute within other legal frameworks, cf. EU law Lasagni/Mirandola (n. 970), p. 129. See also for a lack of solid consensus on this principle in Groussot/Ericsson (n. 369), p. 56.

1037 Milano (n. 1034), p. 468.

1038 *A and B v Norway* (24130/11 and 29758/11) 15 November 2016 ECtHR [GC] at [106].

pleases. On the other hand, a thicket of (both procedural and substantive) safeguards, whose application may well be extended in the future is meant to put a constraint on the punitive excesses as the burden of proof with regard to the justification of parallel proceedings still lies on the State.[1039] What is more, integrating precision into the test ("multiple punitive response has to … *in concreto*… tackle different aspects of the social misconduct involved") allows the ECtHR to pierce through the manipulative strategies that the Member States may be tempted to adopt.

6.37 Therefore, regardless of the 'correctness' of the outcome in this particular case, there is not much reason to agree that the introduction of the novel 'calibrated regulatory approach' will lead us to a 'Levianthian-like State', pushing for 'the maximum possible repressive effect' as judge Pinto de Albuquerque proclaimed *in terrorem*. Paradoxically, whilst chastising the ECtHR for a number of logical fallacies committed in this case, the dissenting judge turned to using a slippery slope argument himself. Also the case law after *A and B* shows that the ECtHR is ready to intervene when an abusive and disproportionate use of the duplication of proceedings occurs. More precisely, the case of *Jóhannesson and Others*[1040] proves a point in fact: here Iceland could not convincingly demonstrate that a very similar 'punitive arrangement' to the one invoked in the *A and B* authority, i.e. the criminal conviction and the imposition of tax surcharges for the same tax breach, was an integrated dual process representing a necessary response to various aspects of a faulty behaviour of the applicants. The crucial defect in this case was the lack of 'a substantial connection in time' as both proceedings took nine years and three months and only a small part of them overlapped, i.e. for just a little more than a year they were conducted in parallel. Besides, the collection and assessment of the evidence happened largely independently, thus vexatiously burdening the applicants. The ECtHR, relying on the *A and B* test, found this practice unsatisfactory and declared a breach of the *ne bis in idem* rule.[1041]

6.38 The same result was obtained in the case of *Nodet v France*,[1042] which dealt with a situation of market abuse. In this case, the fact that the criminal proceedings continued for more than four years and two months after administrative sanctions were imposed on the applicant was decisive in the ECtHR's finding of there being no 'sufficiently close connection in time'

1039 As clearly highlighted in *A and B v Norway* (24130/11 and 29758/11) 15 November 2016 ECtHR [GC] at [134].

1040 *Jóhannesson and Others v Iceland* (22007/11) 18 May 2017 ECtHR.

1041 See for a contrasting conclusion *Bajčić v Croatia* (67334/13) 8 October 2020 ECtHR; See also *Matthildur Ingvarsdottir v Iceland* (22779/14) 4 December 2018 ECtHR (dec.), in which the applicant prolonged proceedings herself.

1042 *Nodet v France* (47342/14) 6 June 2019 ECtHR.

between the two proceedings. Additionally, the ECtHR noted that both of them were pursuing the same aims (punishment for insider trading) and, in addition, the double collection of evidence that took place hindered the conclusion that the impugned sanctions were complementary. Finally, the case of *Šimkus v Lithuania*[1043] demonstrates that even an administrative reprimand issued to an applicant in a first set of proceedings can present an obstacle to initiating a second (criminal) set of proceedings in relation to the same transgression with much heavier fines. Thus, the threshold is rather high and the ECtHR has credibly demonstrated that it will not tolerate the infliction of 'chaotic' multiple punishment – be it conducted in a parallel or in a successive manner.

6.5. Conclusion

6.39 The principle of *ne bis in idem* is in and of itself about the acceptable boundaries of multiple punishment. The analysis thereof with an emphasis on its relationship with administrative punishment leads to a self-evident conclusion that finding a solution to this conundrum is a tall order. This is so due to the antithetical interests that this principle pertains to: the need to shield the individual from punitive inroads that the State might take too far, on the one hand, and the need of the State to have a flexible punitive toolbox to respond to different manifestations of social wrongdoing and ensure effective compliance with the law, on the other. The earlier case law of the ECtHR sought to attain a solution by focusing on the *idem* side of the principle and was highly oscillatory. The ECtHR's approach seemed to swing from a broad to a narrow interpretation of the protective scope of this principle as it grappled with defining the parameters of the 'same offence'. The different approaches offered in this regard did not seem to suit the critics (paradoxically or not, the critics were not silenced after the ECtHR's *volte-face* in interpretation quoting the same lack of legal certainty). However, at the same time the divergent body of case law enabled the ECtHR to evolve and carve out a number of important notions (such as the 'essential elements') on which the ECtHR could later build its further case law. It also showed that the ECtHR was pushing for a *una via* model and procedural protection of the individual (*ne bis vexari*) from the very beginning.

6.40 The interpretation of the *idem* side of the principle grew richer over time and was supplemented by new parameters such as differing facets of the offender's insolent behavior or the social value protected by a particular offence. The authority of *Zolotukhin* marked a watershed moment and added 'a sufficient connection in space and time [between the offences]' as a cornerstone notion in delineating the acceptable boundaries of double jeopardy. The

1043 *Šimkus v Lithuania* (41788/11) 13 June 2017 ECtHR.

analytical pivot of the ECtHR then turned to the *bis* side: the very same formulae developed previously were invoked but this time around everything culminated in the adoption of the so-called 'calibrated regulatory response' in the case of *A and B,* consisting of four main criteria that have to be checked every time the State makes use of multiple punishment. It coherently strung together various tenets scattered in the relevant case law and encompassed procedural as well as substantive safeguards aimed at ensuring that the individual suffers no great injustice due to the combination of punitive measures. The ancillary role of administrative law and the palette of sanctions that it offers in addition to criminal law was, thus, maintained.

6.41 Although lots of critique with regard to this 'calibrated regulatory response' was uttered, it is hard to subscribe to (what could have been) an alternate path towards solving such a loaded legal problem, i.e. discarding the complementary use of administrative and criminal penalties altogether. This is not realistic and would be too intrusive into the national preferences of the Member States in shaping their criminal policies, especially considering that some of them have a long history of such use (cf. MN. 3.65 et seq.). An additional friction to this problem would be generated by the fact that there are explicit provisions in certain domains stemming from EU law, where a combination of both criminal measures and administrative sanctions is included in the *acquis* and its Member States have to transpose this mode of action into their national laws.[1044] At the end of the day, the ECtHR is ready to give as much protection to fundamental rights as the Contracting States of the ECHR are. The constitutional role of the ECtHR, for its part, should not destroy the added value of administrative punishment, established through time at too high a price.

6.42 In the opinion of the author of this thesis, the comprehensive criteria of *A and B* – while possessing both abstract and concrete dimensions – are well-balanced in drawing the line to the (much-dreaded) punitive excesses. They are furthermore under continuous development and will most likely be elaborated in the future. The only thing that could be highlighted more is the necessity to justify the combined use of punitive measures by the Member States. This would make them 'think twice' before turning to double punishment (Is it really necessary to burden the individual twice? Do the proclaimed benefits of different means of punishment outweigh the *pro persona* considerations undergirding the *ne bis in idem* rule?). In this way, the boogeyman of the "State pushing for the maximum repressive effect" could be better controlled. At the same time, the fact that some legal problems within the punitive domain (like the finding

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[1044] See for a good example of how such a requirement stemming from the EU law caused a 'headache' on the national level regarding the *ne bis in idem* rule, *Georgouleas and Nestoras v Greece* (44612/13 and 45831/13) 28 May 2020 ECtHR, in which EU market manipulation provisions had to be transposed.

of *summa divisio* between administrative and criminal law, cf. MN. 3.81 et seq.) are bound to stay intractable should be acknowledged. Thus, the best one can do is to opt for carving out intelligent, flexible and elaborate solutions that could assuage the tensions that these problems generate. The ideal of the *una via* model endorsed by the ECtHR marks a good start.

CHAPTER 7
ADMINISTRATIVE PUNISHMENT: THE SUBSTANTIVE SIDE

"*Ignorance of the law is no excuse, unless there is no way of finding out what the law is*"

Marcel Berlins

7.1. Introduction

7.01 Having explored the procedural side of administrative sanctions and its manifold implications stemming from the case law of the ECtHR, it is now time to take a closer look at the substantive side of these sanctions. Firstly, they should be explored in light of the principle of legality – a principle that was coextensive with the development of administrative law itself in the continental legal system.[1045] It should be highlighted that, currently, the term 'legality' may be invoked in a variety of ways;[1046] however, within the framework of administrative law, broadly speaking, it primarily presupposes the need to base any intervention by public authorities on a legal basis, thus aiming to prevent arbitrary infringements of the rights of the individual.[1047] This principle moreover ensures equality before the law of individuals as aggravating measures are not 'fixed' at the discretion of administrative authorities or judicial bodies. The said basis should also be clearly indicated in decisions taken in exercises of public power that encroach upon individual rights.[1048] In fact, the more that is at stake for the individual, the more precise the regulation that should be expected.

7.02 In the punitive administrative context the principle of legality can furthermore be conceptually broken down into four sub-principles, neatly encapsulated in the Latin adage *nullum crimen (nulla poena) sine lege scripta, praevia, certa, stricta*.[1049] Despite its crucial role alongside another cornerstone substantive principle of sanctioning, i.e. proportionality, the principle of legality in the (punitive) administrative context seems somewhat overlooked compared to its application within the framework of criminal law, wherein it was originally

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1045 B. Sordi, "Révolution, Rechtsstaat and the Rule of Law: historical reflections on the emergence and development of administrative law" in S. Rose-Ackermann/P.L. Lindseth, *Comparative Administrative Law* (2010), pp. 23–35 (p. 30). Under common law this principle, however, has a slightly different meaning, i.e., it is used as a substitute for constitutional review.

1046 A. Somek, "Is Legality a Principle of EU Law?" in S. Vogenauer/S. Weatherill, *General Principles of Law: European and Comparative Perspectives* (2017), pp. 53–73 (p. 53).

1047 J. Schwarze, *European Administrative Law* (2006), cxxi.

1048 See, e.g., *Frizen v Russia* (58254/00) 24 March 2005 ECtHR; *Adzhigovich v Russia* (23202/05) 8 October 2009 ECtHR.

1049 Despite its Latin name the legality principle was first conceived in the aftermath of the French Revolution and the Enlightenment era, see Peristeridou (n. 16), pp. 33 et seq.

conceived.[1050] This academic gap is glaring considering the fact that in some regulatory domains there are clear deficits regarding the proper application of this principle.[1051] This gap is even more unwarranted because, as hinted at earlier, there are abundant cases in competition and data protection law in which the level of coercion inflicted by administrative authorities approaches or even exceeds that which is typical for criminal law[1052] and which produce thorny questions touching upon legality (e.g., fines without upper limits in competition law).

7.03 Furthermore, the principle of legality raises a host of further questions that merit attention, namely, how precisely should an administrative law provision the breaching of which is capable of triggering the imposition of a sanction be drafted? Should an obligation to act in one way or another be unambiguous or is any discretion left to an administrative body in assessing whether a particular breach has been committed? Furthermore, is there any space for punishment by analogy or extensive interpretation of legal wordings expressing the said behavioural obligations when it comes to inflicting detrimental administrative measures?[1053] What about (the precision of) administrative sanctions themselves – can someone, for example, be punished for breaching not a legal provision but, say, a general legal principle? Such a situation is easily imaginable in so-called 'administrative offences law', integrating such broad concepts into legal provisions as, for example, 'decency' of behaviour or public order.[1054] In the latter area, even the ECtHR concedes that absolute precision is almost impossible.[1055]

7.2. Legality in the 'Soft Law' of the CoE

7.04 As noted above, the term 'legality' is variegated; thus, before moving on to a more concrete analysis, it is important to extract its specific meaning within a particular normative framework. The first relevant source in this regard – Recommendation No. R (91) 1 – although not legally

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1050 See, e.g., for recent scholarship exploring the topic Timmerman (n. 16) and Peristeridou (n. 16).

1051 Schwarze (n. 10471047), cxxiv – cxxvi.

1052 See, e.g., on 'draconian' administrative fines in data protection law S. Golla, "Is Data Protection Law Growing Teeth? The Current Lack of Sanctions in Data Protection Law and Administrative Fines under the GDPR", (2017) *Journal of Intellectual Property, Information Technology and Electronic Commerce Law 1*, pp. 70–78.

1053 The infamous "principle of analogy" in the Soviet Union basically outlawing any "socially dangerous act" is meant here, see more in Husak (n. 489), pp. 11 et seq. It may seem like a distant cry from the past but it is still worth checking whether administrative punitive law might sometimes go down this dangerous path.

1054 See, e.g., on breach of the peace and behaviour *contra bonos mores* as 'vague' concepts in *Hashman and Harrup v the United Kingdom* (25594/94) 25 November 1995 ECtHR at [40] and *Steel and Others v the United Kingdom* (24838/94) 9 April 1997 CHR (dec.) at [100]. See also *Lauko v Slovakia* (26138/95) 2 September 1998 ECtHR for a minor contravention against 'civic propriety'.

1055 *Steel and Others v the United Kingdom* (24838/94) 9 April 1997 CHR (dec.) at [151].

binding *stricto sensu*, is significant for many reasons, which have already been explicated above (cf. MN. 3.19 et seq.). This recommendation accords the principle of legality a prominent place that is quite in line with the tendencies discernible on the domestic level in countries that have a tradition of adopting special codes dealing with administrative sanctions or in other legal frameworks[1056] as well as other supranational tendencies.[1057]

7.05 Namely, Recommendation No. R (91) 1 designates legality as 'Principle 1' stipulating that 'the applicable administrative sanctions and the circumstances in which they may be imposed shall be laid down by law'. This principle has to be read in conjunction with the definition of administrative sanctions that is also enunciated in the same recommendation, i.e. conceiving administrative sanctions only in terms of a punitive dimension that is congruent with the overall 'autonomous' perception of an administrative sanction found in the case law of the ECtHR (cf. MN. 4.10). The content of 'Principle 1' is laid down in a somewhat laconic fashion, i.e. only emphasizing the need to base administrative punishment on law. However, the recommendation neither specifies what kind of 'law' should serve as a basis in this regard nor determines its level of precision in any way. Thus, one is left to speculate whether this 'law' has to be understood in the 'parliamentarian' sense or if the sub-statutory level also suffices. At least in the case law of the ECtHR, the term 'law' has always been interpreted quite broadly in its 'substantive' and not in its 'formal' sense. This means that both enactments of lower rank than statutes and unwritten law have been included within its ambit.[1058]

7.06 Alongside the imposition of sanctions, 'Principle 1' also includes 'the circumstances in which administrative sanctions may be imposed' within its ambit. It is not entirely clear whether 'circumstances' means legal wordings entailing obligations whose breach presupposes the imposition of the sanctions (within the meaning of *nullum crimen*) or whether it goes beyond that, hinting at the need for 'high' regulatory quality in the context of sanctioning. The inclusion of 'circumstances' of sanctioning in any event implies that the legality principle should be construed broadly when it comes to public bodies exercising *ius puniendi* – thus, shrinking their room for manoeuvre to the minimum. Further clarifications on the content of this provision are

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1056 E.g., it is enshrined in Article 1 of the Austrian Administrative Penal Code and Article 2 of the EU Regulation No. 2988/95.

1057 EU law holds this principle in high regard when it comes to punitive context. In fact, it explicitly requires even penalties of compensatory nature to be rest "on a clear and unambiguous legal basis", see to this effect, e.g., *Maizena Gesellschaft GmbH and others v Bundesanstalt für landwirtschaftliche Marktordnung (BALM)* (C-137/85) 18 November 1987 CJEU at 15.

1058 See, e.g., *De Wilde, Ooms and Versyp v Belgium* (2832/66; 2835/66; 2899/66) 18 June 1971 ECtHR at [93].

provided in the Explanatory Memorandum of Recommendation No. R (91) 1 and are worth quoting at length:[1059]

> 'in a democratic society, it is not possible for the administration at the same time to lay down rules of conduct, determine the sanctions applicable in case of non-observance and put sanctions into effect. Legislation is required, at least to lay down the scale of pecuniary sanctions applicable, to empower the administrative authorities to apply such sanctions so as to ensure observance of particular legislative measures and to define those cases in which sanctions restricting the exercise of fundamental rights can be applied. The references to "the law" encompasses the well-established rules of common law. However, a lesser degree of precision may suffice in the definition of the specific circumstances in which the sanctions may be imposed'.

7.07 Several things transpire from this passage: firstly, the principle of legality requires a separation between (legislative) bodies stipulating administrative sanctions and the (executive) ones imposing them. This effectually reflects the competency (empowerment) of public authorities as a key concept of European public law[1060] and means that a situation in which an administrative authority created a legal basis for itself, e.g., by means of an executive order, and, hence, 'self-empowered' itself to punish could hardly be compatible with the legality requirement. Instead, democratic legitimation via a legislative procedure is necessary. Indeed, this legitimation, perceived as the input of citizens into the law-making process regarding intrusive practices of the State such as punishment (at least from the viewpoint of continental legal systems), is of heightened significance. It may furthermore lead to better quality drafting of legal provisions (especially when it comes to the clarity and proportionality of a penalty) in that these provisions receive more scrutiny from democratic representatives.[1061]

7.08 Secondly, the said clarifications stipulate the need to lay down the scale of pecuniary sanctions (thus, requiring *lex certa* of penalties) and a clear definition of those sanctions that may impinge upon fundamental rights. The formulation 'at least' in the passage hints at the very minimum standards; however, they ought to intensify when it comes to [legally defining] any situation threatening fundamental rights. This seems to be quite in line with European tendencies on the national level.[1062] Finally, the inclusion of common law, i.e. judge-made

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1059 Available in the book by Council of Europe "The administration and you" (n. 8), pp. 455–466.

1060 Ziller (n. 121), p. 169.

1061 See more on these points within the criminal law context in J. Chalmers/F. Leverick, "Criminal law in the shadows: creating offences in delegated legislation", (2018) 38 *Legal Studies* 2, pp. 221–241.

1062 For instance, German constitutional case law recognizes that 'the degree of precision relating to the imposition of sanctions should correlate with the size of the penalty', see Decision No. BvR 2559/08 of the *Bundesverfassungsgericht* of 23 June 2010. In France, fundamental rights are also considered in adjudicating on sanctions. The general jurisprudential rule is that fundamental rights can by no means be limited by the executive will; see the famous Decision of the *Conseil Constitutionnel* No. 2009-580 DC of 10 June 2009, in which administrative authorities tried to limit the right to internet use of an individual by an administrative act bearing no legal basis.

law,[1063] into the definition of 'law' may be seen as reflecting the diversity of European legal thought, i.e. the fact that in some countries the judicial creation of offences and penalties was historically allowed and no separation of powers between the legislature and judiciary was deemed necessary.[1064]

7.09 The case law of the ECtHR resonates with this approach by accepting judicial law-making or embracing an interpretation of the statutory rules in light of the meaning attributed thereto by the pertinent (domestic) case law.[1065] In fact, interpreting the term 'law' in its substantive meaning and not requiring a particular form thereof enables the ECtHR to reconcile a myriad of different instruments, varying from Acts of Parliament to bylaws and policy measures and to case law and the like, found in the forty-seven State Parties of the Convention.[1066] On the flip side, it is also plausible that the very same diversity also precluded Recommendation No. R (91) 1 from specifying what is to be understood as 'law' within its meaning. In any event, the term 'law' in the sanctioning context should be interpreted in harmony with the case law of the ECtHR wherein its more precise meaning has been expounded on numerous occasions and according to its many facets.

7.10 Principle 2 of the same recommendation, for its part, can be seen as an extension of the principle of legality and stipulates, among other things, that no administrative sanction may be imposed on account of an act that, at the time when it was committed, did not constitute conduct contrary to applicable rules, thus embedding the imperative of *nulla poene sine lege*. Moreover, it lays down two further sub-rules: firstly, that where a less onerous sanction was in force at the time when the act was committed, a more severe sanction that was introduced subsequently may not be imposed (*lex retro non agit*) (cf. MN. 7.27 et seq.); and secondly, that the entry into force, after the act, of less repressive provisions should be to the advantage of the person on whom the administrative authority is considering imposing a sanction (*lex mitior retro agit*). These principles concerning non-retroactivity of laws have clear criminal law underpinnings and once again emphasize the punitive perception of administrative sanctions within this cornerstone recommendation.

1063 "The body of law derived from judicial decisions, rather than from statutes or constitutions", Black's Law Dictionary (2014), p. 334.

1064 Timmerman (n. 16), pp. 32 et seq.

1065 See in this regard the seminal case of *The Sunday Times v The United Kingdom* (6538/74) 26 April 1979 ECtHR at [46]–[53] accepting an offence created by common law, i.e. not enunciated in legislation.

1066 Gerards (n. 121), p. 199.

7.3. Legality in the (Punitive Context of the) ECHR

7.11 The principle of legality and its relationship with administrative sanctions within the case law of the ECtHR has to be analysed by taking Article 7 ECHR as a point of departure. Even though this Article speaks of a 'criminal offence' and not of 'administrative offences' and 'administrative sanctions' the ECtHR interprets the (general) notion of punishment autonomously, i.e. going beyond appearances and assessing the substance of a particular measure. More precisely, the existence of a criminal conviction is not a decisive factor triggering the use of Article 7 ECHR (cf. MN. 7.29 et seq.). Instead the nature, purpose and severity, characterisation under national law and other elements capable of indicating a regime of punishment are taken into consideration.[1067]

7.12 Along the same lines as the *Engel* criteria is used against the 'mislabelling' tendencies of sanctioning in order to escape the enhanced procedural guarantees of Article 6 ECHR (cf. MN. 4.08), the practice of the ECtHR has attested to their conceptual (even if, as will be demonstrated below, somehow limited) suitability for shielding individuals from the very same tendencies when it comes to this substantive guarantee, i.e. the clear requirement to base punishment on law and not on the whims or political necessities of the executive. In fact, in the landmark cases in which the said criteria were conceived, the ECtHR has explicitly stated that: "if Contracting States were able at their discretion, by classifying an offence as 'regulatory' instead of 'criminal' to exclude the operation of the fundamental clauses of articles 6 and 7, the application of these provisions would be subordinated to their sovereign will… and incompatible with the object and purpose of the Convention".[1068] This means that punitive administrative sanctions could also be, and have been, included within the ambit of Article 7 ECHR, as will be explicated below.

7.3.1. Article 7 (1) ECHR: Autonomous Meaning of Punishment

7.13 As noted above, the principle of legality in the context of *ius puniendi* is enshrined in Article 7 (1) ECHR as 'No punishment without law', which the ECtHR has described as an essential element of the rule of law on multiple occasions.[1069] It prescribes that:

> 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor

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1067 See more on the concept of penalty in *Welch v the United Kingdom* (17440/90) 9 February 1995 ECtHR.

1068 See *Öztürk v Germany* (8544/79) 21 February 1984 ECtHR at [49]. See also *Engel and Others v Netherlands* (5100/71, 5101/71, 5102/71, 5354/72, 5370/72) 8 June 1976 ECtHR at [81].

1069 See the example *Varvara v Italy* (17475/09) 29 October 2013 ECtHR at [52].

shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed'.

Article 7 (1) ECHR explicitly encompasses both the *nullum crimen* and *nulla poena* components of punishment as well as international law within its wording. In its case law the ECtHR has clearly established that this provision entails, among other things, the non-retroactivity of criminal law,[1070] a prohibition on construing criminal law extensively to an accused's detriment, for instance by analogy,[1071] and a prohibition on imposing a penalty without a finding of liability (cf. MN. 7.29 et seq.). Thus, this provision – modelled on criminal law logic – is more extensive than the one found in Recommendation No. R (91) 1.

7.14 However, it has limitations too: the case law of the ECtHR clearly hints that Article 7 ECHR generally encompasses substantive guarantees and not procedural ones even if sometimes the distinction between the two is blurred since procedures are known to determine outcomes.[1072] Hence, substantive guarantees cannot be interpreted separately from procedural ones. Due to this and other considerations, in contrast to Article 6 ECHR, which enlists procedural guarantees of sanctioning, no derogations from Article 7 ECHR are allowed in times of war or other public emergencies according to Article 15 (2) ECHR. This – once again – renders a very high salience for the legality principle and is in tune with the prominent place accorded to it by Recommendation No. R (91) 1. Such 'normative harmony' is conducive to the overarching goal of the ECHR of shielding individuals from arbitrariness by setting clear legal boundaries regarding the power to punish over which the state has a monopoly. At the same time, as the following part of the thesis will demonstrate, the ECtHR 'activates' Article 7 ECHR with regard to administrative punishment somewhat parsimoniously.

7.3.2. Article 7 (1) ECHR: A Hurdle or a Blessing for Administrative Punishment?

7.15 The analysis of the case law carried out for this thesis has revealed that Article 7 ECHR, despite being an autonomous concept whose invocation bears a resemblance to the '*Engel* test', is a not-so-easily surmountable hurdle for administrative sanctions. Whereas the ECtHR is at times willing to include even 'trivial' administrative fines within the ambit of Article 6 ECHR

1070 See the example *Scoppola v Italy (no. 2)* (10249/03) 17 September 2009 ECtHR at [28].

1071 See the example *Cantoni v France* (17862/91) 11 November 1996 ECtHR at [29].

1072 For example, in *Coëme and Others v Belgium* (32492/96, 32547/96, 32548/96, 33209/96 and 33210/96) 22 June 2000 ECtHR, the ECtHR it was made clear that an extension of limitation periods through the immediate application of a procedural law – even if frustrating the expectations of the applicant – was compatible with Article 7 ECHR. See more on the link between procedures and outcomes in Della Cananea (2016, n. 4), p. 11. See also *Orlen Lietuva Ltd. v Lithuania* (45849/13) 29 January 2019 ECtHR at [97].

and subject them to the procedural guarantees set out therein,[1073] the required 'punitive connotation' or 'punitive regime' needs to be particularly strong when it comes to the application of Article 7 ECHR. The case law shows that even rather severe public order measures, such as compulsory hospitalisation measures[1074] or placement on a sexual offenders register,[1075] do not make the cut, let alone administrative sanctions of a more 'fused nature', i.e. wherein the punitive element is not especially well-pronounced and/or is blended with other aims. This is problematic because the 'hybrid' nature of administrative sanctions is a recurrent phenomenon in practice, even though for an individual on whom an administrative sanction has been inflicted it is of little importance how a particular sanction is classified, as the 'grey zones' of this typology demonstrate (cf. MN. 3.36).

7.16 This was clearly showcased in the recent judgment of *Rola v Slovenia*[1076] concerning the divestment of the applicant's license as a liquidator following his criminal conviction, i.e. placing an additional professional ban on him. This divestment was permanent and was imposed in accordance with administrative law provisions, namely the Financial Operations Act, that classified such a measure as a 'legal consequence of a conviction'. The ECtHR did not perceive this sanction to be a 'punishment' within the meaning of Article 7 ECHR in spite of its rather dense 'retributive content' for the applicant, instead highlighting its aim of ensuring public confidence in the profession at issue.[1077] As noted above, this might be attributed to the general rationale of disciplinary measures (cf. MN. 4.20), implying that "the (collective) reputation of the profession is more important than the fortunes of any individual member".[1078] Hence, Article 7 ECHR was declared not to be applicable in this case. This stands in stark contrast to the case law on 'professional bans' regarding Article 6 ECHR, in which a more *pro persona* stance has been adopted by the ECtHR (cf. MN. 4.59).[1079]

7.17 One is left to speculate why the threshold for 'Article 7 guarantees' is set so high by the ECtHR – whether it is because this provision is modelled on criminal law logic or whether it is due to its non-derogability. At the same time it has to be stated that the dividing line between

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1073 Provided that it identifies a potential danger to fundamental rights, such as structural deficiencies in a legal system, by any kind of punitive measures, see more MN. 4.30; 4.52 et seq.

1074 *Berland v France* (42875/10) 3 September 2015 ECtHR.

1075 *Gardel v France* (16428/05) 17 December 2019 ECtHR.

1076 *Rola v Slovenia* (12096/14 and 39335/16) 4 June 2019 ECtHR.

1077 For a critique, see the Partly Concurring and Partly Dissenting Opinion of Judge Kūris in *Rola v Slovenia* (12096/14 and 39335/16) 4 June 2019 ECtHR at [20]–[23].

1078 Harris/Carnes/Byrne (n. 304), p. 546.

1079 See above all *Grande Stevens and Others v Italy* (18640/10) 4 March 2014 ECtHR [GC].

ECHR articles and their guarantees is especially blurry in this context because when speaking of 'law' Article 7 ECHR alludes to the very same concept as that to which the ECHR refers elsewhere. The ECtHR demands a legal basis for any interference with fundamental rights by a public authority, as defined in the very wordings of articles 8-11 ECHR as well as in Article 1 of Protocol No. 1 ECHR.[1080] More precisely, all of these provisions encompass the words 'in accordance with the law' and 'prescribed by law' and this is the first factor that the ECtHR will take into consideration whilst assessing whether a limitation to these substantive rights was justified in a particular case.[1081] The *Rola* case is a clear example of this 'blurry' protection: even if the divestment of the applicant's license was not recognized as a punishment within the meaning of Article 7 ECHR, the domestic legal framework governing the said 'legal consequences of convictions', i.e. professional bans, was not deemed to have been reasonably foreseeable for the applicant when the ECtHR considered the same question from the perspective of Article 1 of Protocol No. 1 ECHR and the 'lawfulness' requirement enshrined therein.

7.4. Unlocking the (Content of) Legality in the Case Law of the ECtHR

7.18 As demonstrated above, Article 7 (1) ECHR, despite its 'autonomous nature', is applied with moderation when it comes to administrative punishment. It has been successfully invoked in cases concerning administrative detention, the annulment of a driving license, and the impounding of a car. All of these sanctions are of a severe nature, whereas the legality of sanctions of a 'lesser calibre' is assessed using another normative toolbox, namely the 'lawfulness' requirement entrenched in the wordings that stipulate the protection of various substantive ECHR rights, outlined above. Any interference with these rights has, first and foremost, to be based on "law" as interpreted autonomously by the ECtHR. In fact, if the requirement of lawfulness is not met in the first place, it becomes irrelevant whether the interference would have been justifiable on substantive grounds.[1082] Administrative sanctions, for their part, encroach upon property and other individual rights and, hence, most of the time

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1080 See the example *July and SARL Libération v France* (20893/03) 14 February 2008 ECtHR at [50] et seq.; *Leela Förderkreis E.V. and Others v Germany* (58911/00) 6 November 2008 ECtHR at [85] et seq.; *Dogru v France* (27058/05) 4 December 2008 ECtHR at [49] et seq.

1081 See more broadly on the requirement for lawfulness as justification of restrictions in Gerards (n. 515), pp. 198 et seq.; N. Lupo/G. Piccirilli, "European Court of Human Rights and the Quality of Legislation: Shifting to a Substantial Concept of 'Law'?", (2012) 6 *Legisprudence*, pp. 229–242; R. Weiss, *Das Gesetz im Sinne der europäischen Menschenrechtskonvention* (1996), pp. 108 et seq.

1082 See more on the 'principle of lawfulness' and the ECtHR case law building on articles 8 to 11 ECHR, Article 2 of Protocol No. 4 to the ECHR and of Article 1 of Protocol No. 1 to the ECHR in Stelkens/Andrijauskaitė (n. 7), MN. 1.43 – 1.45.

are covered by the said 'lawfulness' test in the case law of the ECtHR, which also seems to serve the very same purpose, i.e. ensuring the absence of arbitrariness by checking whether a particular (punitive) interference by a public authority was guided by law. Both approaches used by the ECtHR have been taken into consideration in order to crystalize precepts regarding the legality of administrative punishment, which can broadly be classified into 1) regulatory quality, 2) non-retrospective application of administrative punishment, and 3) the need for personal liability.

7.4.1. Regulatory Quality of Administrative Punishment

7.19 The principle of legality firstly implies the need to sustain 'regulatory quality' in administrative punishment, which encompasses manifold requirements. Among them, the foreseeability, accessibility and precision of the legal provisions on which a punitive measure is based need to be highlighted. Importantly, all of these traits ought to sufficiently enable an individual to ascertain whether or not her behaviour is lawful. In other words, individuals should know in advance which actions will expose them to the risk of sanctions by the governmental apparatus.[1083] This also necessitates that the legal provision on which the punishment is based is 'alive' and has not fallen into desuetude, as it would be extremely hard for individuals to project their behaviour considering the latter.[1084] While the accessibility requirement is usually not hard to satisfy as it demands some official publication of a relevant legal provision, and the ECtHR seldom establishes violations thereof,[1085] the foreseeability requirement (also sometimes referred to as 'fair notice') presents more challenges and is highly context-dependent, i.e. contingent upon a particular regulatory field. More precisely, the requirement depends on the regulatory content and complexity, the number, status and expertise of those to whom it is addressed, etc. In highly technical, entrepreneurial or other risky spheres, such as, for example, taxation or telecommunications law, the case law of the ECtHR invites applicants to take 'special care' in assessing the risks that their professional activity entails.[1086] However, there are certain defective practices that by their very nature are hardly compatible with the said requirement and the whole 'regulatory quality' logic.

1083 B. Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004), p. 119.

1084 E. Bleichrodt, "No Punishment without Law" in Van Dijk/Van Hoof/Van Rijn/Zwaak (n. 559), pp. 655 – 666 (p. 662).

1085 Timmerman (n. 16), pp. 86 et seq.

1086 See *Cantoni v France* (17862/91) 11 November 1996 ECtHR at [35] for entrepreneurial context; See further *Groppera Radio AG and Others v Switzerland* (10890/84) 28 March 1990 ECtHR (Plenary) at [68] for telecommunications law and *Valico S.r.l. v Italy* (70074/01) 21 March 2006 ECtHR (dec.) for construction law.

7.20 The most straightforward of these practices undermining the legality requirement is the absence of regulation. The ECtHR in its case law has expressed desiderata that not only the committal of administrative offences but also the (allowed) gathering of evidence for proving them should be clearly regulated.[1087] Another variant of the said regulatory 'malpractice' is the prolixity of laws, i.e. (over)regulation encapsulated in convoluted wordings that may well achieve the same detrimental effect by not allowing the individual to ascertain the contours of her lawful behaviour. An excessive number of blanket provisions also dilutes the legality requirement. It goes without saying that it is not possible for the legislator to cover every eventuality by statutory provisions; however, the imperative of regulatory quality calls for their application to be "sufficiently clear in the large majority of cases".[1088] Put otherwise, the law should not fail in its communicative function. The remaining interpretational doubts, inimical to any textual expression, for their part, could be dissipated through adjudication exercised by judicial authorities.

7.21 A striking example of administrative punishment in spite of a (complete) lack of provisions stipulating the required behaviour can be found in the *Vyerentsov v Ukraine* case[1089] concerning the exercise of the freedom of a peaceful assembly. More precisely, the applicant was punished for holding a demonstration in breach of the relevant procedure. The ECtHR recognized that a sanction had been imposed on him in line with domestic law, namely, the offence of a breach of the procedure for holding demonstrations was provided for by the Ukrainian Code on Administrative Offences. However, the basis of that offence, i.e. the said procedure, was not established in the domestic law with sufficient precision. Instead a tangle of unclear and somewhat contradictory provisions, some of which dated back to Soviet times, existed regarding the said procedure. Naturally, the applicant was not able to ascertain precisely what kind of action was expected from him especially because he had tried to 'follow the procedure' to the best of his understanding, which included notifying the City Council of his intention to carry out the demonstration at issue.[1090] This meant that 'the law breached' was in force but the 'law to be observed' was missing. The whole problem was exacerbated by the fact that the Ukrainian Constitution itself required regulation of such a procedure but the legislator had been

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1087 See *Kuzmickaja v Lithuania* (27968/03) 25 August 2003 ECtHR (dec.) for an interesting case of carrying out "test purchases" of adulterated alcohol.

1088 *Cantoni v France* (17862/91) 11 November 1996 ECtHR at [32].

1089 *Vyerentsov v Ukraine* (20372/11) 11 April 2013 ECtHR. See also *Shmushkovych v Ukraine* (3276/10) 14 November 2013 ECtHR.

1090 *Vyerentsov v Ukraine* (20372/11) 11 April 2013 ECtHR at [6].

inactive for over 20 years[1091] and these considerations inevitably led the ECtHR to declare a violation of Article 7 ECHR.

7.22 Furthermore, overly broad formulations, a set of loosely defined situations that are considered to be administrative offences or overly broad discretion given to the executive, will also not be compatible with the principle of legality. An example of an overly broad interpretation of what is considered to be an administrative offence leading to a sort of punishment *ad infinitum* was furnished in *Navalnyy v Russia*.[1092] In this case, the Russian legislator subjected participation in 'public gatherings, meetings, demonstrations, marches or pickets' performed in an undue manner to administrative fines stipulated by the relevant provisions of the Code of Administrative Offences. The interpretation of this legal provision was so broad that it factually resulted in penalising any kind of unwanted behaviour of political activists, including the simple fact of finding oneself amidst an impromptu group of people, which is what the applicant was sanctioned for. The said practice and its sheer regulatory breadth in empowering executive authorities to end any kind of public event and subsequently penalise those involved in it even in the absence of any nuisance led the ECtHR to declare a violation of the ECHR. This case reflects the practice that was once known in the USSR of introducing 'sweeping' definitions capable of bringing all kinds of unwanted behaviour under them as a tool of social control (cf. MN. 3.59).[1093]

7.23 Another Russian case, namely *Liu v Russia*,[1094] demonstrates that not only overly broad wordings of legal provisions or 'loose' interpretations of them but also giving overly broad discretion to the executive may also be detrimental to the 'quality of law' requirement. In fact, administrative discretion is a field in which an individual may feel particularly defenceless;[1095] thus it should be expressed with sufficient clarity, i.e. by indicating its scope and manner of its exercise, the latter of which should in no way morph into unfettered power, making the assertion of individual rights impossible.[1096] In the said case, two parallel procedures for the removal of

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1091 *Vyerentsov v Ukraine* (20372/11) 11 April 2013 ECtHR at [55]. The general rule in such cases is that the longer the state fails to repeal legislative mistakes, the harder it is to use them as a defence.

1092 *Navalnyy v Russia* (29580/12 et al.) 15 November 2018 ECtHR [GC].

1093 For example, under the term 'hooliganism' transgressive behavior ranging from joyriding, illegal broadcasting to improper or uncultured behavior could have been brought during Soviet times, van den Berg (n. 351), pp. 73–74.

1094 *Liu v Russia* (42086/05) 6 December 2012 ECtHR.

1095 Council of Europe (n. 8), p. 371.

1096 In fact, it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power, see *Weber and Saravia v Germany* (54934/00) 29 June 2006 ECtHR (dec.) at [94].

foreign nationals unlawfully residing in Russia were established within the domestic legal framework – one with attendant procedural guarantees, and the other without them or indeed any form of independent review or adversarial proceedings. This case illustrates that given a choice of procedure the executive will most likely not be induced to apply higher safeguards of individual protection against arbitrariness. Instead, it will gravitate towards a more convenient solution that enforces the executive will and escapes judicial scrutiny, as happened in this particular case; an executive order stating that a foreign national's presence on Russian territory was undesirable without giving any reasons and with no possibility of appealing against the decision was deemed to be enough by the domestic authorities, but this did not sit well with the ECtHR.

7.24 However, in the recent case law of the ECtHR it transpired that the overly broadness of regulation can sometimes be accepted, if it is consistent with the essence of the offence. In the case of *Georgouleas and Nestoras v Greece*,[1097] in a similar vein to the *Navalnyy* case analysed above, the seemingly infinite regulatory breadth of provisions outlining an administrative offence of market manipulation came under criticism. The main claim went that the Greek legislator did not specify any particular forms of disseminating inexact or misleading information that could lead to artificially influencing the price of shares (the offence of market manipulation), which *a fortiori* led to the imposition of administrative sanctions, as happened in this particular case. Instead the legislator used the expression 'in any way', i.e. the relevant administrative authority was entitled to impose administrative sanctions "on natural or legal persons who publish or disseminate *in any way* inaccurate or misleading information regarding securities …". The ECtHR, in contrast to the approach adopted in *Navalnyy*, found this to be acceptable, as consistency with the essence of the offence of such a broad formulation could be established because it was near impossible for the legislator to anticipate all of the 'creative' forms of insolent behaviour by offenders in advance. The existence of pertinent judicial decisions clarifying the impugned provision for persons who were professionals in the financial markets was a supplementary argument in reaching the conclusion that despite the critique the impugned legal provision was in fact foreseeable for the applicants.

7.25 Finally, ambiguities, antinomies or contradictions used in regulatory provisions may also very easily upset the said requirement, especially if they are compounded by inconsistent interpretation by the domestic authorities applying them and/or the judicial authorities interpreting their application. The ECtHR has time and again emphasized that in general Article

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1097 *Georgouleas and Nestoras v Greece* (44612/13 and 45831/13) 28 May 2020 ECtHR.

7 ECHR does not outlaw the gradual clarification of the rules of liability through judicial interpretation from case to case, "provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen".[1098] A glaring instance of ambiguous regulation resulting in administrative punishment was captured by the case of *Žaja v Croatia*.[1099] In this case the source of uncertainty and ambiguity was caused by inconsistency in the translation of legal sources. More precisely, the applicant's car was impounded with a view to collecting the customs debt for the alleged importation of his car upon his entry from the Czech Republic, wherein he was habitually residing, to Croatia. In addition, administrative penalties were imposed on the applicant. These measures were taken by the Croatian authorities claiming that the applicant – a Croatian national – had his 'domicile' in Croatia and, thus, failed to satisfy the conditions for exemption from payment of customs duties set forth in the Istanbul Convention on Temporary Admission, which stated that the registered owner of a vehicle registered abroad must, in order to qualify for the exemption, have his domicile outside the territory of the state into which the vehicle was being brought. The applicant, for his part, contended that the Croatian authorities had falsely equated the (original) term 'persons resident' in the Istanbul Convention with 'persons having domicile', which had a different meaning in the domestic legislation. The ECtHR found force in the arguments of the applicant and took the view that the imprecise translation of the said term that could not be clarified by consistent interpretation by the domestic authorities, resulting in the applicant's inability to foresee with the sufficient precision required by Article 7 ECHR that entering Croatia from another country in his car would constitute an offence.

7.26 Another example of 'vague' legislation upsetting the requirement for regulatory quality was *mutatis mutandis* furnished in the *Kakabadze and Others v Georgia*[1100] case. In this case the applicants were sanctioned for protesting outside a courthouse. This behaviour attracted liability under two legal provisions within the domestic legal framework between which a material difference could not be clearly established. Furthermore, their wordings, stipulating 'breach of public order' and 'contempt of court' as offences, were deemed 'vague' even by the apex domestic court. All of this was compounded by the fact that the applicants' protest was halted by the court bailiffs arbitrarily expanding the territorial application of the said provisions,

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1098 *Valico S.r.l. v Italy* (70074/01) 21 March 2006 ECtHR (dec.).

1099 The consistency of interpretation by domestic authorities is a factor that the ECtHR includes in its assessments of the ambiguity of such terms, see the example *Žaja v Croatia* (37462/09) 4 October 2016 ECtHR at [99]–[105].

1100 *Kakabadze and Others v Georgia* (1484/07) 2 October 2012 ECtHR.

i.e. by carrying out an administrative arrest of the applicants outside the courthouse whereas the law enabled them to use force exclusively inside the courthouse.[1101] This lack of regulatory quality stipulating respective liability, as well as its arbitrary application, led the ECtHR to declare that the applicants could not have reasonably foreseen that their protest would attract any liability at all.[1102]

7.4.2. Non-Retrospective Application of Administrative Punishment

7.27 Another highly important tenet for the (proper) application of administrative punishment is non-retrospective application to the detriment of the accused. It is rather evident that a public authority is not allowed to inflict administrative punitive measures for a certain socially unwanted behaviour that is established *post hoc*. However, the *Mihai Toma v Romania*[1103] case demonstrates that even this 'clear cut' rule may quickly be forsaken when it comes to more complex situations, even though it goes to the very heart of justice.[1104] In this case the Romanian legislator had changed the legal framework concerning the annulment of a driving license. More precisely, the legal provision stating that 'a driving license *may* be annulled if its owner has been convicted of a criminal offence under the regulations on driving on public roads' was changed into 'automatic annulment of the driving license' if there was a relevant conviction for a road safety offence. Both measures were to be imposed by the police. The applicant in this case was deprived of his driving license by virtue of the new law ten years after the fact, i.e. committing the relevant road safety offence.

7.28 The unfavourable change in the legal regime, namely the elimination of discretion regarding the annulment of a driving license, was not deemed to be compatible with the ECHR because in this way the applicant was deprived of the possibility of not having such a punitive measure taken against him.[1105] It was established that not only was the said *lex posterior* way more detrimental to the applicant but it also lacked any rules on retroactivity or a statute of limitations, i.e. provisions that 'operationalized' its application. This additionally resulted in a considerable lack of foreseeability for the applicant who, according to the ECtHR, must have been comforted

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1101 *Kakabadze and Others v Georgia* (1484/07) 2 October 2012 ECtHR at [59].

1102 *Kakabadze and Others v Georgia* (1484/07) 2 October 2012 ECtHR at [69].

1103 *Mihai Toma v Romania* (1051/06) 24 April 2012 ECtHR.

1104 In this regard, an eloquent example provided by legal theorist Fuller can be named, which refers to the attempt in the former Soviet Union to increase the sentence for robbery retroactively, i.e., to those sentenced for this crime in the past. This attempt provoked a strong reaction even in Soviet Union, which was not known for its adherence to the rule of law, and was perceived as a matter of justice, see B. Bix, "Natural Law Theory" in Patterson (n. 297), pp. 211–227 (p. 220).

1105 *Mihai Toma v Romania* (1051/06) 24 April 2012 ECtHR at [28].

by the thought that the police had decided not to annul his driving license years earlier when the relevant offence was committed.[1106]

7.4.3. No Punishment Without Personal Liability

7.29 As noted above, the ECtHR does not explicitly recognize the principle of personal guilt as such, as it would cause too much friction with legal systems recognizing the concept of strict liability (cf. MN. 3.13; 3.54); however, it does prohibit the attribution of responsibility for the actions of others.[1107] Thus, personal liability for committing offences needs to be established, as a string of Italian cases – *Sud Fondi*, *Varvara* and *G.I.E.M. S.r.l. and Others*[1108] – demonstrate. It should be remembered that Italy and Germany have serious reservations when it comes to applying guilt to legal persons in their national legal systems; thus, it is of no wonder that the cases at issue occurred in the context of the former (cf. MN. 3.69 et seq.). These cases dealt with non-conviction-based confiscation of property on the grounds of unlawful land development – a sanction whose 'true' nature remains heatedly debated[1109] – and can be said to be relevant for any other 'derivative' administrative sanctions.[1110] The impugned confiscation measures were imposed on the applicants in the absence of formal convictions regarding the unlawful site development, the issuing of such convictions having been barred by the statute of limitations. The ECtHR made it clear that Article 7 ECHR requires that confiscation must follow a finding of personal liability by the national courts enabling the offence to be attributed to, and a penalty to be imposed on, its perpetrator.[1111] The ECtHR, once again, went 'beyond appearances' and assessed the finding of such personal liability 'in its substance' rather than 'in

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1106 *Mihai Toma v Romania* (1051/06) 24 April 2012 ECtHR at [29].

1107 See to this effect the landmark case of *A.P., M.P. and T.P. v Switzerland* (71/1996/690/882) 29 August 1997 ECtHR, in which transferring criminal tax liability of the deceased on his inheritors was not accepted.

1108 See *Sud Fondi S.r.l. and Others v Italy* (75909/01) 20 January 2009 ECtHR, *Varvara v Italy* (17475/09) 29 October 2013 ECtHR and *G.I.E.M. S.r.l. and Others v Italy* (1828/06 et al.) 28 June 2018 ECtHR [GC]. See for a discussion on their impact on Italian law in D. Tega, "The Italian Way: A Blend of Cooperation and Hubris", (2017) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, pp. 685–713 (pp. 697–699).

1109 In fact, the Italian Construction Code classified them as 'criminal sanctions' but Italy claimed it was a 'technical' mistake (not repealed for sixteen years), and pleaded their administrative nature aimed at restoring legality and not punishing. The situation was further compounded by the fact that domestic courts considered such confiscations to be administrative sanctions, see, e.g., *G.I.E.M. S.r.l. and Others v Italy* (1828/06 et al.) 28 June 2018 ECtHR [GC] at [200], [202] and [220]; *Varvara v Italy* (17475/09) 29 October 2013 ECtHR at [49].

1110 Such as, for example, excluding tenderers from participation in a procurement procedure for violating competition law, see, e.g., the Article 57 (4) of the Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance.

1111 *Varvara v Italy* (17475/09) 29 October 2013 ECtHR at [71].

its form', noting that the applicability of Article 7 ECHR does not have the effect of imposing the 'criminalisation' by States of procedures which, in exercising their discretion, they have not classified as falling strictly within the criminal law.[1112]

7.30 Hence, the ECtHR did not see the infliction of the said sanction lacking attendant formal convictions as being at variance with the ECHR as long as the offence could have been proven to be 'made out, based on both the material element and the mental element' in compliance with the procedural guarantees of Article 6 ECHR. The so-called 'conviction in substance', even if (formally) discontinued due to statutory limitations, sufficed for the ECtHR to ascertain the existence of the said criteria and not declare a breach of the legality requirement. However, the coin was flipped when it came to some of the applicants, namely the companies at issue that were not parties to any kind of proceedings by virtue of the *societas delinquere non potest* principle recognized in Italian law. The ECtHR found this practice to be at variance with Article 7 ECHR having regard to the principle that a person cannot be punished for an act engaging the liability of another.[1113] In the present situation the companies at issue were nothing but 'third parties' to the proceedings of relevant natural persons involved in the unlawful site development; hence, they could not have been subject to the impugned confiscation measure.

7.31 Importantly, the saga of non-conviction-based punishment, even if not undisputed, as demonstrated by the range of dissenting opinions given in these cases, not only helped to cement and clarify the concept of 'personal liability' within the legality context of punishment[1114] but also once again demonstrated the link between substantive and procedural protection within the framework of the ECHR. Finally, the 'conceptual blessing' of administrative punishment was reconfirmed: the ECtHR made it clear that the 'criminal logic' of Article 7 ECHR is not a hindrance to Member States diversifying their 'legal responses' to a variety of socially unwanted practices (cf. MN. 6.31). This seems to be in line with the 'push towards decriminalization' of the legal systems of the Member States, expressed in the very first cases dealing with administrative sanctions (cf. MN 4.04). However, such openness should by no means be equated with an unbridled 'license to punish' because the ECtHR also made it clear that it is ready to defend compliance with the procedural safeguards embedded in the ECHR, which ought to shield individuals from the a state exercising *ius puniendi* in arbitrary ways.

1112 *G.I.E.M. S.r.l. and Others v Italy* (1828/06 et al.) 28 June 2018 ECtHR [GC] at [253].

1113 *G.I.E.M. S.r.l. and Others v Italy* (1828/06 et al.) 28 June 2018 ECtHR [GC] at [274].

1114 The very same question may come to the fore also in the context of fairness of proceedings. See for the claim that 'collective administrative liability' was inflicted on the applicants in *Tuskia and Others v Georgia* (14237/07) 11 October 2018 ECtHR.

7.5. Conclusion

7.32 The tendency of the ECtHR to apply the embodiment of the principle of legality – Article 7 ECHR – autonomously and go beyond a domestic legal designation of a particular punitive measure is laudable. This provides a solid bulwark against the ever-enticing possibility of Member States watering down standards of individual protection by 'mislabelling' punitive measures. It furthermore unlocks a host of 'quality-of-law' standards regarding administrative sanctions as well as requiring CoE Member States to refrain from pernicious retrospective punishment practices and from giving unfettered (misuse of) discretion to administrative authorities that at times degenerates into executive arbitrariness. At the same time the analysis performed above has somewhat paradoxically shown that this tendency is marked by parsimony. The ECtHR appears to wish to reserve the application of Article 7 ECHR to the most severe punitive measures with dense retributory content, be they criminal or administrative. By doing so, however, it excludes from its scope such sanctions as, for example, professional bans by overemphasizing their preventive goals but overlooking the actual deleterious effects of a punitive character on the individual as seen from the intrinsic viewpoint of punishment. In extremis, this results in a jurisprudential 'cacophony', i.e. attributing procedural safeguards to these types of sanctions when it comes to applying Article 6 ECHR but not fully granting the substantive protection enshrined in Article 7 ECHR.

7.33 Put differently, the rather high threshold required by the ECtHR to trigger the application of Article 7 ECHR for administrative punishment is capable of leading to the weakening of individual protection and not providing effective safeguards against arbitrary punishment practices. This, in turn, may not be fully compensated for by performing the 'test of lawfulness' embedded in other provisions of the ECHR because Article 7 ECHR is modelled on criminal law logic and thus offers a higher level of protection due to its formal character and strict binding force when contrasted with the generally accepted principles of administrative law.[1115] Moreover, Article 7 ECHR bears an expressive (awareness-raising) value that is especially significant in punitive domains of law (cf. MN. 4.46). Currently, the relationship between administrative punishment and the principle of legality can be described as a fused one with no evident conceptual sharpness between the application of Article 7 ECHR and the test of lawfulness. This seems to be partially predetermined by the binary nature of the principle of legality, namely it being a general prerequisite for every manifestation of public action and

[1115] Schwarze (n. 1047), cxxvi.

acquiring an enhanced 'dignitarian' meaning and undertones when it comes to administrative punishment.

7.34 A modicum of caution should thus be used in this principle's mode of application to make sure that inconsistencies in the case law are avoided and the level of protection is not diluted because administrative punitive measures reflect a strong form of public censure. Hence, their drafting should be imbued with precision and clarity and kept under scrutiny, not only to help people transgress less by enabling them to plan their legal actions and consider their consequences but also for the people who are called upon to apply the said sanctions. The principle of legality should in any event be construed in a broad manner, as stipulated by Recommendation No. R (91) 1, given the fact that not all of the questions posed at the beginning of this part of the thesis have yet been answered conclusively in the case law of the ECtHR.

7.35 Whereas the case law on regulatory quality regarding the definition of administrative offences (the *nullum crimen* side) as a bulwark against unfettered administrative discretion or other forms of arbitrariness, as well as precepts such as 'no retroactive punishment' and 'no punishment without personal liability', is quite well-developed, many vexing questions touching upon the '*nulla poena*' side of the notion of the principle of legality, i.e. connected to the precision and proportionality of penalties themselves as well as culpability principle, remain unanswered.[1116] The recent case of *Jónsson and Ragnar Halldór Hall v Iceland* is a testament to that because the ECtHR was confronted with the question of whether the absence of an explicit statutory ceiling of a fine was compatible with the ECHR, especially considering that the applicants had received fines that were ten times higher than in previous domestic case law.[1117] The ECtHR, however, declined to answer this question (which was dubbed as a 'missed opportunity' by some of the dissenting judges) in that it held the application to be inadmissible (cf. MN. 4.26).

7.36 The indications found elsewhere also allude to the fact that the ECtHR might be intentionally – in line with the principle of subsidiarity – avoiding this question and steering clear of national sentencing solutions: "the case-law of the Convention institutions on Articles 6 or 7 contains

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[1116] For example, in the *Janosevic v Sweden* (34619/97) 23 July 2002 ECtHR, the ECtHR made an observation that tax penalties at issue "have no upper limit and may come to very large amounts" but it did not go on to assess the compatibility of this fact with the ECHR (since it was not the matter of the dispute). Furthermore, in *Valico S.r.l. v Italy* (70074/01) 21 March 2006 ECtHR (dec.), the ECtHR noticed that the domestic courts could not deviate from administrative penalties fixed *ex lege*, but again paid deference to this as "a choice of legislature".

[1117] See *Jónsson and Ragnar Halldór Hall v Iceland* (68273/14 and 68271/14) 22 December 2020 ECtHR [GC].

no authority in which a legislature has been censured for laying down a fixed sentence or the courts required to 'adapt' such a sentence to the circumstances of the case".[1118] However, this negates neither the pressing nature of this question nor its corrosive potential towards the application of other principles (such as *lex mitior*).[1119] Thus, it seems that it will only be a matter of time before the ECtHR will eventually be confronted with this issue as more and more punitive powers are making their way into the modern regulatory state in the guise of administrative sanctions,[1120] bringing along rules on sentencing as reflected in various legal acts.[1121]

1118 See *Göktan v France* (33402/96) 2 July 2002 ECtHR at [58].

1119 It seems to be impossible to know how to apply *lex mitior*, if the maximum penalty was not set in the first place, Bleichrodt (n. 1084), p. 662.

1120 The burgeoning field of data protection and the exorbitant fines prescribed therein illustrate the point quite well, see n. 699. In the future, adjudication on the 'human rights' dimension' of these fines is likely to spill over to the ECtHR, as has happened with, for example, competition law.

1121 See the example Kert (n. 9), p. 99 on these rules in EU market abuse regulation. See further in competition law and the tension between sentencing practice and the principles of equal treatment and proportionality in A. Möhlenkamp, "Die europäische Bußgeldpraxis aus Unternehmenssicht" in J. Schwarze (ed.), *Instrumente zur Durchsetzung des europäischen Wettbewerbsrechts: Regelungstechniken, Kontrollverfahren und Sanktionen* (2002), pp. 121–133.

CHAPTER 8
REFLECTIONS AND OUTLOOK FOR THE FUTURE

"In the area of human rights he who can do more cannot necessarily do less"
ECtHR

8.1. General Considerations

8.01 Over time the policy-makers and legislators have sought ways to simplify, diversify and expedite punishment in parallel with the regulatory cobweb, which is growing wider in a modern-day society. All of this was fuelled by the pressing need to ensure 'fast and cheap' compliance with law, voiced by the CoE Member States, which, among other things, implied unburdening the courts as the primary actors in punishment. Put otherwise, the age-old *nulla poena sine judicio* maxim was no longer applied. Decriminalisation, which started in 1970s in Europe and entrusted administrative authorities with the task of punishment in certain domains (especially the road traffic), marked the first step in the said direction and was later followed by the (more advanced) system of so-called admonitory fines, 'smart sanctions' or even the privatisation of administrative sanctioning altogether. Besides this, the institutional division of labour by means of a dual-track enforcement born out of complicated legal contexts with diffuse enforcement options (cf. MN. 3.65 et seq.) as well as the need to find surrogate penalties in lieu of criminal fines for legal persons (cf. MN. 3.69 et seq.) have also fuelled the proliferation of administrative sanctions in Europe.

8.02 The ECHR itself is silent on administrative law, let alone administrative sanctions and yet the ECtHR has crafted efficient hermeneutical tools that have allowed it to keep abreast of the 'legal reality' instead of appearances. The ECtHR does not tie its interpretation to formal conceptions when it comes to such crucial terms as 'criminal charge', 'penalty' and the like but opts for substantive and autonomous approaches that enable it to go beyond the textual limitations of the ECHR. Furthermore, by dismantling the 'false labels' attached to national punitive measures a coherent theory of *ius puniendi administrativus* could be developed by the ECtHR. Considering that the ECtHR does not explicitly deal with administrative sanctions, one can conclude that it has developed and amassed an impressive body of standards applicable thereto. This is even more striking knowing that disentangling administrative sanctions from criminal ones is not always an easy task given their conceptual and historic kinship. What is more, this autonomous approach has allowed the ECtHR to eradicate faulty and arbitrary practices of administrative punishment and has even spurred changes in the domestic legal systems that are riddled with such practices.

8.03 In fact, due to the ECtHR's consistent efforts, long gone are the days of 'wild (administrative) punishment': the pervasive practice of putting people in prison for administrative transgressions as a mental legacy of the Soviet punitive tradition, in which the pettiness of the offence barely correlated with the graveness of the sanction (cf. MN. 3.59), denying a tribunal in sanctioning matters (cf. MN. 5.23 et seq.) or 'rubberstamping' administrative decisions (sometimes the courts even being provided with the standard forms to fill in by the police officers instead of adopting judgments of their own, cf. MN. 5.52 et seq.) as well as conducting proceedings very hastily and not furnishing adequate time and facilities for defence for the applicants are no longer allowed (cf. MN. 5.67 et seq.). Although these practices were mostly prevalent in post-socialist Member States, the 'pathologies' in administrative punishment spun from East to West. In the latter category, countries such as France, Italy and Switzerland were also employing opaque practices of sanctioning: failing to disclose the identity of the persons who administered the sanctions (cf. MN. 5.47), not installing enough 'check and balances' in administrative sanctioning procedures to ward off 'prosecutorial bias' and fusing different functions within administrative authorities instead (cf. MN. 5.36 et seq.), not disclosing the case file to the applicant in its entirety (cf. MN. 5.65 et seq.) or holding hearings in secret (cf. MN. 5.35), limiting the subsequent judicial review of administrative sanctions (cf. MN. 5.45 et seq.) and the like.

8.04 The latter has proven itself to be an essential condition in the eyes of the ECtHR due to the significant place a judicial review holds in a democratic society. In fact, not any kind of judicial review will do, only the one bearing an array of various safeguards whose totality form the quintessential notion of a 'fair trial'. Importantly, the full jurisdiction of national judicial bodies which – it goes without saying – ought to be independent and impartial is expected and the ECtHR treats limitations in their adjudicatory function with circumspection. The change visible in the ECtHR's work with regard to administrative punishment was mutual: not only did the ECtHR influence the domestic legal systems, so that they stayed compliant with the ECHR safeguards, but it itself could not remain immune to the needs of the Member States and made concessions in the reading of the ECHR. The case of *ne bis in idem* in which the ECtHR absorbed the 'Scandinavian way' (cf. MN. 6.24 et seq.) and the ECtHR endorsing fines modelled as a percentage of the unpaid tax by domestic laws as catering for the needs of fiscal efficiency (cf. MN. 3.105) illustrate the point.

8.05 Whereas the ECtHR's impact is impressive when it comes to the procedural dimension of administrative sanctioning, its work is not without limitations. It was time and again emphasized in the case law that by using Article 6 ECHR, the ECtHR could not control the

content of a State's national law, hence its substantive dimension (cf. MN. 5.02). The legality principle embedded in (a separate) Article 7 ECHR has also been applied with parsimony (cf. MN. 7.01 et seq.). The ECtHR has reiterated that it is the task of the domestic courts to determine the proper punishment according to the circumstances of the case.[1122] This means that some significant aspects relating to administrative sanctions remain unexamined or pushed to the margins of the ECtHR's work. More precisely, the quality of sentencing practices ('*nulla poena*' side of the legality principle) remains underdeveloped, even though some of the 'national solutions', like stipulating penalties with no upper ceiling, are, for lack of a better word, cringeworthy in view of individual protection (cf. MN. 7.35). The same holds true for the proportionality requirement.[1123] It should not be forgotten that if penalties are not proportionate, then they can impair the very essence of the ECHR rights, let alone commit great injustice in regard to the sanctioned individuals. What is more, historically, this requirement turned out to be crucial for judges to control how the administration excercised its power.[1124] However, one is left searching for guidance towards its application in the case law dealing with other ECHR rights (since it is like the legality principle inherent in the whole ECHR, thus, resulting in a 'fused protection' mechanism).[1125]

8.2. The Verification of Hypothesis

8.06 This thesis started out with an ambitious quest to gauge the scope of protection that the individual confronted with administrative sanctions could expect within the (rather uncharted) normative framework of the CoE. It was furthermore driven by an urge to find out whether there is a minimum core of 'ironclad' guarantees stemming from the ECHR, i.e. those that the ECtHR allows no derogations from whilst imposing administrative sanctions; or, on the contrary, whether the ECtHR is willing to trade all of them or some of them away for efficiency's sake. Before shedding light on the possible answers to these questions it has to be

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1122 See, e.g., *Pirttimäki v Finland* (35232/11) 20 May 2014 ECtHR at [64].

1123 Only in rare occasions will the ECtHR step in and check the substantive dimension of penalties within the context of Article 6 ECHR. See to this effect, *Mamidakis v Greece* (35533/04) 11 January 2007 ECtHR, in which it was stated that the imposition of customs fines in question had dealt such a blow to the applicant's financial situation that it amounted to a disproportionate measure in relation to the legitimate aim pursued. The ECtHR also condems the combined use of penalties and confiscation at the same time, see more in n. 302.

1124 S. Boyron/Y. Marique, "Proportionality in English Administrative Law Resistance and Strategy in Relational Dynamics", (2021) *Review of European Administrative Law* 1, pp. 65–93 (p. 68).

1125 This occurs in examples such as Article 8 or Article 11 ECHR (media law or the right to freedom of peaceful assembly); see, e.g., *Galstyan v Armenia* (26986/03) 15 November 2007 ECtHR, in which the ECtHR found that the sanction of deprivation of liberty for three days for participating in an authorised and peaceful street demonstration impaired the very essence of the right to freedom of peaceful assembly.

stated upfront that two important factors relating to the 'normative architecture' of the ECHR should be considered: firstly, the answers are directly connected to the determination of what is considered an administrative sanction within the relevant framework. In fact, the research has shown that in order to attract the ECHR's protection an aggravated measure has to firstly find its way into the ECHR's proverbial orbit, i.e. it has to be deemed 'punitive and deterrent' by the ECtHR, which makes this determination on the basis of its own, autonomous criteria (cf. MN. 4.31 et seq.). If the measure fails to qualify as 'punitive and deterrent' then it can still attract some of the ECHR guarantees but no sure-fire way to achieving that is guaranteed and the protection most likely will be weaker (for example, a withdrawal of a license as an administrative sanction may still gain protection under the 'civil limb' of Article 6 ECHR but no 'enhanced protection' should be expected).

8.07 Secondly, another methodological issue that should be taken into consideration before drawing conclusions is the fact that the ECtHR does not always interrogate whether breaches of Article 6 (3) ECHR have taken place, i.e. forming most of the guarantees of the said 'enhanced protection' if a violation required by Article 6 (1) ECHR is established. The ECtHR is primarily concerned with ensuring a 'fair trial' and if the Member States manifestly fail on the abstract level in doing so, then the modalities of these failings, i.e. the possible breaches of Article 6 (3) ECHR, are sometimes no longer the centre of attention. In concrete terms, this means that it can be harder to gain conclusive answers when it comes to different guarantees that lie closer to the 'criminal core' of the ECHR and gauge the extent of their applicability to administrative punitive matters. Finally, even though the ECtHR views administrative sanctioning as an 'organic', multi-pronged system, it focuses primarily on the judicial level as predetermined by Article 6 ECHR. This means that the procedural safeguards that could have been invoked at the administrative (sanctioning) level tend to slip under the radar and remain undeveloped as the general attitude of the ECtHR is that a judicial review by a court with full jurisdiction is able to compensate for these shortcomings (cf. MN. 5.44). There is nothing hindering the ECtHR from being more proactive and formulating procedural safeguards at the earliest (sanctioning) level possible; in a similar vein, the reticence of the ECHR about administrative law did not prevent it from developing an array of 'good governance' standards.

8.08 All in all, the research has credibly shown that there is a minimum core of 'ironclad' guarantees, as mentioned above. However, they are also coincidental with the 'very basic' and unbending and explicit requirements of a 'fair trial'. More concretely, the analysis has identified that access to a judicial review (cf. MN. 5.23 et seq.), publicity of sanctioning (cf. MN. 5.35; 5.47) and providing access to the case file (cf. MN. 5.64) are absolute necessities whilst

imposing administrative sanctions. Furthermore, guarantees falling under the rubric of 'good governance' (such as the duty to give reasons [cf. MN. 5.52] or the reasonable time requirement [cf. MN. 5.13 et seq.]) – a notion advanced by the ECtHR – can also be claimed to be non-derogable (also at the administrative level). The view, however, becomes more blurred when it comes to the application of guarantees usually associated with the criminal law paradigm to administrative sanctions. Here the trade-offs are discernible: for example, the right to remain silence or the presumption of innocence in administrative punitive matters is not given full force by the ECtHR (cf. MN. 5.101 et seq). In addition, the imposition of punitive administrative sanctions together with criminal law measures (the so-called 'calibrated regulatory approach') is further testament to the fact that the ECtHR is not ready to equate administrative sanctions with criminal law sanctions and ban their double use altogether (cf. MN. 6.27 et seq.). At the same time, more stringent judicial review, which includes the right to appeal, can be expected when it comes to punitive administrative sanctions of (a serious enough) character (cf. MN. 5.57 et seq.) than to any kind of aggravating administrative measures, which as a rule fall under the 'civil limb' of Article 6 ECHR.

8.09 It is debatable whether the ECtHR should ascribe wider protection to administrative sanctions. The viable 'legal infrastructure' is already there and the ECtHR has made use of it many times, in order to respond to arbitrary tendencies in sanctioning. In certain cases, this would certainly be unwarranted and defy the very rationale of administrative sanctions being a cheaper and more efficient means to ensure compliance with law tackling more trivial transgressions, despite the 'fluid' and ever-present proximity to criminal law measures. However, what would be welcome from the perspective of human rights and, above all, legal certainty is a more precise articulation of what is considered an administrative sanction and the more frequent use of an 'intrinsic approach', as will be explicated below.

8.3. Recommendations

8.10 As mentioned above, the ECtHR, by using autonomous means of interpretation and developing idiosyncratic and innovative tests, has been successful in dismantling the 'false labels' of various punitive sanctions and the incredible 'creative' potential of the Member States in disguising them under various monikers (cf. MN. 4.08). However, in the punitive context it is not sufficient to have hermeneutical devices 'at the ready'; what is even more important is to consider the wider 'real-life' effects that the aggravating measures may cause to those at the receiving end. By turning to extraneous and 'feeble' criteria such as 'general scope [of a legal provision]' (cf. MN. 4.26 et seq.) or 'stigma' and the adjacent 'hard-core and periphery

discourse' (cf. MN. 4.46 et seq.) the ECtHR has not always achieved this, which has resulted in divergent case law and, thus, deficits in individual protection and jurisprudential unpredictability.

8.11 More precisely, not all cases have been granted an equal amount of 'enhanced protection' by the ECtHR, although the indicia stemming from the individual situations of the applicants clearly militated for it: a fine may be trivial in terms of the 'absolute numbers' and, thus, easily discarded as not worthy of attracting a 'more stringent protection' but it may constitute a substantial part of the applicant's livelihood, as the case of the student in Moldova and his humble scholarship shows (cf. MN. 4.39). A pecuniary penalty might be derisory in size but destroy the reputation of the applicant, which, for its part, may be immeasurable, as the case of the hotel owner accused of allowing prostitution in his premises shows (cf. MN. 4.50). Finally, even meagre fines may spur a chain of negative 'prejudicial consequences', e.g., a breach of a traffic rule and the sanction imposed as a consequence may subsequently result in the applicant not being able to receive a full insurance pay-out (cf. MN. 4.68).

8.12 Moreover, further discrepancies in the case law are glaring when it comes to the application of the ECHR's safeguards towards disciplinary sanctions, such as an order to pay exorbitant penalties for damage done to taxpayers or professional bans (cf. MN. 1.22; 4.22; 4.23; 7.16). Sometimes the ECtHR equates them with sanctions that are 'punitive and deterrent' in their essence and, thus, affords enhanced protection, but at other times the lack of the 'general scope' of legal provisions from which the relevant regulatory content originates is perceived as a hurdle to gaining more protection. More coherence regarding this point would be welcome and it could be achieved by elaborating in a more systemic and abstract way what is considered to be 'punitive and deterrent' [in terms of the nature of a sanction] within the meaning of the ECHR (cf. MN. 4.40) instead of emphasizing the 'general scope' requirement. These former parameters form the very crux of admitting a sanction into the body of the ECtHR's case law. Thus, specifying the modalities of them whilst simultaneously keeping an eye on the pernicious 'intrinsic' effects that sanctions may bring about would serve individual protection better than the reliance on the elusive division line between purely 'professional' versus 'administrative' measures, as the two tend to mix.

8.13 An 'intrinsic' approach focusing on what is really at stake for the applicant and conceiving sanctions as 'compelling inner impulses' (cf. MN. 2.26 et seq.) would furthermore facilitate the grasping of their complexity and their variegated nature, as shown by the intricacies found in their typology (above all, the phenomenon of hybridization of sanctions' aims, cf. MN. 3.36 et

seq.), in particular, considering the fact that most of the time the formal ‘designations’ of sanctions come down to legal policies, which, for their part, are determined by ‘fluid’ societal and temporal factors. The current broadening of the person-related sanctions catalogue (especially in the competition and financial markets law domains) also calls for a tailored, person-related approach to fully grasp their intricacies. Eventually, the punishment is in the eye of beholder and the ECtHR should account for that in order to be better equipped to meet the new forms of individual repression that are under way and the challenges that they will bring, be it new administrative liability concerns in fledgling domains like data protection or market regulation (cf. MN. 4.42) or remedial administrative sanctions with clear punitive undertones that the ‘extrinsic’ criteria invoked so far are not always capable of fully responding to (cf. MN. 4.46).

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Protocols, Resolutions, Declarations, Communications, Proposals, Research Notes

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Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions COM(2011) 293 final 'On

the protection of the financial interests of the European Union by criminal law and by administrative investigations: An integrated policy to safeguard taxpayers' money' of 26 May 2011

Explanatory Report ETS No. 117 to the Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 24 November 1984

European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)

Research Note on "Cumulation of administrative and criminal sanctions and the *ne bis in idem* principle" by the Directorate-General for Library, Research and Documentation of March 2017

Summary

This thesis explores the principles of administrative punishment under the European Convention of Human Rights (ECHR). Administrative punishment, for its part, is gaining popularity across European legal systems because it is a flexible, speedy and cost-efficient option. More precisely, it allows public authorities to inflict punishment without having to undergo a judicial action. The procedural safeguards that the concerned individual can expect are accordingly lower. However, whilst at the national and European Union levels the academic attention grew in line with the gradual expansion of the use of administrative punishment, the same cannot be said regarding the legal framework of the Council of Europe ('CoE'). Comprehensive scholarly works on the subject matter are still missing and only a few authors are researching administrative sanctions within this framework more profoundly, i.e., in a cross-cutting manner.

This is regrettable because nowadays, one can speak of a rich and congruent body of administrative punishment under the CoE's law. Not only has the European Court of Human Rights (ECtHR) admitted administrative sanctions within its remit since the famous Engel case in 1976, but it also interprets all relevant terms found in the letter of ECHR such as 'criminal charge', 'penal procedure', and 'penalty' autonomously and in harmony with one another. Autonomous interpretation of these key terms by using Engel criteria means that administrative sanctions can, and often are, put under scrutiny (as long as they bear 'punitive' and 'deterrent' hallmarks). All in all, the following normative sources can be said to comprise the ius puniendi administrativus within the legal framework of the CoE: First, Article 6 ECHR, which ensures the procedural protection for administrative sanctioning by enshrining the right to a fair trial and its various components, i.e., by laying down a range of participatory and defence rights, as well as the possibility to have access to judicial review and the presumption of innocence. Secondly, Article 4 of Protocol No. 7 to the ECHR, which stipulates ne bis in idem principle precluding double jeopardy. Thirdly, Article 7 ECHR is essential in giving substantive protection to the subject-matter, and lays down the requirement of legality including regulatory quality, non-retroactive application of administrative sanctions, and no punishment without personal liability. Finally, Recommendation No. R (91) 1 of the Committee of Ministers to the Members States on administrative sanctions of 13 February 1991 as a 'soft' yet authoritative legal act creates boundaries for acceptable administrative sanctioning. All of these normative sources form the backbone of the research.

This thesis intends to fill the aforementioned academic gap and contribute to the legal scholarship. It furthermore aspires to be a useful source for practitioners working within the field of public law who are empowered to regulate on or impose administrative sanctions. For this reason, the following research questions are tackled: What is a sanction? What purposes does it serve in a legal system? What is an administrative sanction in particular? What are its role and idiosyncratic features? What aims does it follow? How can it be differentiated from other types of public admonition, i.e., from criminal law measures? How do the CoE and the ECtHR conceptualize an administrative sanction? What guarantees stipulated by the ECHR are applicable to these sanctions? To what extent do they apply? Are there any limitations? If so, then what are the implications thereof on the individual rights? Is the current level of protection in the field of administrative punishment regarding fundamental rights sufficient?

The thesis has furthermore sought to verify the following hypothesis: "The ECtHR acknowledges certain minimum requirements stemming from the ECHR from which the administrative authorities imposing a punitive administrative measure upon the individual, cannot deviate". The hypothesis was drafted similarly to the wording of Article 6 (3) ECHR, which, together with other paragraphs of this Article, enlists fundamental individual guarantees for (any kind of) punishment ("Everyone charged with a criminal offence has the following minimum rights […]").

This thesis is structured in view of the questions that it tackles. After the introductory part, which together with the last chapter, serves to frame the thesis (Chapter 1 and 8 respectively), Chapter 2 is dedicated to exploring the perception of a sanction in legal theory. Chapter 3, for its part, continues by enhancing the doctrinal understanding of an administrative sanction. For this purpose, this chapter firstly illustrates diversity in the perception of administrative sanctions on the European plane. It then goes on to discuss a couple of positivistic and doctrinal attempts to define administrative sanctions as well as their conceptual insufficiencies, the typology of administrative sanctions according to their aims and traditions, and their differences from criminal sanctions. Chapter 4 contextualizes the previous theoretical ponderings and explores the notion of an administrative sanction within the chosen normative framework of the CoE, including its genesis and its gradual percolation into the case law of the ECtHR. Chapter 5 turns to the most extensive part of the research, i.e., the procedural guarantees of administrative punishment as developed by the ECtHR, and analyses their application. Above all, these guarantees include various declinations of Article 6 ECHR which protects the right to a fair trial. Chapter 6 is dedicated to the exploration of the principle of ne bis in idem encapsulated in Article 4 of Protocol No. 7 to the ECHR regarding administrative punishment. Finally, Chapter

7 addresses a topic of less academic interest, but that is no less significant in terms of administrative punishment, the principle of legality that stems from Article 7 ECHR.

The thesis uses the common methods employed in doctoral legal theses. However, the primary focus is placed on the analysis of the ECtHR's case law because the author of this thesis holds the strong belief that it is the case law that is the real currency of the lawyer and the 'lifeblood' of the law itself. Among other methods, literal (textual), systemic (contextual), logical and analytical, functional, historic, diachronic, descriptive and comparative, and teleological (purposive) methods, are employed in this thesis. They naturally merge and build on one another, as none of them is sufficient in itself to gain a clear view of such a complex topic.

The thesis reveals that the ECtHR has developed and amassed an impressive body of standards applicable to administrative punishment. In fact, the ECtHR has time and again defended standards of individual protection against so-called 'mislabelling' tendencies by the CoE Member States, i.e., the arbitrary practice of using administrative punishment in cases deserving enhanced safeguards offered by a criminal procedure. The thesis has furthermore confirmed the hypothesis outlined above, and that anyone confronted with administrative punishment should expect the existence of a minimum core of unwavering guarantees, according to the case law of the ECtHR. However, these guarantees are also coincidental with the 'very basic', unbending, and explicit requirements of a 'fair trial' according to the key notion embedded in Article 6 ECHR. More concretely, the access to a full judicial review, which needs to be performed by 'independent and impartial' authorities, publicity of sanctioning, and access to case file are absolute necessities for the imposition of administrative sanctions. Furthermore, guarantees falling under the rubric of 'good governance', such as the duty to give reasons or reasonable time requirement – a notion advanced by the ECtHR, can also be claimed to be non-derogable (which also occurs at the administrative level).

The ECtHR's stance gets, however, more blurred when it comes to the application of guarantees usually associated with criminal law paradigm to administrative sanctions, i.e., the application of the guarantees found in Article 6 (2) and (3) ECHR. Here the trade-offs are discernible: the right to remain silent or the presumption of innocence in administrative punitive matters are not given full force by the ECtHR. In addition, the imposition of punitive administrative sanctions together with criminal law measures (the so-called 'calibrated regulatory approach'), is another testament to the ECtHR not being ready to equate administrative sanctions with criminal law sanctions and ban their double use altogether. The

legality imperative, for its part, is applied with parsimony and ‘criminal colouring’ of the impugned sanction, and must be especially strong for Article 7 ECHR to be invoked.

The thesis concludes with the idea that even though the ECtHR views administrative sanctioning as an ‘organic’, multi-pronged system, it primarily focuses on the judicial level as predetermined by Article 6 ECHR. This means that procedural safeguards which could have been invoked at the administrative sanctioning level, tend to slip under the radar and remain undeveloped, considering the general attitude of the ECtHR is that a judicial review done by a court with full jurisdiction is able to compensate for these shortcomings. This approach is regrettable, as there is nothing hindering the ECtHR to be more proactive and formulate procedural safeguards at the earliest possible sanctioning level, as the two evidently impact one another. What is more, ‘punitive and deterrent’ aims as defining parameters of a sanction could be elaborated in a more systemic and abstract way. This lack of a conceptual approach (substituting it with an in concreto assesment of circumstances), may become even more acute in the future as it appears to be only a matter of time until the further hybridisation of the aims and the forms of sanctions takes place. Simultaneously, the consideration of the pernicious ‘intrinsic’ effects that the administrative sanctions may bring about to the applicants should supplement the Engel criteria. These criteria have proven themselves to be efficient hermeneutical devices overall, but sometimes they also failed to consider the wider ‘real-life’ effects that the aggravating measures may cause to the ones at the receiving end. Eventually, the punishment is in the eye of beholder. The ECtHR should account for this in order to be better equipped to meet the new forms of the individual repression underway, and the challenges that they will bring – be it new administrative liability concerns in fledgling domains, like data protection or market regulation.

Santrauka

Šis disertacinis tyrimas nagrinėja administracinį baudimą Europos žmogaus teisių ir pagrindinių laisvių apsaugos konvencijos plotmėje (toliau – ir EŽTK). Tyrimas yra aktualus, nes administracinis baudimas, būdamas lankstesniu, greitesniu ir pigesniu už baudžiamąjį procesą, vis labiau skverbiasi į Europos teisines sistemas. Kitais žodžiais tariant, asmenį baudžiant administracine tvarka, galima išvengti pirminio teismų įsitraukimo. Procedūrinių teisių, kurių gali tikėtis baudžiamas individas, apimtis atitinkamai mąžta. Nors Europos Sąjungos bei atskirose nacionalinėse teisinėse sistemose akademinių tyrimų gausėjo sulig administracinio baudimo skverbimųsi į šias sistemas; tas pats nepasakytina apie Europos Tarybos plotmę. Priešingai – joje vos keli autoriai yra išleidę publikacijas, nagrinėjančias specifinius administracinių sankcijų taikymo klausimus, o bendresnių ir išsamesnių tyrimų minėtąja tema iki šiol stinga.

Toks akademikų dėmesio ir darbų administracinio baudimo tema stygius glumina, nes Europos Taryba šioje srityje yra suformavusi daug vertingos praktikos. Europos žmogaus teisių teismas (toliau – ir EŽTT) dar 1976 m. kelrodėje *Engel* byloje išaiškino, jog administracinės sankcijos gali patekti į šio teismo jurisdikciją, jeigu atitinka tam tikrus kriterijus. Be to, EŽTT tokias kertines sąvokas kaip „baudžiamasis kaltinimas“, „baudžiamasis procesas“ ir „bausmė“ savo jurisprudencijoje aiškina sistemiškai ir vieningai. Administracinės sankcijos EŽTT yra dažnai nagrinėjamos, vadovaujantis būtent *Engel* byloje suformuluotais kriterijais, jeigu ginčijama sankcija yra „baudžiamojo“ ir „atgrasomojo“ pobūdžio. Apibendrinant galima teigti, jog šių normatyvinių šaltinių visuma sudaro Europos Tarybos *ius puniendi administrativus* bei šio disertacinio tyrimo šerdį: EŽTK 6 straipsnis, užtikrinantis procedūrinę administracinėn atsakomybėn traukiamo asmens apsaugą, teisę į teisingą teismą ir nekaltumo prezumpciją. Be šio kertinio straipsnio, tyrimui taip pat aktualus Septintojo protokolo 4 straipsnis, įtvirtinantis dvigubo nebaudžiamumo (*ne bis in idem*) principą bei EŽTK 7 straipsnis, įtvirtinantis teisėtumo principą, apimantį teisėkūros kokybę, administracinių sankcijų taikymo atgaline tvarka draudimą bei draudimą bausti nenustačius asmeninės atsakomybės už padarytą pažeidimą. Europos Tarybos 1991 m. vasario 13 d. rekomendacija Nr. R (91) 1 „Dėl administracinių nuobaudų“ savo ruožtu yra nagrinėjama kaip teisiškai neįpareigojantis, tačiau autoritetingas teisės aktas, brėžiantis administracinio baudimo ribas.

Disertaciniu tyrimu yra siekiama užpildyti pirmiau minėtą akademinę spragą, tokiu būdu prisidedant prie teisės mokslo. Jis taip pat turėtų būti vertingas šaltinis viešojo administravimo

subjektams bei kitiems viešosios teisės praktikams, susiduriantiems su administraciniu baudimu savo veikloje. Disertacijoje nagrinėjami šie pagrindiniai klausimai: Kas yra sankcija? Kokių tikslų taikant ją yra siekiama teisinėje sistemoje? Kas yra administracinė sankcija? Kokia yra jos reikšmė, skiriamieji bruožai ir tikslai? Kaip ji gali būti atribojama nuo kitų viešojo baudimo formų, kaip antai bausmių? Kaip Europos Taryba ir EŽTT suvokia administracinę sankciją? Kokios garantijos ir kokia apimtimi yra taikomos administracinėms sankcijoms pagal EŽTK? Ar yra tokių garantijų taikymo apribojimų? Jeigu taip, kokią įtaką tai turi individualioms teisėms? Ar esamas tokių garantijų apsaugos lygis yra pakankamas?

Disertacinis tyrimas taip pat siekė patikrinti šią hipotezę: „EŽTT pripažįsta tam tikrų reikalavimų minimumą, nuo kurio viešojo administravimo subjektai, taikantys administracines sankcijas, negali nukrypti“. Hipotezė buvo suformuluota, remiantis EŽTK 6 straipsnio 3 dalimi, kuri kartu su kitomis šio straipsnio dalimis, išvardija fundamentalias garantijas, taikytinas (bet kokiam) baudimui: („Kiekvienas kaltinamas nusikaltimo padarymu asmuo turi mažiausiai šias teises...“).

Disertacijos struktūra atspindi jos nagrinėjamus klausimus. Pirmasis ir paskutinis skyriai, kaip įprasta, yra skirti įžangai ir išvadoms. Be jų, antrasis disertacijos skyrius nagrinėja sankcijos sampratą teisės teorijoje, o trečiasis skyrius – doktrininius administracinės sankcijos aspektus. Šiam tikslui pasiekti pastarasis skyrius pirmiausia nušviečia daugialypę administracinės sankcijos sampratą Europoje. Trečiasis skyrius taip pat pateikia kelis pozytivistinius ir doktrininius bandymus apibrėžti administracinę sankciją bei analizuoja, kodėl jie yra neišsamūs, taip pat – administracinės sankcijos tipologiją pagal jos tikslus ir tradicijas, bei skirtis su baudžiamosios teisės sankcijomis. Ketvirtasis disertacijos skyrius sukonkretina pirmesniuose skyriuose pateiktą teorinę medžiagą, telkdamasis į administracinės sankcijos taikymą Europos Tarybos plotmėje, įskaitant tokio pobūdžio sankcijos genezę ir palaipsnį įsitvirtinimą EŽTT praktikoje. Penktasis skyrius, savo ruožtu, yra paskirtas EŽTT administraciniam baudimui taikomų procedūrinių garantijų tyrimui. Kalbant konkrečiau, šios procedūrinės garantijos apima įvairius EŽTK 6 straipsnyje įtvirtintos teisės į teisingą teismą komponentus. Šeštasis disertacijos skyrius nagrinėja dvigubo nebaudžiamumo principo (*ne bis in idem*), įtvirtinto Septintojo protokolo 4 straipsnyje, taikymą administraciniam baudimui. Galiausiai, septintasis skyrius tiria kiek mažiau dėmesio susilaukiantį, tačiau ne mažiau reikšmingą teisėtumo principą, įtvirtintą EŽTK 7 straipsnyje bei jo poveikį administraciniam baudimui.

Disertacijoje taikomi metodai yra įprastiniai tokio pobūdžio darbams. Disertacijoje išskirtinai daug dėmesio skiriama EŽTT praktikos analizei, nes, autorės nuomone, būtent teisminė praktika yra teisės gyvastis ir tikroji teisininko valiuta. Be bylų analizės, darbe taip pat pasitelkiami lingvistinis, sisteminis, loginis, analitinis, funkcinis, istorinis, diachroninis, aprašomasis, palyginimasis ir teleologinis metodai. Žinia, metodai darbe naudojami kompleksiškai, nes nė vienu iš jų atskirai nėra įmanoma atskleisti visą disertacijos tematikos gamą.

Disertacinis tyrimas atskleidė, kad EŽTT yra suformavęs gausų administracinio baudimo teisiniams santykiams taikytinų principų rinkinį. EŽTT nuo pat kelrodės *Engel* bylos sėkmingai užkardė valstybių narių bandymus sumenkinti EŽTK garantijų, taikytinų įvairioms sankcionavimo praktikoms, apimtį. Disertacinis tyrimas taip pat patvirtino hipotezę, jog egzistuoja garantijų, taikytinų administraciniam baudimui, minimumas, nuo kurio viešojo administravimo subjektai negali nukrypti. Tiesa, šios garantijos sutampa su pagrindiniais ir eksplicitiniais EŽTK įtvirtintos teisės į teisingą teismą „saugikliais“. Kalbant konkrečiau, prie neatsiejamų nuo administracinio baudimo garantijų priskirtintos teisė kreiptis į neribotos jurisdikcijos (*full jurisdiction*) teismą, kuris yra nepriklausomas ir nešališkas (EŽTK 6 str. 1 d.). Prie tokių garantijų taip pat priskirtinas ir sankcijų viešumo reikalavimas bei būtinybė užtikrinti administracinėn atsakomybėn traukiamam asmeniui galimybę susipažinti su bylos medžiaga. Be to, viešojo administravimo subjektai, taikantys administracines sankcijas, neturėtų nukrypti ir nuo gero administravimo principo bei jo elementų, t.y. nuo būtinybės motyvuoti sprendimus ir juos priimti per pagrįstą laiko tarpą.

EŽTT požiūris į garantijas, įtvirtintas EŽTK 6 straipsnio 2 ir 3 dalyse, savo ruožtu, nėra toks vienareikšmis. Šioje plotmėje EŽTT renkasi kompromisinį variantą bei administraciniam baudimui visa apimtimi netaiko teisės neduoti parodymų prieš save ir nekaltumo prezumpcijos. Be to, EŽTT pripažįstama galimybė baudžiamosios teisės sankcijas taikyti kartu su administracinėmis sankcijomis byloja apie tai, jog EŽTT diferencijuoja skirtingoms sankcijų rūšims taikytinas garantijas. Teisėtumo reikalavimas, savo ruožtu, taip pat yra taikomas rezervuotai: sankcija turi turėti itin aiškiai išreikštą baudžiamąjį pobūdį, idant ji galėtų patekti į EŽTK 7 straipsnio taikymo sritį.

Disertacijoje prieinama prie išvados, jog nors EŽTT ir traktuoja administracinį baudimą kaip organišką bei daugialypį reiškinį, daugiausia dėmesio vis tiek yra skiriama įvairiems EŽTK 6 straipsnyje įtvirtintos teisės į teisingą teismą aspektams. Tai reiškia, jog procedūrinės teisės, kuriomis būtų galima remtis dar administraciniame lygmenyje, lieka neišplėtotos. EŽTT

požiūriu, šiame lygmenyje įvykdytas pažaidas gali ištaisyti neribotos jurisdikcijos (*full jurisdiction*) teismas. Toks požiūris nėra optimalus, nes EŽTK nėra nieko, kas užkirstų kelią EŽTT būti proaktyviu ir taikyti minėtąsias teises anksčiausiai įmanomame sankcionavimo lygmenyje. Be to, „baudžiamasis“ ir „atgrasomasis“ sankcijos pobūdis, kaip sankcijos patekimą į EŽTT jurisdikciją lemiantis veiksnys, turėtų būti aiškinamas sistemiškiau ir abstrakčiau. Tokia konceptualaus požiūrio stoka, keičiant jį aplinkybių vertinimu *ad hoc*, gali tapti itin opia ateityje, kuomet sankcijos vis labiau „hibridizuosis“, t.y. persipins viena su kita savo tikslais ir formomis. Taip pat EŽTT *Engel* byloje išplėtotus kriterijus galėtų papildyti vidiniu administracinių sankcijų sukeliamų pasekmių asmeniui suvokimu. Pastarieji kriterijai buvo pakankamai sėkmingai taikomi teismo veikloje, tačiau kartais jie nepajėgdavo aprėpti realaus gyvenimo pasekmių, kurias asmeniui gali sukelti įvairių administracinių sankcijų taikymas. Administracinį baudimą geriausiai suvokia tas, kam jis yra taikomas. EŽTT turėtų į tai atsižvelgti, be kita ko, ir tam, kad pats būtų labiau pasiruošęs įvairioms administracinio baudimo formoms ateityje: ar tai būtų sankcijos asmens duomenų apsaugos srityje, ar rinkos reguliavime, ar kitose reguliacinėse srityse.

List of Publications

1) Agnė Andrijauskaitė, “The Principle of Legality and Administrative Punishment under the ECHR: A Fused Protection” (2020) 13 *Review of European Administrative Law* 4, pp. 33–51
2) Agnė Andrijauskaitė, “Exploring the Penumbra of Punishment under the ECHR” (2019) 10 *New Journal of European Criminal Law* 4, pp. 363–375

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