Are EU Administrative Penalties Reshaping the Estonian System of Sanctions?

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eucrim
European Law Forum: Prevention • Investigation • Prosecution

ABSTRACT

EU legislation on administrative penalties has prompted an intense discussion in Estonia on whether to resurrect a measure from the past, namely administrative penalties. These penalties were abolished in Estonia in 2002, with all minor offences since then being classified as misdemeanours. Proponents of the administrative penalty procedure raise two main arguments: first, that the EU requires transposition of administrative penalties laid down in EU legislation specifically under a domestic administrative procedure; and second, that an administrative procedure would be a speedier and effective way to detect and punish offenders. In 2019, the authors of this article carried out a research project for the Estonian Ministry of Justice to map out the options for transposing EU administrative sanctions into Estonian law and to assess their compatibility, feasibility, and consequences. This paper summarizes the main results of that project.

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CITE THIS ARTICLE

Kangur, A., Lott, A., & Soo, A. (2020). Are EU Administrative Penalties Reshaping the Estonian System of Sanctions? Eucrim - The European Criminal Law Associations' Forum. https://doi.org/10.30709/eucrim-2020-009

Published in eucrim 2020, Vol. 15(2) pp 138 – 144

https://eucrim.eu

ISSN:

I. Introduction

In 2002, the new Penal Code of Estonia[1] created a uniform offence concept comprising crimes and misdemeanours. The idea underpinning the reform was that misdemeanours, previously classified as administrative infractions, while clearly less serious in nature, are still punishable offences like crimes. Therefore, they should be governed by the same general principles and provisions in terms of both substantive and procedural criminal law. This fundamental policy decision means that punishing offenders belongs to the domain of criminal law instead of administrative law.

In 2019, a bill was introduced to transpose EU legislation on administrative sanctions into Estonian law. It sought to adjust the definitions of some misdemeanours and increase the maximum fines in order to achieve conformity with European requirements. Regulatory bodies – institutions also responsible for conducting misdemeanour proceedings in areas in which EU legislation has been developed (e.g., the Financial Supervision Authority, the Estonian Financial Intelligence Unit, etc.) – were not satisfied: while the maximum fines for misdemeanours in Estonia certainly needed an upgrade, the procedural framework for misdemeanours was also deemed cumbersome and inadequate for effective law enforcement, especially with regard to corporate entities. This opposition led the bill to be scrapped.

The Estonian government is now planning to transpose EU administrative sanctions for corporations to the Estonian legal system by re-introducing administrative infractions. Work on drafting the law on the administrative sanctions procedure has already begun. While the government seems to have made up its mind, the authors call into question whether EU law actually requires that punishment be imposed specifically under an administrative procedure or, indeed, whether the idea of administrative infractions is compatible with Estonian law.

This article is based on a study conducted by the authors for the Estonian Ministry of Justice from September 2019 to January 2020. Its aim was to map out the options for transposing EU administrative sanctions into Estonian law and to assess the compatibility, feasibility, and consequences of deciding in favour of each mapped option. The study comprised both desktop research and interviews with Estonian regulatory bodies. The following sections summarize the main results of this project and provides a reasoned opinion of the authors on what they consider to be the most preferred option to transpose EU administrative sanctions into Estonian law.

II. Does the EU Call for Administrative Punishments?

In recent decades, the boundaries between criminal and administrative punitive sanctions have become blurred in Europe.[2] The grey zone between these two areas has even been given a name: “criministrative law”.[3] Generally speaking, governments justify their increasing use of administrative punitive sanctions by pointing to a reduction in the workload of courts and achieving speedier proceedings.[4] In criminal proceedings, the defendant is guaranteed a “full package of procedural safeguards” (the contents of which, of course, depend on the state as well as the international context in which a particular state operates), while proceedings under administrative law generally offer a more limited set of safeguards – and regulatory authorities like the “limited set”.

The EU is making extensive use of punitive administrative sanctions in its legislation. Historically, its limited competence and lack of an appropriate legal basis prevented it from using other measures.[5] The EU’s increasing use of administrative sanctions led to criticism that it was seeking to regulate criminal law, an area in which it had no legislative competence.[6] Even after the necessary legal basis appeared, the EU was still

https://doi.org/10.30709/eucrim-2020-009

initially required to operate under the three-pillar system, as a result of which its activity on administrative sanctions continued.[7] Paradoxically, now that Art. 83 of the Treaty on the Functioning of the European Union (TFEU) lays down the explicit competence of the EU to provide for criminal sanctions, the EU continues to adopt punitive measures on legal bases other than Art. 83, calling them "administrative." This preference for administrative punitive sanctions over criminal ones may stem from a desire to extend the EU's criminal jurisdiction beyond the scope of Art. 83 TFEU. It may also be an attempt to strip defendants of some of their procedural rights in criminal prosecutions so that possible lawbreakers can be punished swiftly and effortlessly – an aspiration possibly running contrary to the European Court of Human Rights (ECtHR's) ruling in *Engel*.[8] In *Engel,* the ECtHR held that the question whether an offence amounts to "criminal offence" for the purposes of Art. 6 of the European Convention on Human Rights (ECHR) cannot be answered according to the domestic classification alone, but has an autonomous meaning which takes into consideration not only the domestic classification of the offence but also the nature of the offence and the severity of the potential penalty. The Court of Justice of the European Union (CJEU) has recognized *Engel's* criteria and has, over time, explicitly extended at least some of its criminal procedural guarantees to punitive administrative sanctions.[9]

Proponents of administrative sanctions in Estonia have successfully managed to spread a serious misconception that the EU prescribes the exact procedural regime for handling breaches of EU law in the Member States. Although these measures in EU law are called administrative, EU law does not actually rule out the possibility of imposing them through quasi-criminal proceedings such as the existing misdemeanour procedure in Estonia. In Estonia, the majority of misdemeanours are initially adjudicated by the regulatory agencies themselves who have the authority to impose fines. This distinguishes the Estonian procedure, for example, from that of Denmark where all sanctions are imposed directly by the courts.

In accordance with the principle of subsidiarity, the EU treaties do not require complete harmonization of the procedural rules applied by the Member States when imposing administrative sanctions. According to the established case law of the CJEU, the choice of penalties also remains within the Member States' discretion. The principle of loyalty dictates that violations of EU law must be handled under conditions that are analogous to those applicable to infringements of national law of similar nature and importance. The sanction must be effective, proportionate, and dissuasive.[10] In fact, many EU instruments explicitly state that Member States may decide not to enact sanctions under administrative law for violations that are subject to domestic criminal sanctions.[11] Therefore, as long as the enforcement of EU law is effective, the EU really does not dictate whether the sanctions are transposed under administrative law or fall under the quasi-criminal category. This begs the question of whether enacting a new category of offences with separate procedural rules under administrative law is really necessary in Estonia.

III. Does Estonia Need to Bring Back Administrative Infractions?

In the analysis commissioned by the Estonian government, the authors explored two options to transpose EU legislation on administrative sanctions:

- As administrative measures;
- As misdemeanours.

These options are discussed below as the authors give their reasoned opinion on why they prefer transposition of EU administrative sanctions via misdemeanour proceedings.

https://doi.org/10.30709/eucrim-2020-009

1. EU administrative sanctions as administrative measures

While the government's attempt to raise maximum fines for misdemeanours within the existing criminal law scheme got bogged down (see Introduction above), some penalties prescribed in the EU's legal acts related to regulation of credit institutions and data protection, for example, have already been transposed into the Estonian legal order as penalty payments. Penalty payments belong to the general part of administrative law and can be imposed by regulatory authorities in order to enforce their compliance notices.[12] As provided in the relevant domestic laws,[13] penalty payments can be imposed if an authority's compliance notice remains fruitless. The maximum amount of an administrative penalty that can be levied at a time is normally only €9600 in Estonia.[14] The new penalty payments may run in the millions. Furthermore, the procedure for imposing a penalty payment is not a suitable expeditious reaction to violations that call for punitive measures. The law expressly states that a penalty payment is a coercive measure as opposed to a punitive one;[15] it must be preceded by a compliance notice and a written warning, i.e., a formal document that directs a person to perform a required act or refrain from illegal activity and sets a deadline by which the directions in the notice must have been complied with.[16] The penalty payment is imposed only after the time limit has elapsed and the directions have been ignored.[17] This multi-stage procedure hardly qualifies as an effective enforcement mechanism of EU law.

If Estonia is to adopt EU administrative sanctions under an administrative procedure, a new procedure aimed distinctly at punitive measures should be devised. This new procedure would likely be intertwined with regulatory enforcement activities as provided for by the Law Enforcement Act (LEA). The LEA provides for a wide variety of measures such as questioning of people and requiring of documents, obtaining data from telecommunications providers, entry into premises and examination of both real and personal property. Laws governing particular fields may also authorize regulatory agencies to use other more far-reaching regulatory measures, such as orders to cease activity. For example, the Estonian Financial Supervision Authority has the right to require disclosure of information, prohibit a credit institution from concluding certain types of transactions or to restrict the volume thereof; it can also prohibit payment of dividends from the profit of a credit institution, demand restrictions on the operating expenditures of a credit institution, demand suspension of an employee of a credit institution from work, make a proposal to amend or supplement the organisational structure of a credit institution, etc.[18] Such measures can be imposed by the authority both as a preventive as well as remedial action in order to ensure regulatory compliance. Introducing a punitive component to regulatory enforcement, however, could potentially cause the current non-punitive regime to become less effective, as the fear of punishment would likely deter cooperation between the regulators and those being regulated.

Interview partners in nearly all regulatory enforcement agencies complained about the current legal framework for misdemeanours. They argued that introducing a new category of punishable offences under a general framework of administrative law would make law enforcement much more effective. The interviews revealed that, for the enforcement agencies, "effectiveness" primarily means the discretion to expeditiously mete out harsh punishments to violators with less judicial oversight. While attractive, this effectiveness cannot come at the expense of fundamental rights to the extent that it is contrary to the ECHR or the Estonian Constitution.[19] If an offence deserves greater social condemnation and a severe punishment, the state must afford to the person charged with such an offence practical and effective means to put up a defence – even if it means spending more government resources.

2. Transposition of EU administrative sanctions as misdemeanours

The other route for transposing EU administrative sanctions would be a reform of the misdemeanour law. Although the Ministry of Justice has cast aside this option at this point in time, revamping the misdemean-

our law actually appears more workable than the previously described routes under administrative procedure. Addressing the identified shortcomings in misdemeanour law would improve the effectiveness of law enforcement with regard to both European and domestic contexts, making any upgrade of the misdemeanour law and procedure a doubly productive endeavour.[20]

The authors have identified several areas in misdemeanour law that need revision. Firstly, it is certain that the maximum fines must be adjusted. Some of the EU legislation requires Estonia to adopt fines that exceed both the current maximum fines for misdemeanours as well as pecuniary punishments for crimes.[21] In principle, the seriousness of the offence should be reflected in the sanction (i.e., punishments for crimes should be more severe than for misdemeanours or administrative infractions), and a steep increase in the fines for misdemeanours upsets this balance significantly.[22] This inconsistency can be overcome by recognizing that criminal defendants are usually also faced with the prospect of imprisonment and the stigma that accompanies every criminal conviction regardless of the sentence. This, along with possible ancillary sanctions, is sufficient to justify lower rates of pecuniary punishment as compared to the fines for misdemeanours.

Interview partners at regulatory authorities unanimously complained about the current regime of corporate criminal liability and the authors agree with them. Following the model used by Germany in its administrative infractions law, Estonia has adopted the concept of derivative liability for corporations in both criminal and misdemeanour cases. The derivative liability model offers a distinct advantage for larger corporate entities where complicated multi-tiered structures often disconnect the corporate *mens rea* (i.e., the authorized decision-makers) from the individuals committing the actual offence. As there is no corporate officer or authorized agent whose personal actions would constitute an offence committed in furtherance of corporate interests, an attempt to prosecute the corporation would fail. The authors recommend that Estonia abandon this narrow approach and follow, for instance, the more pragmatic example of the Netherlands where the intent of a corporation is either determined according to derivative responsibility or gleaned from organizational policy and everyday procedures.[23] Contrary to a common misconception, there is no constitutional barrier preventing Estonia from moving towards the more flexible organizational approach, which would not only lighten the onerous burden placed on law enforcement but also reflect modern corporate reality.

Interviewed regulatory enforcement authorities further criticized the limitation periods for misdemeanours as being too short to conduct investigations in complex matters. Currently, the Estonian Penal Code sets the maximum limitation period for misdemeanours at three years. For crimes in the second degree[24] this period is five years, and there is no real reason why the maximum limitation period for misdemeanours could not be the same. This amendment, together with adjustments made in the concept of corporate liability, have the potential to significantly simplify the detection and prosecution of misdemeanants.

Perhaps even more pervasive was the criticism levelled against the procedural regime applicable to misdemeanours. Most misdemeanours in Estonia are investigated by the same government agency that has regulatory authority in the relevant field. So, in practice, a misdemeanour investigation is often prompted by a regulatory inspection. Once the investigation is complete, sanctions for the misdemeanour are also initially imposed by the same agency in most cases. The district courts get involved only if the government seeks a short-term custodial sentence for the misdemeanant or the defendant disputes the initial decision, in which case a *de novo* trial in the district court will follow.[25] The interviewees argued that the process should be streamlined: the information gathered in the regulatory enforcement procedure should be admissible as evidence in misdemeanour proceedings, the burden of proof should be shared more evenly with the defendant, the standard of proof should be lowered to resemble that in administrative law, and the sanctions imposed should fall under administrative court jurisdiction and be reviewed for abuse of discretion.

These arguments are intrinsic to *Herbert Packer's* "crime control model", which focuses on punishing offenders as efficiently and rapidly as possible, unlike his "due process model" that emphasizes respect for the fundamental rights of an individual.[26] In an attempt to balance the two opposing considerations, the ECtHR has held that, in the proceedings that meet the so-called *Engel* criteria,[27] defence rights (including the rights provided for in Art. 6 ECHR) must be guaranteed, irrespective of the classification of the procedure and the offence under national law. The CJEU has also emphasized in its case law that the effective fulfilment of the objectives of the Union (including the effective punishment of offenders) must not be achieved at the expense of the fundamental rights of individuals.[28] In other words, the crime-control focused approach advocated by the regulatory enforcement authorities must be tempered to avoid unconstitutional overreach. The specific grievances from the regulators discussed below aptly illustrate this tension.

The allocation of the burden of proof to the prosecution in criminal matters is derived from the presumption of innocence and is well established in the jurisprudence of the ECtHR.[29] The Estonian Supreme Court and the ECtHR have recognized that the burden may be reversed in the light of certain specific facts. A prime example in Estonia is the defence of alibi, but the Supreme Court has also recognized, for example, a rebuttable presumption of criminal intent for transactions that resemble stock market manipulation.[30] The use of reverse burdens and rebuttable presumptions is justified based on the defendant's independent legal obligation to keep records and report relevant data. In other situations, the reverse burden with a rebuttable adverse presumption could be based on *prima facie* evidence adduced by the government, as long as such presumptions are clearly stated in the applicable statutes and will not have the effect of shifting the overall burden of proof in the case to the defendant.

The presumption of innocence is also the root of another well-established principle criticized by the regulatory authorities – the privilege against self-incrimination. Both the presumption of innocence and the privilege against self-incrimination are enshrined in Art. 22 of the Estonian Constitution. The tension between the regulatory enforcement procedure and the privilege against self-incrimination becomes apparent in the duty to cooperate – a standard feature of modern regulatory practice but virtually unheard of in criminal procedure. In regulatory matters, Estonian enforcement authorities routinely demand and receive information from the regulated parties. As long as there is no impending or ongoing criminal investigation, the privilege against self-incrimination trumps the duty to cooperate in regulatory enforcement matters under very limited circumstances.[31] As a backstop, Estonian Supreme Court has held that any statements made by the defendant to the authorities before he was notified that he is being suspected of an offence and advised of his legal rights are inadmissible.[32] Interview partners at regulatory authorities expressed their frustration over how the privilege against self-incrimination bars the use of information compelled from the defendant in regulatory enforcement proceedings. They also argued that the privilege against self-incrimination is only applicable in criminal proceedings – an interpretation which has been held erroneous by the Estonian Supreme Court.[33] They also point to the – rather outdated – *Orkem* judgment[34] in which the CJEU circumscribed the privilege against self-incrimination in competition law enforcement cases. One should note that the ECtHR decided its leading case on the privilege against self-incrimination (*Saunders v. U.K.)*[35] seven years later and extended the privilege to all procedures, including administrative procedures. This calls the CJEU's wisdom in *Orkem* in question.

Lastly, Art. 6(3) lit. d) ECHR entitles the criminal defendant to the right to question witnesses brought against him and to produce witnesses on his own behalf. Most of the information gathered in the course of regulatory inspections and enforcement is admissible in misdemeanour court proceedings unless it violates the privilege against self-incrimination. The confrontation right limits the admissibility of out-of-court statements to impeachment purposes and situations where the witness is unavailable. While inconvenient for the regulatory enforcement authority in its function as prosecutor, the confrontation clause is a vital part of a fair trial and instrumental in testing the credibility and reliability of witnesses in court. Therefore, dispensing with or

limiting the confrontation right as advocated by the regulatory authorities would again be an unacceptable encroachment on defence rights.

The Estonian Supreme Court has held that the statutory "inner conviction of the judge" as a standard of proof in criminal and misdemeanour cases means "proof beyond a reasonable doubt."[36] While the statutory language for administrative law courts uses the same "inner conviction" phrase, the Supreme Court's administrative law chamber has not elaborated on its meaning.[37] What these standards actually mean in terms of the required level of probability or subjective certainty of a judge writing a decision is *terra incognita*; it could be an interesting topic for empiricists. Perhaps, in an administrative regulatory context, a lower standard would be acceptable, as regulation and enforcement are a continuous process aimed at achieving compliance. Furthermore, regulatory measures could be adjusted as the situation changes. The interviewees at regulatory authorities opined that the standard of proof for criminal and misdemeanour cases in district courts is too high and that they would prefer to have their decisions reviewed by administrative law courts for abuse of discretion instead of having to prove their case at a *de novo* district court trial. Such an arrangement would be contrary to the ECHR. The ECtHR has held that a procedure in which a sanction is imposed by an administrative authority is compatible with Art. 6(1) ECHR only if the decision is subject to appeal to an independent and impartial body with full powers.[38] Such a body must have full jurisdiction in the meaning of having the power to amend the decision in all its factual and legal aspects.[39] Indeed, unless there is a *de novo* trial of the matter before a court, the presumption of innocence in misdemeanour cases would be an empty promise, as the first decision in the matter is made by the same authority that investigated and prosecuted the case.

Punishing someone is a reaction to the past and the past cannot be changed. There is a certain vibe of finality in imposing or receiving a punishment. The standard of proof is a tool for preventing errors. Punishing someone when the government is not able to convince the judge that an offence has been committed and who committed it would not be justified under the rule of law.

The hope of calling the multi-million-euro sanctions "administrative" and bypassing "criminal" guarantees is misguided. The severity of the sanctions places them squarely within the ambit of a "criminal charge" as established in the ECtHR's *Engel* case law and, as such, they are subject to the fair trial requirement under Art. 6 ECHR, regardless of what they are called or how they are systematized under the Estonian national legal system. Keeping this in mind, the authors suggest that it is far more economical, compatible with the Constitution, and in alignment with the logic of existing Estonian legal framework to update both substantive and procedural misdemeanour law. This would allow for more effective enforcement of domestic law and for adequate transposition of the sanctions under European legislation.

IV. Conclusions

The EU does not require its Member States to transpose EU administrative sanctions specifically under an administrative procedure. Nonetheless, even if the administrative infractions procedure is reinstated in Estonia, its procedural guarantees cannot fall below what is required by the Strasbourg system. The existing Estonian misdemeanour procedure has the potential to adequately balance the need to effectively punish offenders and, at the same time, to protect the individual rights provided by the ECHR. The amendments that should be made to misdemeanour law to meet this goal would be equally useful in prosecuting domestic offences. Therefore, the obligation to transpose EU administrative sanctions serves as an opportunity for Estonia to critically review its misdemeanour law and to improve its efficiency generally. This opportunity will

be missed if the Estonian legislator decides to transpose EU administrative sanctions by creating a new procedure altogether.

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1. The Estonian Penal Code is available in English at: <https://www.riigiteataja.ee/en/eli/513012020005/consolide>, accessed 23 June 2020.↩
2. A. Weyembergh and N. Joncheray, "Punitive Administrative Sanctions and Procedural Safeguards. A Blurred Picture that Needs to be Addressed", (2016) 7 *New Journal of European Criminal Law*, 190.↩
3. A. Bailleux, "The Fiftieth Shade of Grey. Competition Law, 'Criministrative Law' and Fairly Fair Trials", in: F. Galli and A. Weyembergh (eds.), *Do Labels Still Matter? Blurring Boundaries between Administrative and Criminal Law*, 2014, p. 139.↩
4. D. Ohana, "Administrative Penalties in the *Rechtsstaat*: On the Emergence of the *Ordnungswidrigkeit* Sanctioning System in Post-War Germany", (2014) 64 *The University of Toronto Law Journal*, 243, 244.↩
5. J. Schwarze, "Rechtsstaatliche Grenzen der gesetzlichen und richterlichen Qualifikation von Verwaltungssanktionen im europäischen Gemeinschaftsrecht", (2003) *Europäische Zeitschrift für Wirtschaftsrecht*, 261.↩
6. E. Herlin-Karnell, "Is Administrative Law Still Relevant? How the Battle of Sanctions Has Shaped EU Criminal Law", *Jean Monnet Working Paper* 25/14, p. 4.↩
7. A. Weyembergh, N. Joncheray, *op. cit.* (n. 2), 203–204.↩
8. ECtHR, 8 June 1976, Appl. nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, *Engel and others v The Netherlands*.↩
9. ECJ, 5 June 2012, C-489/10 *Bonda*, para 28ff; CFI, 8. July 2008, T-99/04, *AC-Treuhand AG v Commission of the European Communities*, para 113ff; ECJ, 8 July 1999, C-199/92, *Hüls v Commission of the European Communities*, para 150; ECJ, 8. July 1999, C-49/92, *Commission v Anic Partecipazioni*, para. 78.↩
10. ECJ, 21 September 1989, case 68/88, *Commission v Greece* ["*Greek Maize*"], paras 22–24; ECJ, 10 July 1990, C-326/88, *Anklagemyndigheden vs Hansen & Søn I/S*, para 17; ECJ, 27 March 2014, C-565/12, *LCL Le Crédit Lyonnais SA v Fesih Kalhan*, para 53. On the proportionality criterion, see, e.g., ECJ, 17 July 2014, C-272/13, *Equoland Soc. coop. arl v Agenzia delle Dogane*, para 35.↩
11. See, e.g., Art. 31(2) of Directive 2016/97/EU, *O.J.* L 26, 2.2.2016, 19. See also Art. 58(2) of Directive 2015/849/EU, *O.J.* L 141, 5.6.2015, 73; Art. 22(1) of Directive 1286/2014, *O.J.* L 352, 9.12.2014, 1; Art. 61(1) of Directive 909/2014, O.J. L 257, 28.8.2014, 1; Art. 99(1) of Directive 2014/91/EU, *O.J.*L 257, 28.8.2014, 186; Art. 70(1) of Directive 2014/65/EU, *O.J.* L 173, 12.6.2014, 349.↩
12. Confusingly sometimes translated as "precepts" in Estonian sources.↩
13. Money Laundering and Terrorist Financing Prevention Act, e.i.f. 27.11.2017, Section 65(2). Credit Institutions Act, e.i.f. 1.7.1999, Section 104-1(2). Securities Market Act, e.i.f. 1.1.2002, Section 234-1. Financial Crisis Prevention and Resolution Act, e.i.f. 29.3.2015, Section 91. Personal Data Protection Act, e.i.f. 15.1.2019, Section 60. All of these acts and subsequent acts can be found in English here: <https://www.riigiteataja.ee/en/>, accessed 23 June 2020.↩
14. Law Enforcement Act, e.i.f. 1.7.2014, Section 28(2).↩
15. Substitutive Enforcement and Penalty Payment Act, e.i.f. 1.1.2002, Section 3(2).↩
16. *Ibid*, Section 4(1).↩
17. *Ibid*, Section 2(1).↩
18. Credit Institutions Act, e.i.f. 1.7.1999, Section 104.↩
19. The Constitution of the Republic of Estonia is available in English at: <https://www.riigiteataja.ee/en/eli/521052015001/consolide>, accessed 23 June 2020.↩
20. This would also obviate the theoretical question: is there an actual difference between misdemeanours and administrative infractions to justify keeping the two under separate names – because, if not, and the administrative infractions are so much more government-friendly, should there even be misdemeanours?↩
21. Currently, the highest maximum fine is set out in the General Data Protection Regulation (Regulation (EU) 2016/679), *O.J.* L 119, 4.5.2016, 1), which includes an obligation to impose fines on natural and legal persons up to a maximum of €20 million.↩
22. The Estonian Penal Code imposes a fine of up to €1200 on natural persons and €100 to €400,000 on legal persons (sections 47 (1) and (2) of the Penal Code). The amount of the pecuniary penalty is 30 to 500 daily rates (minimum daily rate is €10) for natural persons and €4000 to €16,000,000 for legal persons (subsections 44 (1), (8) and (9) of the Penal Code).↩
23. J. Keiler and D. Roef (eds.), *Comparative Concepts of Criminal Law.* 3rd edition, 2019, pp. 357–364. The Netherlands are not a lone outlier but rather represent the contemporary mainstream of looking at corporate criminal responsibility. In this sense, Estonia and Germany just seem to be clinging to the past.↩
24. The Estonian Penal Code distinguishes between the crimes of first and second degree according to prescribed punishments by stating:
"§ 4. Degrees of criminal offences
(1) Criminal offences are criminal offences in the first and in the second degree.
(2) A criminal offence in the first degree is an offence the maximum punishment prescribed for which in this Code for a natural person is imprisonment for a term of more than five years or life imprisonment. An offence of a legal person is a criminal offence in the first degree if imprisonment for a term of more than five years or life imprisonment is prescribed for the same act as maximum punishment for a natural person.
(3) A criminal offence in the second degree is an offence the punishment prescribed for which in this Code is imprisonment for a term of up to five years or a pecuniary punishment."↩
25. In 2019, all Estonian district courts handled 2049 misdemeanour matters (incl. 1114 cases for *de novo* trial) while the police and border guard officers of the Northern Region alone disposed of 56,941 cases – keeping in mind that there are four regions in the country and a host of other government agencies authorized to handle certain misdemeanors, such as the ones interviewed for this project. The proportion naturally varies depending on the area of law.↩
26. H.L. Packer, *The Limits of the Criminal Sanction*, 1968, pp. 149–173.↩

27. ECtHR, *Engel and others v the Netherlands, op. cit.* (n. 8). Accordingly, a measure is to be understood as a "criminal charge" if (i) it is classified as criminal (indicative criterion), (ii) it follows a punitive aim, and (iii) it is severe. As a consequence, the ECtHR has triggered the application of Art. 6 ECHR to administrative proceedings.↩
28. ECJ, 17 January 2019, C-310/16, *criminal proceedings against Peter Dzivev, Galina Angelova, Georgi Dimov, Milko Velkov* (see also eucrim 1/2019, 23–24).↩
29. ECtHR, 6 December 1988, Appl. no. 10590/83, *Barberà, Messegué and Jabardo v. Spain*.↩
30. Sup. Ct. No. 3-1-1-70-11, see also ECtHR, 20 March 2001, Appl. no. 33501/96, *Telfner v. Austria*.↩
31. See, for example, Tallinn Circuit Court of Appeal no. nr 3-17-1916/28.↩
32. Sup. Ct. No. 3-1-1-105-97.↩
33. Sup. Ct. No. 3-1-1-39-05.↩
34. ECJ, 18 October 1989, case 374/87, *Orkem v. Commission*.↩
35. ECtHR, 17 December 1996, Appl. no. 19187/91.↩
36. Sup.Ct. No. 3-1-1-38-11.↩
37. The Court has, however, underlined that trial courts should consider all evidence and set out the reasoning for their findings of fact. See Sup.Ct. No. 3-12-1360/131. Furthermore, in reviewing the decisions of regulatory enforcement agencies, the administrative court will use the standard of proof that the law has prescribed for the regulator which may be even lower (e.g. reasonable suspicion is sufficient to create a rebuttable presumption of tax evasion).↩
38. ECtHR, 4 March 2014, Appl. no. 18640/10, *Grande Stevens v. Italy*, paras 138 and 161. As according to the ECtHR lack of independence of the administrative body can be resolved in subsequent judicial proceedings, most countries have not drawn a strict boundary between the investigative and the decision-making administrative body in administrative proceedings. F. P. Mateo, "Harmonising National Sanctioning Administrative Law: An Alternative to a Single Capital-Markets Supervisor", (2018) 24 *European Law Journal*, 321, 344.↩
39. ECtHR, 4 March 2004, Appl. no. 47650/99, *Silvester's Horeca Service v Belgium*, paras 25-30.↩

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The project is co-financed by the Union Anti-Fraud Programme (UAFP), managed by the European Anti-Fraud Office (OLAF).

Co-funded by
the European Union