

Old Wine in New Bottles: Shifting the Criminal Sanction into Administrative Law¹ *Part 1*



1. INTRODUCTION

In a contribution to a previous issue of *Law and Practice* I examined the juridical nature of administrative sanctions. In this follow up paper, I would like to address some additional, related, issues namely: the system of review of administrative measures inflicted by the public administration; how administrative penalties are levied; the prescription of administrative sanctions; whether the administrative action is extinguished and, if so, in which cases; the making of subsidiary legislation establishing administrative measures together with the quantum of



*Dr. Kevin Aquilina
Dip. Phil., B.A.,
B.A. Hons.,
M.A., LL.M.,
LL.D., Ph.D.
(Lond.),*

*Senior Lecturer,
Department of
Public Law,
Faculty of Law,
University of
Malta.*

administrative penalties; the Council of Europe's Recommendation No R (91) IE on Administrative Sanctions; and the advantages of resorting to administrative measures. By identifying the several advantages of administrative offences, this paper assists in comprehending why minor criminal offences have been transformed into administrative measures. It therefore suggests that both the criminal and the administrative offence, though not mutually exclusive, tend to complement each other.

2. REVIEW OF THE COMPETENT AUTHORITY'S DECISIONS INFLECTING ADMINISTRATIVE SANCTIONS

Although the public administration has been granted the right to inflict administrative sanctions, their decisions are subject to being reviewed. Review is carried out either by an ad hoc tribunal or an appeals board established by law or under the general rules of judicial review set out in article 469A of the Code of Organization and Civil Procedure.



2.1. Review by an Appeals Board

The competent public authority's decision inflicting an administrative sanction is reviewed by an Appeals Board in the following cases: by the Communications Appeals Board in the case of the Malta Communications Authority;² the Planning Appeals Board in the case of the Malta Environment and Planning Authority;³ the Value Added Tax Appeals Board in the case of the Commissioner of Value Added Tax;⁴ the Tourism Appeals Board in the case of the Malta Tourism Authority;⁵ the Licensing Appeals Board in the case of both the Malta Tourism Authority and the Trade Licensing Unit;⁶ the Producer Organisations Appeals Board in the case of both the Director of Agriculture and the Director of Fisheries;⁷ the Sports Appeals Board in the case of the *Kunsill Malti għall-Isport*⁸ and the Eco-Contribution Appeals Board in the case of the Commissioner of Value Added Tax.⁹

2.2. Review by a Tribunal

The competent public authority's

¹This paper gives the position of the law as at 4th January, 2006.

²Article 4 of the Postal Services Act, Cap. 254, and articles 33(5) and 38 of the Malta Communications Act, Cap. 418.

³Articles 15(1)(c) and 58 of the Development Planning Act, Cap. 356.

⁴Article 37, 44(k) and 45 of the Value Added Tax Act, Cap. 406.

⁵Articles 14 and 45 of the Malta Travel and Tourism Services Act, Cap. 409.

⁶Article 9(1) of the Trading Licences Act, Cap. 441.

⁷Articles 18(5) and 19(2)(k) of the Producer Organisation Act, Cap. 447.

⁸Article 54(2) of the Sports Act, Cap. 455.

⁹Articles 14, 15, 18 and 19 of the Eco-Contribution Act, Cap. 473.

decision inflicting an administrative sanction is reviewed by a Tribunal in the following instances: by the Financial Services Tribunal in various cases where the Malta Financial Services Authority inflicts an administrative measure¹⁰ and in the case of administrative sanctions imposed by the Malta Stock Exchange *qua* Listing Authority,¹¹ and by the Data Protection Appeals Tribunal in the case of the Data Protection Commissioner.¹²

2.3. Other Forms of Review

The competent public authority's decision inflicting an administrative sanction is reviewed by other reviewing bodies in the following cases: by appeals bodies yet to be established to review the decisions of the Director of Agriculture and the Director of Fisheries¹³ and the Co-operatives Board,¹⁴ by the Civil Court, First Hall, in the case of administrative measures imposed by the Broadcasting Authority,¹⁵ by the Court of Appeal in the case of other

administrative sanctions imposed by the Broadcasting Authority,¹⁶ and by the First Hall of the Civil Court (in terms of article 469A of the Code of Organization and Civil Procedure) in the case of those competent authorities empowered by law to inflict compromise penalties¹⁷ and in those cases where no reviewing body is established,¹⁸ and by the Civil Court, First Hall, when reviewing administrative penalties inflicted by the Registrar of Companies and Other Commercial Partnerships.¹⁹

3. APPEALS TO THE COURT OF APPEAL FROM DECISIONS OF A REVIEWING BODY

A decision of a quasi-judicial body mentioned above inflicting and/or reviewing the infliction of an administrative measure can be appealed before the Court of Appeal. The same can be said with regard to those decisions of public authorities reviewed by the Civil Court, First Hall, either in terms of an ad hoc

provision of the law or generally in terms of article 469A of the Code of Organization and Civil Procedure.

3.1. Appeals from decisions of an Appeals Board to the Court of Appeal

The Court of Appeal hears appeals from decisions of several appeal boards which review decisions of the competent public authority's decision inflicting an administrative sanction. Such is the case with the Communications Appeals Board,²⁰ the Planning Appeals Board,²¹ the Value Added Tax Appeals Board,²² the Tourism Appeals Board,²³ the Licensing Appeals Board,²⁴ the Producer Organisations Appeals Board,²⁵ the Sports Appeals Board²⁶ and the Eco-Contribution Appeals Board.²⁷

3.2. Appeals from decisions of a Tribunal to the Court of Appeal

The Court of Appeal hears appeals from decisions of the Financial Services Tribunal in those cases where the administrative sanction is inflicted by the Malta Financial Services Authority²⁸ and by the Malta Stock Exchange *qua* Listing Authority,²⁹ and from decisions by the Data Protection Appeals Tribunal.³⁰

3.3. Appeals from decisions of other Reviewing Bodies to the Court of Appeal

The Court of Appeal hears appeals from judgments of the Civil Court, First Hall, when the latter reviews decisions of the competent public authority's decision inflicting an administrative sanction in the following cases: administrative measures imposed by the Broadcasting Authority,³¹ judgments delivered in terms of article 469A of

¹⁰Articles 36A(c) and 52A(1) of the Central Bank of Malta Act, Cap. 204, article 10(1)(c) of the External Transactions Act, Cap. 233, articles 16(3) and 20B(2)(b) of the Malta Financial Services Act, Cap. 330, article 6(9) and (11) of the Investment Services Act, Cap. 370, article 10 of the Banking Act, Cap. 371, articles 21 and 23 of the Financial Institutions Act, Cap. 376, article 58 of the Insurance Business Act, Cap. 403, article 45(3) of the Insurance Brokers and Other Intermediaries Act, Cap. 404, articles 7, 8, 17, 24 and 54(1)(e) of the Special Funds (Regulation) Act, Cap. 450 and articles 22 and 23 of the Prevention of Financial Markets Abuse Act, Cap. 476.

¹¹Articles 19, 20 and 42 of the Financial Markets Act, Cap. 345.

¹²Articles 47(2) and 49 of the Data Protection Act, Cap. 440.

¹³Article 7(f) and (g) of the Agricultural and Fishing Industries (Financial Assistance) Act, Cap. 146.

¹⁴Article 17, proviso, paragraph (v) of the Co-operative Societies Act, Cap. 442.

¹⁵Article 41 and the Fifth Schedule to the Broadcasting Act, Cap. 350.

¹⁶Article 16 of the Broadcasting Act, Cap. 350.

¹⁷For instance, article 41(5) of the Broadcasting Act, Cap. 350, article 58(2) of the Development Planning Act, Cap. 356, article 84 of the Value Added Tax Act, Cap. 406, article



the Code of Organization and Civil Procedure when reviewing decisions of competent authorities empowered by law to inflict compromise penalties,³² where no reviewing body is established,³³ and when reviewing administrative penalties inflicted by the Registrar of Companies and Other Commercial Partnerships.³⁴

There are also cases where the Court of Appeal, when reviewing administrative sanctions imposed by certain authorities such as the Broadcasting Authority, acts as a court of original jurisdiction.³⁵

4. NATURE OF REVIEW OR APPEAL

Appeals or review of decisions of the competent public authority which inflicts an administrative sanction can be lodged either on points of fact or on points of law or on both. Again, the review or appeal from the decision thereof may be twofold, first by an a quasi-judicial tribunal which would be competent to review decisions both on points of law and of fact and, subsequently, by the Court of Appeal which would normally hear an appeal on a point of law from the

quasi-judicial tribunal's decision.

4.1. Nature of Review by a Quasi-Judicial Body

The nature of the review by a quasi-judicial tribunal of a competent public authority's decision inflicting an administrative sanction varies. Such grounds of review can be broadly classified under the following categories:

(a) a general appeal both on a point of law and of fact;³⁶

(b) an appeal on certain prescribed grounds. These grounds essentially can be classified into two categories:

(i) wrong application of the law or that the decision of the competent authority constitutes an abuse of discretion and/or is manifestly unfair;³⁷

(ii) material error as to the facts or a material procedural error; or an error of law, or that there has been some material illegality, including unreasonableness, or lack of proportionality;³⁸

(c) an appeal by reference to another enactment.³⁹



4.2. Nature of Appeal to the Court of Appeal

A decision of a quasi-judicial body inflicting and/or reviewing the infliction of an administrative measure can be appealed before the Court of Appeal. Sometimes it is the Court of Appeal sitting in its Superior Jurisdiction⁴⁰ which hears and decides such appeal; at other times it is the Court of Appeal sitting in its inferior jurisdiction⁴¹ which does so. The Court of Appeal's jurisdiction, whether superior or inferior, is usually restricted either to a point of law or to a point of law⁴² decided by the quasi-judicial tribunal.⁴³

5. LEVYING OF ADMINISTRATIVE PENALTIES

Administrative penalties are usually levied by civil process but there are cases where they can be collected by criminal process.

5.1. Levying of Administrative Penalties by Civil Process

The vast majority of administrative penalties are considered to be an executive title within the meaning of Title VII of Part I of Book Second of

⁴⁰Article 43 of the Malta Statistics Authority Act, Cap. 422.
⁴¹Articles 401(3) to (17) and 427 and the Eleventh Schedule of the Companies Act, Cap. 386.
⁴²Article 41(1) of the Malta Communications Authority Act, Cap. 418.

⁴³Article 15(2) of the Development Planning Act, Cap. 356.

⁴⁴Article 47(1) of the Value Added Tax Act, Cap. 406.

⁴⁵Article 14(2) of the Malta Travel and Tourism Services Act, Cap. 409.

⁴⁶Article 11 of the Trading Licences Act, Cap. 441.

⁴⁷Articles 18(6) of the Producer Organisation Act, Cap. 447.

⁴⁸Article 50 of the

the Code of Organization and Civil Procedure.⁴⁴ The Value Added Tax Act, although it considers an administrative penalty as an executive title as aforesaid further provides that the provisions of article 468 of the said Code apply with respect to any warrant issued on the strength of an executive title and to the paying out of the proceeds of the sale by auction of the property seized, and no opposition or reservation in the schedule of deposit may stay the paying of any sum deposited in court following any such warrant.⁴⁵

In terms of the Malta Statistics Authority Act, administrative penalties are due to the Malta Statistics Authority as a civil debt and the provisions of article 466 of the Code of Organization and Civil Procedure apply thereto.⁴⁶

Other legislation, although it acknowledges that the penalty is levied as a civil debt, does not outline which of the above procedures should be adopted for its collection.⁴⁷ Hence the matter is regulated by the ordinary provisions of civil procedure.

5.2. Levying of Administrative Penalties by Criminal Process

Article 58(2)(c) of the Development Planning Act states that if the fine (*multa*) is not paid within the period established in that article, it shall be treated as if it were a fine ordered to be paid by the court which would have had jurisdiction to take cognizance of the offence, and proceedings may be taken accordingly as if it were an order of that court. This provision appears to imply that the administrative penalty has to be collected through criminal procedure, and in the eventuality of non-payment, the fine has to be converted into imprisonment. An identical provision is found in article 45(2)(c) of the Malta Travel and Tourism Services Act, Cap. 409. There is however a case where although a person accepts responsibility for an offence but fails to pay the administrative penalty or comply with the provisions of the law, that penalty is not levied and criminal proceedings are instead instituted against that person.⁴⁸



6. PRESCRIPTION OF ADMINISTRATIVE SANCTIONS

As a general rule Maltese Law does not establish the extinctive prescription period of administrative infringements. Of course, there are exceptions to this rule as is the position with the Commissioners for Justice Act, the Companies Act, the Value Added Tax Act, the Malta Communications Authority Act and the Eco-Contribution Act.

Article 12 of the Commissioners for Justice Act does not apply the provisions of the Civil Code on extinctive prescription but, on the contrary, resorts to the provisions of the Criminal Code in view of the fact that administrative infringements cognisable by the Commissioners for Justice were,

Sports Act, Cap. 455.

²⁷Articles 23(1) of the Eco-Contribution Act, Cap. 473.

²⁸Articles 36A(c) and 52A(1) of the Central Bank of Malta Act, Cap. 204, article 10(1)(c) of the External Transactions Act, Cap. 233, article 21(14) of the Malta Financial Services Act, Cap. 330, article 6(10) and 19 of the Investment Services Act, Cap. 370, article 10 of the Banking Act, Cap. 371, articles 21 and 23 of the Financial Institutions Act, Cap. 376, article 58 of the Insurance Business Act, Cap. 403, article 45(3) of the Insurance Brokers and Other Intermediaries Act, Cap. 404, articles 7, 8, 17, 24 and 54(1)(e) of the Special Funds (Regulation) Act, Cap. 450, and articles 22 and 23 of the Prevention of

prior to their depenalisation, criminal offences. In fact, the provision states that an 'action before a Commissioner shall be subject to the same rules of prescription which may from time to time be applicable to the criminal action taken in respect of an offence mentioned in the Schedule' and that 'the period of prescription with respect to actions before a Commissioner shall be suspended from the date that a summons is served and shall remain so suspended for a period of six months.' Furthermore, 'the period of prescription of the criminal action in respect of an offence mentioned in the Schedule shall be suspended by the proceedings before a Commissioner.'

The Companies Act states that

actions for the recovery of a penalty by the Registrar are prescribed by the lapse of five years from the day on which the default occurs.⁴⁹

The Value Added Tax Act states that an action for the payment of administrative penalties may be taken by the Commissioner at any time within six years from the date on which such administrative penalty becomes payable⁵⁰ and, further, that the running of the period of six years is interrupted by any judicial act filed before the expiration of such period.⁵¹

In addition, according to the Malta Communications Authority Act, 'the prosecution of a criminal offence or the initiation of proceedings to impose an administrative fine under this Act or under any other law which

the Authority is entitled to enforce shall be prescribed by the lapse of two years from the date on which the offence or administrative infringement is alleged to have been committed.⁵²

Another exception to this rule is contained in the Eco-Contribution Act, 2004.⁵³ This provision states that the initiation of proceedings to impose an administrative penalty under that Act is prescribed by the lapse of five years from the date on which the administrative infringement is committed.

However, where the law is silent in this respect, the provisions of the Civil Code will have to apply due to the fact that the offences in question are not of a penal character (unless the law provides otherwise as in the case, for instance, of article 12 of the Commissioners for Justice Act discussed above). In the latter instance, the appropriate provisions of the Civil Code appear to be article 2149(e) which states that actions of the Government of Malta for the payment of judicial fees, customs or other dues is time barred by the lapse of two years and article 2156(f) which provides for the payment of any other debt arising from any other cause which is time barred by the lapse of five years. Nonetheless, these provisions firstly apply only to the Government and not to bodies corporate which enjoy their own separate and distinct juridical personality, and secondly seem to apply to those cases where an administrative penalty is contemplated. What is the situation where exceptionally the administrative sanction does not take the form of a pecuniary penalty but

Financial Markets Abuse Act, Cap. 476.

²⁹Article 44 of the Financial Markets Act, Cap. 345.

³⁰Articles 47(2) and 49 of the Data Protection Act, Cap. 440.

³¹Article 41 and the Fifth Schedule to the Broadcasting Act, Cap. 350.

³²For instance, article 41(5) of the Broadcasting Act, Cap. 350, article 58(2) of the Development Planning Act, Cap. 356, article 84 of the Value Added Tax Act, Cap. 406, article 45(2) of the Malta Travel and Tourism Services Act, Cap. 409, article 26 of the Environment Protection Act, Cap. 435, article 68(2) of the Lotteries and Other Games Act, Cap. 438 and article 47 of the Animal Welfare Act, Cap. 439.

³³Article 43 of the Malta Statistics Authority Act, Cap. 422.

³⁴Articles 401(3) to (17) and 427 and the Eleventh Schedule of the Companies Act, Cap. 386.

³⁵Article 16 of the Broadcasting Act, Cap. 350.

³⁶Article 15(1) of the Development Planning Act, Cap. 356, article 14(1) of the Malta Travel and Tourism Services Act, Cap. 409, article 18(5) of the Producer Organisation Act, Cap. 447, and article 20 of the Eco-Contribution Act, Cap. 473.

³⁷Article 43(1) of the Financial Markets Act, Cap. 345, article 19(3) of the Investment Services Act, Cap. 370, article 58(2) of the Insurance

some other form such as the revocation or suspension of a licence, the prohibition from broadcasting for a certain period of time, the demolition of an illegal structure, etc.? In the case of non-pecuniary sanctions the position seems to be that there is no extinctive prescriptive period established by law.

There are nonetheless cases where the law expressly does away with an extinctive prescriptive period. Take the case, for instance of article 51(2) of the Development Planning Act which empowers the Malta Environment and Planning Authority to 'undertake a review of all development carried out before the coming into force of this Act not in compliance with plans or policies in force at the time the development took place; and in respect of any such development the Authority shall have such powers as it has in respect of development carried out after the coming into force of this Act in order to ensure that the plans and policies aforesaid are enforced or, if this is not reasonably possible, to regularise such development to the extent the Authority deems adequate in the circumstances.' The purport of this provision was curtailed to a certain extent by the provisions introduced by the 2001 amendments in the said Act by article 55B thereof which freezes the taking of any enforcement action with regard to any illegal development which (i) had been carried out prior to 1st January 1993; (ii) was located within a Temporary Provisions Scheme boundary or a development boundary as indicated in a local plan; (iii) did not consist in

a change of use or was not in conformity with road and building alignment specified or interpreted in such Scheme or local plan. In those cases where the provisions of article 55B of the Development Planning Act apply, for instance, in the case of illegal development in a green area with took place say in 1911 or illegal development outside the development zone which took place say in 1930, the Authority can still, in terms of article 51(2) of the Development Planning Act, take the necessary enforcement proceedings. The Court of Appeal has had the opportunity to study article 51 of the Development Planning Act but, at the moment of writing, has not interpreted it from the point of view of extinctive prescription. For instance, in *Martin Vella vs. Planning Authority*, the court emphasised that although it was correct to state that the Planning Authority had the right to review development which took place prior to the entry into force of the Development Planning Act and prior to the establishment of the Planning Authority it added a word of caution when it stated in an *obiter dictum* that, 'pero' tkun haga xierqa li aktar ma l-izvilupp kontestat imur lura fis-snin, aktar dan il-poter ghandu jigi ezercitat b'certa cirkuspezzjoni'.⁵⁴ ■

Old Wine in New Bottles: Shifting the Criminal Sanction into Administrative Law Part 1 footnotes continued below:

Business Act, Cap. 403, article 45(3) of the Insurance Brokers and Other Intermediaries Act, Cap. 404, and article 54(2) of the Special Funds (Regulation) Act, Cap. 450.

³⁸Article 49(2) of the Data Protection Act, Cap. 440, article 9(1) of the Trading Licences Act, Cap. 441, and article 48(2) of the Sports Act, Cap. 455.

³⁹Reference is made (a) to the Financial Services Tribunal established by article 21 of the Malta Financial Services Authority Act, Cap. 330, in the following enactments: article 36A of the Central Bank of Malta Act, Cap. 204, article 10(1)(c) of the External Transactions Act, Cap. 233, article 10 of the Banking Act, Cap. 371, article 21 of the Financial Institutions Act, Cap. 376, and article 23 of the Prevention of Financial Market Abuse Act, Cap. 476; and (b) to the Communications Appeals Board established by article 36 of the Malta Communications

Authority Act, Cap. 418 in the following enactments: the Electronic Communications (Regulation) Act, Cap. 81, the Postal Services Act, Cap. 254, and the Utilities and Services (Regulation of Certain Works) Act, Cap. 399.

⁴⁰Such is the case with certain decisions of the Financial Services Tribunal and the judgments of the Civil Court, First Hall.

⁴¹Such is the case when it hears appeals from the Planning Appeals Board, the Value Added Tax Appeals Board, the Tourism Appeals Board, the Communications Appeals Board, the Data Protection Appeals Tribunal, the Licensing Appeals Board, the Producer Organisations Appeals Board, the Sports Appeals Board and the Eco-Contribution Appeals Board.

⁴²Such is the case with article 21(14) of the Malta Financial Services Act, Cap. 330, article 47(1) of the Value Added

Tax Act, Cap. 406, article 41(1) of the Malta Communications Authority Act, Cap. 418, article 51 of the Data Protection Act, Cap. 440, and article 11 of the Trading Licences Act, Cap. 441.

⁴³Such is the case with article 44 of the Financial Markets Act, Cap. 345, article 15(2) of the Development Planning Act, Cap. 356, article 14(2) of the Malta Travel and Tourism Services Act, Cap. 409, article 18(6) of the Producer Organisation Act, Cap. 447, and article 50 of the Sports Act, Cap. 455.

⁴⁴Article 52B(4) of the Central Bank of Malta Act, Cap. 204, article 81(2)(k) of the Postal Services Act, Cap. 254, article 10(5) of the Commissioners for Justice Act, Cap. 291, article 41(8) of the Broadcasting Act, Cap. 350, article 35A(3) of the Banking Act, Cap. 371, article 23(2) of the Financial Institutions Act, Cap. 376, article 401(4) of the Companies Act, Cap. 386,

article 59(1) of the Value Added Tax Act, Cap. 406, article 33(4) of the Malta Communications Authority Act, Cap. 418, article 42(3) of the Data Protection Act, Cap. 440, article 17, proviso, paragraph (iv) of the Co-operative Societies Act, Cap. 442, and article 22 of the Prevention of Financial Markets Abuse Act, Cap. 476.

⁴⁵Article 59(3) of the Value Added Tax Act, Cap. 406. Interesting to note is that article 468 of the Code of Organization and Civil procedure was repealed by article 200 of Act No. XXIV of 1995.

⁴⁶Article 43(6) of the Malta Statistics Authority Act, Cap. 422, and article 43(6) of the Malta Statistics Authority Act, Cap. 422.

⁴⁷Article 19(4) of the Financial Markets Act, Cap. 345, article 67(6) of the Insurance Business Act, Cap. 403, article 3(3)(d) of the Insurance Brokers and Other Intermediaries Act, Cap. 404, and article 68(4) of

the Lotteries and Other Games Act, Cap. 438.

⁴⁸Article 100(4) of the Medicines Act, Cap. 458.

⁴⁹Article 427(3) of the Companies Act, Cap. 386.

⁵⁰Article 58(2) of the Value Added Tax Act, Cap. 406.

⁵¹Article 58(3) of the Value Added Tax Act, Cap. 406.

⁵²Article 35 of the Malta Communications Authority Act, Cap. 418.

⁵³Article 17 of Cap. 473.

⁵⁴12th May 1997 (appeal no. 17/97A), paragraph 10.