

Exploring the penumbra of punishment under the ECHR

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Abstract

Administrative sanctions can be said to dwell in the periphery of punishment because they do not require setting the wheels of criminal procedure in motion. This allows States to save public resources as well as helps them to escape closer scrutiny at the judicial level. At the same time, the imposition of administrative sanctions usually curtails individual guarantees. Against this background, this article examines where the European Court of Human Rights (ECtHR) draws the line between measures belonging to the ‘hard core of criminal law’ and the periphery. After a presentation of gradual broadening of the ‘criminal limb’ guarantees of Article 6 European Convention on Human Rights to administrative measure of a punitive nature, it explores where do these guarantees meet their limits by taking the approach adopted in the landmark Jussila judgment as a point of departure. Subsequently, a structured analysis of the selected ECtHR case law in which this approach has been applied or – at least – invoked is provided. The article is finished with a reflection on the current interpretation of the said penumbra of punishment, which, among other things, identifies the possible gaps of individual protection, and the outlook for the future.

Keywords

Administrative sanctions, administrative punishment, ECHR, ECtHR, individual protection

The temptation to ‘outsource’ punishment to the field of administrative law never seems to fall out of fashion. By imposing administrative sanctions of a punitive nature not only can the desired goals thereof be achieved, but it all comes at a lesser price too. Namely, ‘outsourcing’ does not require setting the wheels of criminal procedure in motion and shifts the burden of proof of a particular

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offence to the detriment of the individual, among other things.¹ This, in turn, results in watered-down standards of individual protection.² The European Court of Human Rights (ECtHR), by developing and applying the famous *Engel* criteria,³ proved as early as the 1970s its willingness to defend standards of individual protection against so-called ‘mislabelling’ tendencies, that is, the practice of using administrative punishment in cases deserving higher safeguards offered by criminal procedure, whose main aim is to minimize the hazard of a wrongful conviction.⁴ However, while this stance of the ECtHR is clear-cut when it comes to ‘traditional’ criminal matters, especially those entailing the possibility of imprisonment⁵ or registration of a particular crime in criminal records,⁶ it becomes more nuanced in ‘fringe’ cases of punishment. This is shown by the seminal *Jussila* judgment of 2006⁷ dealing with the limited application of guarantees of the European Convention on Human Rights (‘ECHR’, ‘Convention’) to administrative sanctions. As it transpires, 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.

After well over a decade of such punishment *à deux vitesses*,⁸ this article intends to explore the periphery of punishment more profoundly within the framework of the Convention. Without pretending to find the dividing line between criminal and administrative law – a conundrum that

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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* (Bruxelles: Editions de l’Université de Bruxelles, 2014), pp. 137–152 at 146–147.
 2. It seems fair, however, to remark that while the criminal standards of enhanced protection usually usurp the discussion on administrative punishment, administrative law can also be resourceful and develop *sui generis* instruments dedicated to the very same purpose, such as *droits de la défense*, especially the right to be heard (J. Schwarze, ‘Judicial Review of European Administrative Procedure’, *Law and Contemporary Problems* 68 (2004), pp. 85–106 at 104) continuing to be of utmost importance in ‘all proceedings in which sanctions, in particular fines or penalty payments, may be imposed’ as interpreted by the CJEU (see, e.g. Case C-85/76 *Hoffmann-La Roche v. Commission* [1979] ECR 461; Case C-289/04 *Showa Denko KK v. Commission of the European Communities* [2006] ECR I-5859).
 3. See *Engel and Others v. Netherlands* App. nos 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72 (ECtHR, 8 June 1976). For a more recent affirmation of these criteria by the Grand Chamber, also see *Ezeh and Connors v. the United Kingdom* App. nos 39665/98 and 40086/98 (ECtHR [GC], 9 October 2003).
 4. K. Svatikova, *Economic Criteria for Criminalization: Optimizing Enforcement in Case of Environmental Violations* (Cambridge, Antwerp, Portland: Intersentia, 2012), p. 151.
 5. The possibility of imprisonment provided by relevant legal provisions prescribing a liability for the offence regardless of how small the imposed sanction actually is (in the case of *Greco*, e.g. it was the equivalent of ‘[the price of] ten kilograms of meat’, *Greco v. Romania* App. no. 75101/01 (ECtHR, 30 November 2006) at [48] or even a possibility of converting unpaid pecuniary fines into a prison sentence at the enforcement stage (see to this effect *Anghel v. Romania* App. no. 28183/03 [ECtHR, 4 October 2007] at [43], [52] and [61]; *Bendenoun v. France* App. no. 12547/86 [ECtHR, 24 February 1994] at [47]) almost always triggers the use of higher standards of legal protection by the ECtHR. See more on this presumption in *Zolotukhin v. Russia* App. no. 14939/03 (ECtHR, 10 February 2009) at [56].
 6. See, for example, *Sanckli v. Turkey* App. no. 1385/07 (ECtHR, 15 May 2008) at [26] and [49].
 7. See *Jussila v. Finland* App. no. 73053/01 (ECtHR [GC], 23 November 2006).
 8. As coined by the Judge Pinto de Albuquerque in his dissenting opinion given in the case of *A. Menarini Diagnostics S.R.L v. Italy* App. no. 43509/08 (ECtHR, 27 September 2011).

has kept many legal minds busy⁹ – it strives to identify in which cases the ECtHR is willing to dispense with Convention guarantees. More precisely, it seeks to find out when are they exchanged for flexibility and cost-effectiveness – two of the many advantages which administrative procedure offers in ‘extremely varied forms’ that has gained more and more relevance in the face of the push towards decriminalization.¹⁰ What are the implications of such trade-offs for the rights of the individual? Finally, can one draw clear contours for the penumbra of pan-European punishment? If so, are there any ironclad Convention guarantees which belong to this penumbra? Or does a casuistic approach still reign? In order to answer these pertinent questions, this article will start out with a succinct presentation of the placement of administrative sanctions under the ECHR and other theoretical and contextual insights which may serve as a key to the emergence of the *Jussila* formula (and the category of so-called quasi-criminal sanctions that it brought). It will then carry on with a structured analysis of selected case law in which this formula has been applied or – at least – invoked. The article will be crowned with a reflection on the current interpretation of the said penumbra of punishment and the outlook for the future.

Administrative sanctions under convention law: Conceptual dependency on the ‘criminal charge’ and ‘Jussila Distinction’

The exploration of the European penumbra of punishment has to be started with a clear statement that administrative sanctions do not operate under Convention law on their own accord. Instead they are conceptually dependent on the [determination of] ‘criminal charge’ in each case *sub judice* – an inescapable legal parameter embedded in the very wording of Article 6 ECHR¹¹ – and thus reflect its object and purpose, that is, factors that the ECtHR has to follow in its interpretation.¹²

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9. The German doctrine, for example, on this matter seems to be especially rich: starting with the works of criminal jurists such as P.A. Feuerbach and K. Binding in the 19th century it continued to be elaborated by administrativists such as J.P. Goldschmidt, O. Mayer, E. Schmidt and others in the 20th century. The wide-reaching academic discussion, post-war codifications put in place and subsequent domestic constitutional revision (see the long line of cases of the German Constitutional Court enlisted in Schwarze, ‘Judicial Review of European Administrative Procedure’, p. 104, note 107) in the author’s opinion have led to the spill over of acceptance of administrative sanctions on a pan-European level in the guise of *Ordnungswidrigkeiten* (see *Öztürk v. Germany* App. no. 8544/79 [ECtHR, 21 February 1984] and *Lutz v. Germany* App. no. 9912/82 [ECtHR, 25 August 1987]). See more in D. Ohana, ‘Regulatory Offences and Administrative Sanctions: Between Criminal and Administrative Law’, in M. D. Dubber and T. Hörnle, eds., *The Oxford Handbook of Criminal Law* (Oxford: OUP, 2014), pp. 1064–1086.
 10. As recognized and encouraged not only by the ECtHR itself (see, e.g. *Öztürk v. Germany* App. no. 8544/79 at 49) but also by the Council of Europe, see, for example, 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, 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, see more in EC Communication COM (2011) 573 final ‘Towards an EU criminal policy’.
 11. The discussions on punishment within the context of the ECHR usually pivot around the ‘fair trial’ guarantees enshrined in Article 6 ECHR. Other important guarantees to that effect are, however, connected with the principle of legality neatly encapsulated in the Latin adage *nullum crimen (nulla poena) sine lege scripta, praevia, certa, stricta* (Article 7 ECHR) as well as *non bis in idem* (Article 4 of Protocol No. 7 of the ECHR) principle. See more in M. Timmerman, *Legality in Europe: On the Principle ‘Nullum Crimen, Nulla Poena Sine Lege’ in EU law and Under the ECHR* (Cambridge, Antwerp, Portland: Intersentia, 2018).
 12. In the author’s opinion, it is precisely this formulation (the ‘semantic trap’ of Article 6 ECHR) that has facilitated the recognition that, for example, antitrust fines can be of a criminal nature within the meaning of the ECHR (see, e.g. *Menarini Diagnostics S.R.L v. Italy* App. no. 43509/08 at [42]) – still somewhat of a ‘taboo’ in EU law, see on various

This autonomous attribution of ‘criminal charge’ to administrative punishment in each case is not by itself problematic 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’.¹³ As hinted above, the first time it unlocked and applied this parameter regarding punitive measures falling outside the category of domestic criminal law happened in the 1970s through the introduction of the famous *Engel* criteria. These criteria were conceived out of concern that the Member States might be inclined to circumvent safeguards, which the ECHR affords by transferring certain offences from the criminal sphere to the administrative one – be it insidiously or out of ignorance. In other words, this development took place in order to fight arbitrariness on the domestic level and has enabled the ECtHR to apply a ‘criminal charge’ autonomously, that is, 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 a deterrent or punitive purpose rather than (only) a compensatory one.¹⁴ All these factors, although alternative, are assessed by means of a cumulative approach by the ECtHR, that is, by it weighing the different circumstances in each case.¹⁵

Admittedly, this is a rather simplified depiction of these criteria, which have evolved and have become more nuanced as time has progressed. However, given that they have been dealt with in the legal scholarship *ad nauseam*,¹⁶ the analytical focus of this article shall proceed to the *Jussila* authority, which obfuscated the neat narrative of the ‘criminal charge’. In this case, concerning tax penalties imposed for errors in bookkeeping on the applicant that amounted to 10% of the respective tax liability (or just above 300 euros), the ECtHR basically conceded that there is a genus of sanctions devoid of enhanced protection under the Convention.¹⁷ 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).¹⁸ Consequently, such criminal cases do not trigger the application of the ‘criminal charge’ guarantees with their full stringency.¹⁹ Following this line of argument, the concrete ‘trade-off’ in *Jussila* was made: an oral hearing as guaranteed by Article 6 ECHR was not deemed necessary in tax law proceedings undertaken by an administrative court. However, an important caveat has to be highlighted: the

divergent points between the two legal systems in W.P.J. Wils, ‘The Increased Level of EU Antitrust Fines, Judicial Review and the ECHR’, *World Competition* 33(1) (2010), pp. 5–29, for further discussion see Bailleux, ‘The Fiftieth Shade of Grey’. 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* App. no. 8544/79.

13. *Öztürk v. Germany* App. no. 8544/79 at [51].

14. See, for example, *Hüseyin Turan v. Turkey* App. no. 11529/02 (ECtHR, 4 March 2008) at [19].

15. And if taken together, they predominantly have a ‘criminal connotation’, then the existence of a ‘criminal charge’ shall be established, see *Bendenoun v. France* App. no. 12547/86 at [47].

16. For the overview and development of the *Engel* criteria see, for example, P. Caeiro, ‘The Influence of the EU on the Blurring Between Administrative and Criminal Law’, in F. Galli and A. Weyembergh, eds., *Do Labels Still Matter?*, pp. 177, 182 et seq.

17. 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, see E. Breen, ‘Country Analysis – France’, in O. Jansen, ed., *Administrative Sanctions in the European Union* (Cambridge, Antwerp, Portland: Intersentia, 2013), p. 203.

18. *Jussila v. Finland* App. no. 73053/01 at [43].

19. *Op. cit.*

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’.²⁰ In other words, the proceedings at the domestic level, despite lacking an oral hearing, were deemed to be ‘impeccable’²¹ (see *infra* for ‘procedural hindrances’ as factors impacting the ECtHR’s assessment). All in all, it can be assumed from the *Jussila* dictum that by making the said concession the ECtHR tried to evade the difficulty of classifying a particular measure as being of an administrative or criminal nature.²² 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.²³ In other words, the ECtHR wanted to have its cake and eat it too. 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 to leave some wiggle room for the Member States to deviate in contexts which are ‘administrative’, or for the lack of a better word, ‘technical’.

However, evoking ‘stigma’ as a self-evident criterion capable of expressing the blameworthiness of a particular offence with a view to factually delimit the two fields (or, at the very least, for 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 partial dissents they gave in the case.²⁴ Several reasons yield the reliance on ‘stigma’ as a non-legalistic notion problematic: Firstly, it is widely agreed that ‘stigma’ in a contemporary ‘pluri-ethnic’ society is a relative concept.²⁵ What is considered as morally reprehensible (despicable) behaviour by one group in society might be encouraged by other groups, and vice versa.²⁶ Although, worthwhile taking into account, while considering whether to criminalize a particular offence,²⁷ the existence of stigma per se can by no means provide a watertight distinction between criminal and administrative liability.²⁸ In fact, the prevailing contemporary view is that no substantive criteria are able to

20. Op. cit. at [48].

21. As 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* App. no. 73053/01 at [41]–[42].

22. A. Weyembergh and N. Joncheray, ‘Punitive Administrative Sanctions and Procedural Safeguards: A Blurred Picture That Needs to be Addressed’, *New Journal of European Criminal Law* 7(2) (2016), pp. 190–209 at 191.

23. *Jussila v. Finland* App. no. 73053/01 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. Articles 37[1] and 35[3][b] ECHR). Although this was de facto done in the ‘admissibility’ stage (before *Jussila*, see *Morel v. France* App. no. 54559/00 [ECtHR [dec.], 3 June 2000) and after *Jussila* – see *Suhadolc v. Slovenia* App. no. 57655/08 [ECtHR [dec.] 17 May 2011).

24. See for a further critique of stigma and the lack of its (real) application in the ECtHR’s case law in the separate opinion of Judge Pinto de Albuquerque given in *A and B v. Norway* App. nos 24130/11 and 29758/11 (ECtHR [GC] 15 November 2016) §§ 26–32.

25. I. Appel, *Verfassung und Strafe: Zu den Verfassungsrechtlichen Grenzen Staatlichen Strafens* (Berlin: Duncker & Humblot, 1998), pp. 482–488 at 485.

26. 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* App. no. 18568/12 (ECtHR, 4 October 2018); *Dubská and Krejzová v. the Czech Republic* App. nos 28859/11 and 28473/12 (ECtHR [GC], 15 November 2016).

27. Namely, if stigma is desired by a policymaker, criminal law should be used to this effect due to its expressive (signalling) function, Svatikova, *Economic Criteria for Criminalization*. See more on the reprobative symbolism of punishment in J. Feinberg, ‘The Expressive Function of Punishment’, *The Monist* 49(1) (1965), pp. 397–423.

28. In fact, the ECtHR has itself admitted that even civil proceedings may have a degree of stigma, see *Carmel Saliba v. Malta* App. no. 24221/13 (ECtHR, 29 November 2016) at [73].

do that and the distinction is left for the legislator to make to a great extent.²⁹ 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 stigma changes over time, thus making it a rather elusive concept.³⁰ Finally, the ‘stigma’ criterion turns to ‘extraneous’ factors of punishment, namely its perception by society, and fails to incorporate the intrinsic ones (punishment as conceived *in foro interno*), without which understanding of the effects of punishment remain limited because – ultimately – ‘punishment is in the eye of the beholder’.³¹ As accurately observed in one of the dissents given in *Jussila*, for ‘the persons concerned . . . all cases have their importance’³² 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 some legal theorists have claimed that administrative sanctions are nothing more than ‘taxes on conduct’,³³ 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’.³⁴

Post-*Jussila* punishment: More of the same?

At this juncture, it is time to return to the questions defined in the introductory part of this article: what is the penumbra of pan-European punishment whose advent was marked by *Jussila*? Is it already filled, and if so, what are the ironclad (non-dispensable) guarantees belonging thereto? Or is everything allowed for Member States in this destigmatized *terra puniendi*? The analysis of the case law in which the ‘*Jussila*’ line of reasoning was invoked, which is provided below and will reveal some of the (rather nuanced) answers to these questions. Before delving into them, a preliminary remark has to be made that from this analysis it has emerged that three strands of case law ‘outside the hard core of criminal law’ may be distinguished. These are the following: (1) Cases involving criminal-lite sanctions of pecuniary nature in which *Jussila*’s reasoning was invoked and upheld, that is, a violation of Convention guarantees was not found and thus the weakened protection of individual rights was reaffirmed. (2) Cases involving such sanctions in

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29. Of course, he cannot make arbitrary choices in this regard and is bound by various constitutional imperatives, as well as the *ultima ratio* principle in the criminalization and other axiological considerations. The ECtHR 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, for example, *Öztürk v. Germany* App. no. 8544/79 at [51].
30. It is worthwhile noting that the change of stigma is bidirectional: stigma becomes obsolete regarding some offences (like in the case of ‘medical cannabis’ as reflected by legalizing it in multiple European countries, for example, Italy [2015] and Germany [2017]) while regarding others it expands (although currently driving under the influence seems to attract a great deal of stigma across European states, it was not like this in the early days of automobilism).
31. D.M. Kennedy, *Deterrence and Crime Prevention: Reconsidering the Prospect of Sanction* (London and New York: Routledge, 2009), p. 37; See more in M. Schmideberg, ‘Psychological Factors Underlying Criminal Behavior’, *Journal of Criminal Law and Criminology* 37(6) (1947), pp. 458–476 at p. 472.
32. See the partly dissenting opinion of Judge Loucaides, joined by Judges Zupančič and Spielmann in *Jussila v. Finland* App. no. 73053/01.
33. American realist Oliver Wendell Holmes, for example, went so far as to claim that in such instances ‘law does not forbid you from doing the thing, but merely says that if you do it you must pay a tariff’, see more in R.W. Gordon, ‘Holmes’ Common Law as Legal and Social Science’, *Hofstra Law Review* 10(3) (1982), pp. 719–746 at pp. 736–737.
34. A. Ross, *On Guilt, Responsibility and Punishment* (Berkeley and Los Angeles: University of California Press, 1975), p. 90.

which *Jussila*'s reasoning was invoked but not upheld, that is, a violation of Convention guarantees was found, either because of a significant amount of sanctions or a 'fundamental rights' element was involved in the adjudication. (3) Cases involving non-pecuniary sanctions (e.g. professional bans) in which *Jussila*'s reasoning seems to be superfluous to begin with. The ECtHR itself does not use this structure in any way and its value is, of course, relative; however, this structure is employed here because of its 'utility' in breaking down and showcasing different shadings in interpretation in a systematic way when it comes to the penumbra of punishment.

Pro-*Jussila* case law: A conveniently casuistic use of stigma by the ECtHR?

The analysis performed for the purposes of this article has revealed that the approach adopted in *Jussila* is not limited to accepting the lack of an oral hearing but may be extended to other procedural issues 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 double jeopardy principle under Article 4(1) of Protocol No. 7 of 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, remains to be applied in a differentiated manner: in 'techy' domains, it is applied quite boldly, whereas in cases which are – to put it in 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.

A clear conclusion that there was no stigma attached to a particular offence was made in the case of *Kammerer v. Austria*,³⁵ which concerned a fine imposed on the applicant for the non-compliance with the obligation to have his car duly inspected. The minor sum of the penalty (approximately 72 euros), for its part, seems to have been a secondary, but a significant enough motive leading 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*³⁶ – in which the applicant was penalized, as an individual entrepreneur for non-compliance with technical regulations on food storage, committing a so-called 'public welfare offence', such an approach was also clearly followed with a direct reference to the *Kammerer* case. The ECtHR – cumulatively assessing all the relevant circumstances of the case – did not find that 'defective notifications' about 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 of and a fine of (only) 298 euros regarding sanctioning in the entrepreneurial context (hence, usually bearing more risks to the persons concerned), the ECtHR found no force in the arguments to the contrary.

However, stigma (probably due to the elusiveness outlined above) is easily sidelined in more nuanced cases. This very clearly came to the fore in the case of *Sancakli v. Turkey*,³⁷ in which it was alleged that the applicant provided premises for prostitution, as a hotel owner and 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 administrative punishment for the said

35. *Kammerer v. Austria* App. no. 32435/06 (ECtHR, 12 May 2010).

36. *Vyacheslav Korchagin v. Russia* App. no. 12307/16 (ECtHR, 28 August 2018).

37. See *Sancakli v. Turkey* App. no. 1385/07.

misdeemeanour happened without holding an oral hearing (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 on 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 judgment. Instead, reading the judgment closely, it becomes clear that the modesty of the fine (totalling approximately 16 euros) 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.³⁸ No recourse to stigma or any other implications of punishment was taken in this case by the ECtHR, despite the applicant arguing about the impact such a nefarious offence had on him.³⁹

Finally, in another (rather controversial)⁴⁰ case of *A and B v. Norway*,⁴¹ *Jussila*’s reasoning was an ancillary⁴² tool that helped the ECtHR to justify and accept deviations from the prohibition against double jeopardy and thus reassure those States that were developing their administrative penal systems.⁴³ More precisely, while elaborating on the *bis*-aspect of the *non bis in idem* principle enshrined in Article 4(1) of Protocol No. 7 of 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 in a simple way, 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 [. . .]’ by 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).⁴⁴ The comprehensive analysis of the totality of the criteria that need to be fulfilled in order for such an approach to be deemed fully compatible with the Convention would clearly outstrip the scope of this article⁴⁵; however, it has to be noted that the ECtHR has made it clear that it will have regard to the stigmatizing effects of administrative proceedings within the meaning of *Jussila*, while assessing compliance with the *non 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’.⁴⁶

38. Op. cit. at [49].

39. Op. cit. at [41].

40. As demonstrated not only by the scathing dissent of Judge Pinto de Albuquerque, but also by a handful of third-party interveners in this case.

41. *A and B v. Norway* App. nos 24130/11 and 29758/11.

42. 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 tensions with the EU framework may have pushed the ECtHR to focus on the *bis*-aspect in the interpretation of the *non bis in idem* principle. For a comment, see P.H. van Kempen and 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’, *New Journal of European Criminal Law* 9(2) (2018), pp. 247–264 at pp. 260 et seq.

43. See more in L. Milano, ‘L’arrêt A et B c. Norvège, Entre Clarifications et Nouvelles Interrogations Sur le Principe Non bis in Idem’, *Revue trimestrielle des droits de l’homme* 114 (2018), pp. 467–484.

44. *A and B v. Norway* App. nos 24130/11 and 29758/11 at [106], [124].

45. For a systematization thereof, see *A and B* at [132].

46. Op. cit. at [130].

Case law diluting *Jussila*'s reasoning: *Quantum*, procedural imperfection and fundamental rights concerns

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 of administration of justice and/or those of a fundamental rights character of the grievances put before the ECtHR, which are simply too blatant to be dismissed. The first glaring divergence in the use of the *Jussila* approach comes in the same regulatory context in which it was conceived, namely taxation. Following *Jussila*, the general claim should go that tax penalties are stigmatized and thus merit a lower level of protection under the ECHR. However, the coin was quickly flipped in the case of *Chap Ltd v. Armenia*,⁴⁷ dealing 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 information provided by witnesses in administrative proceedings, that is, to examine them in accordance with procedural safeguards stipulated by Article 6(1) ECHR read in conjunction with Article 6(3)(d) ECHR.

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 just above 300 euros. Furthermore, the 'political' character⁴⁸ 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,⁴⁹ may have led the ECtHR to arrive at a different conclusion even though the claim of applicants in both peripheral cases of punishment was identical – to have 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 witnesses was deemed 'decisive for the determination of the applicant company's tax surcharges', and thus a failure to carry out this resulted in an unreasonable restriction of the applicant's right as guaranteed by the ECHR.⁵⁰ Interestingly, the ECtHR also took into consideration the lack of 'procedural safeguards to compensate for the handicaps caused to the applicant as

47. *Chap Ltd v. Armenia* App. no. 15485/09 (ECtHR, 4 May 2017).

48. The applicant claimed that the whole tax evasion case, among other things, was 'politically fabricated', see *Chap Ltd v. Armenia* App. no. 15485/09 at [11].

49. In *Jussila*, written submissions obtained in the tax inspection procedure were deemed to be enough for the domestic administrative court to resolve the case; 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 seemed to have touched the very heart of the right to challenge the incriminatory evidence. Such a divergent perspective seems to fit 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* App. no. 28394/95 (ECtHR, 12 November 2002) at [37].

50. See, for a similar rationale, the case of *Özmurat İnşaat Elektrik Nakliyat Temizlik San. ve Tic. Ltd. Şti. v. Turkey* App. no. 48657/06 (ECtHR, 28 November 2017). The ECtHR admitted that the penalty imposed for operating a mining business outside of the licenced area was 'purely technical' and was not by itself part of the hard core of 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.

a result of being unable to examine the witnesses'.⁵¹ This flexible formulation plausibly 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 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.⁵²

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*,⁵³ in which tax penalties levied on the additional personal income tax amounted to 50% surcharges and interest (approximately 39,100 euros), the ECtHR, although perfunctorily invoked *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 tax surcharges were 'very substantial'⁵⁴ and ruled that an oral hearing should have been held at the appeal stage even without the applicant requesting it.⁵⁵ Aside from the severity of the penalty at issue, another crucial factor that has seemingly affected the adjudicatory outcome in this case was the fact that the administrative proceedings took an unexpected turn (the situation of the so-called 'procedural surprises'). At the first-instance court, the decision of the tax authority imposing the said heavy penalties on the applicant was quashed, while at the higher instance court this was reversed. According to the ECtHR, the reassessment of the crucial evidence (namely, the applicant's father's testimony on 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.⁵⁶ 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 sideline any ponderings on 'stigma' and the varied scale of guarantees that it attracts in the field of tax surcharges *à la Jussila*.

Finally, as already hinted at the beginning, the derisory size of penalties does not always play a decisive role in the ECtHR's determination of whether punitive measures fall outside the hard core of criminal law, thereby deserving a heightened level of protection. If the ECtHR identifies a potential danger to fundamental rights by 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*⁵⁷ clearly demonstrates that. In this case, the ECtHR ascertained that despite the low amount of the fine, even by national standards (approximately 28 euros), imposed on the applicant for her participation in a march and subsequent disobedience regarding a police order, the respondent State had to make free legal assistance

51. *Chap Ltd v. Armenia* App. no. 15485/09 at [51].

52. See more in K. Ambos, *European Criminal Law* (Cambridge: Cambridge University Press, 2018), pp. 101–103.

53. *Pákozdi v. Hungary* App. no. 51269/07 (ECtHR, 25 November 2014).

54. And took into account 'what was at stake for the applicant', see *Pákozdi v. Hungary* at [28] and [39].

55. Despite the Hungarian Code of Civil Procedure explicitly providing for this possibility, see *Pákozdi v. Hungary* App. no. 51269/07 at [9].

56. Op. cit. at [39].

57. *Mikhaylova v. Russia* App. no. 46998/08 (ECtHR, 19 November 2015).

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. By failing to do so, a violation of Article 6(1) and (3)(c) ECHR was established. 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’.⁵⁸ By dissecting the latter requirement of ‘interests of justice’, it becomes clear that the possibility of 15 days’ detention for the said offence was enshrined in the relevant statute (even if applied only in exceptional cases)⁵⁹ and the individual circumstances of the applicant reflecting her ‘social vulnerability’ (old age, lack of legal training, etc.) were the crucial reasons leading the ECtHR to arrive at the said conclusion.⁶⁰ In other words, a structural deficiency in the domestic legal order (inter alia, the absence of any provision providing for 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.

Non-pecuniary sanctions: Towards a default ‘stigma-intense’ punishment?

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. Quite understandably so, 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 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 v. Italy*⁶¹ case in which, together with severe financial penalties, ‘professional bans’ were imposed on the applicants (namely, 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’.⁶² 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 making use of such individual sanctions in, for example, EU competition law, but it also does not (as of yet) reveal the whole picture.⁶³ Considering the extreme diversity of administrative sanctions falling outside the hard core of the criminal law, it remains to be seen whether this approach

58. Op. cit. at [84].

59. As becomes obvious from the ECtHR’s dedication of the whole structural part of this judgment under the headline of ‘additional considerations’ to the analysis thereof, see *Mikhaylova v. Russia* App. no. 46998/08 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, thus triggering the enhanced protection of Convention guarantees, *Butkevich v. Russia* App. no. 5865/07 (ECtHR, 13 February 2018).

60. *Mikhaylova v. Russia* App. no. 46998/08 at [30], [47].

61. *Grande Stevens v. Italy* App. no. 18640/10 (ECtHR, 4 March 2014).

62. Op. cit. at [122].

63. The author of this article could only find this one case dealing with ‘multi-speed punishment’ in the context of non-pecuniary sanctions, rendering the whole analysis somewhat inconclusive.

will be upheld in all cases, especially in contexts that are ‘more administrative and less punitive’ by their nature, such as the withdrawal of a previously granted right to perform a special activity or the like.⁶⁴

Conclusion

The exploration of the penumbra of punishment has shown that the reasoning conceived 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. Especially, ‘unforeseeable’ effects for an individual as an outcome of inconsistent or otherwise flawed sanctioning practices, which 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 until 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 in a hearing on sanctioning and a ‘strict’ ban on double jeopardy when it comes to imposing both administrative and criminal sanctions.

Despite the said developments, the clear contours of this penumbra remain fuzzy. Especially, 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 Convention rights real and effective. As the examples of *Chap Ltd v. Armenia* and *Pákozdi v. Hungary* cases that were 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 destigmatized and ‘techy’, merit the enhanced protection of Convention guarantees because of their severity alone. Needless to say, it is not easy to define what severity actually is, and some case-dependent interpretation will be inevitable, and nor does it have to be. Together with evaluating the sheer size of a particular fine the ECtHR could have regard to its broader case law and the elucidation of this notion found therein: it has already identified a severe sanction as ‘having substantial impact on the person concerned’,⁶⁵ ‘having far-reaching detriment’,⁶⁶ and being ‘particularly harsh and intrusive’.⁶⁷ All 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.⁶⁸

64. For an overview of different types of administrative sanctions according to their nature see, for example, R. Stanke-wicz, ‘Administrative Sanctions as a Manifestation of State Coercion’, *Wrocławskie Studia Erazmiańskie* (2017), pp. 267–279 at pp. 272 et seq. and according to their aims sought see, for example, Schwarze, ‘Judicial Review of European Administrative Procedure’, p. 101.

65. *Welch v. The United Kingdom* App. no. 17440/90 (ECtHR, 9 February 1995) at [32].

66. Op. cit. at [34].

67. *G.I.E.M. S.r.l. and Others v. Italy* App. nos 1828/06 et al. (ECtHR [GC], 28 June 2018) at [227].

68. See for a depiction of the whole range of elements of a sanction in Kennedy, *Deterrence and Crime Prevention*, pp. 32 et seq.

This would not only foster consistency in the case law but also converge with the *Engel* criteria⁶⁹ devised by the ECtHR when it first started grappling with the ‘extremely varied forms’ of punishment and their implications for the individual. It would also 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’,⁷⁰ and causing new liability concerns in typical administrative law domains like data protection.⁷¹ In some countries, sanctioning is about to be automated in some of these domains.⁷² It is furthermore probable 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 may not initially 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 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.⁷³

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69. 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 its ‘criminal charge’ test, that is, 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 the ‘*Jussila*’ formula is not superfluous in such cases can be raised.

70. 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)).

71. 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* App. no. 45849/13 (ECtHR, 29 January 2019). A similar nascent tendency can be observed in the data protection field, with national regulators imposing first fines for breaches of the General Data Protection Regulation (with France’s data protection regulator recently fining Google 50 million euros 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.

72. For example, in Lithuania, there are currently plans to automate the issuing of speeding tickets and the Interior Ministry is allotting funds to this endeavour. This means that fines for some road offences will be imposed exclusively by technical devices, that is, without the intervention of a police officer or a court.

73. For current tensions in sanctioning regimes, see, for example, F.P. Mateo, ‘Harmonising National Sanctioning Administrative Law: An Alternative to a Single Capital-Markets Supervisor’, *European Law Journal* 24(4–5) (2018), pp. 321–348.