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Penalty and Other Punitive Sanctions in the Estonian and European Legal Order

1. Introduction: sanctions and their position in the legal order

The notion of sanctions requires, above all, solving of the problem of whether the sanctions of each particular branch of law remain within the limits of the specifics of that branch of law or involve a more punitive matter or repressive element — that is why they have to be analysed essentially as penal law sanctions. The domestic angle is particularly important from the point of view of Estonia's young legal order, which is still in the development stage. The other, the international dimension, results primarily from the fact that sanction rules are contained both in European Union law and in other international acts, first and foremost in the Council of Europe conventions. All these provisions together must be co-ordinated with the national legal order to build an integrated system. However, we must say that European Union law is characterised by inconsistent terminology. The sanctions contained in European Union law are so varied that their analysis would presume scrutiny of individual issues, which surely goes beyond the scope of this article. We can only note that the notion of sanctions cannot be found in the text of the Treaty establishing a Constitution for Europe[*1]; the treaty mentions only that of a penalty. However, comparison of the English, French, German, and Finnish texts gives a somewhat more varied picture. All these treaty versions speak about penalty (*penalty*, *peine*, *Strafe, rankastus*) in Article II-109, where it is definitely adequate (offences and penalties). In Article III-271, however, the English, French, and Finnish versions speak about sanction (*sanction*, *seuraamus*), whereas the German one mentions the penalty concept (*Strafe*). It is the other way round in Article III-363: the English version refers to penalty, while the French and German versions mention sanction.

This article sets out to (1) analyse the notion of sanctions in penal law against the background of both national and European Union, as well as Council of Europe, law; (2) then examine the problems related to

[1] Available at: http://europa.eu.int; published also in print form but not widely available: the Treaty establishing a Constitution for Europe. Luxembourg: Office for Official Publications of the European Communities 2005.

public law sanctions as exemplified by suspension of the right to drive; and 3), finally, consider the prohibition of business in civil law as a punitive sanction.

2. Penal law

2.1. Penalties

The nature of penal law is eventually revealed in the penalty imposed for a wrongful act. Here we may ask whether each legal consequence in punitive law is a sanction or sanctions only include penal or punitive sanctions that give a negative assessment to an act. In fact, there are more questions to ask, such as that of the extent to which we can talk about sanctions in the case of a legal consequence that involves not imposition of a penalty but instead its rescission.

It is obvious that sanctions comprise penalties. The European Court of Human Rights points out the characteristics of a penalty that distinguish this sanction from the punitive sanctions contained in other branches of law. Firstly, a penalty must be contained in criminal or misdemeanour law (this criterion not being of any significance here); secondly, the nature of the delict is important, whether it is part of general penal law and aimed against general legal rights but is not a disciplinary offence; and, thirdly, the content of the sanction, the damage contained therein, and the resulting important preventive impact on the public are key.[*2]

A penalty may be applied both actually and conditionally. The applicable Estonian penal law uses the French and Belgian *sursis* in the institution of conviction, in the case of which a person is convicted and is given a penalty that is not enforced but is conditional. According to the system of law, the conditional sentence is not regarded as an independent sentence type but as release from punishment (Chapter 5: 'Release from punishment'); however, it follows the punishable act and is a legal consequence determined by the degree of guilt, and thus it must be considered a sanction. During the period of probation, the convicted offender may be subjected to certain supervisory requirements or obligations; for example, he must reside at a permanent place of residence determined by the court, remedy the damage caused by the criminal offence, undergo the prescribed treatment, not meet certain persons, and so on (§ 75). Such requirements and obligations are not sanctions *per se* but form the substance of a conditional sentence as a sanction.

A person may be released from the conditional sentence not only during the imposition of the sentence but also during its service — that is, on parole (§§ 76 and 77). Here we can also say that the convicted offender continues to bear liability, though conditionally; thus, he is subject to sanction. Release from punishment due to terminal illness (§ 79 (1)), on the other hand, means unconditional release: the person no longer serves the sentence and is no longer sanctioned. *Poena naturalis* (§ 80) is a different issue. Namely, the court may release the convicted offender from the punishment if he is seriously injured as a result of committing the criminal offence. Though called a **natural punishment**, this does not, however, constitute a penalty in the legal sense and consequently does not serve as a sanction.

In addition to the principal and supplementary punishment, the sanction system underlying the Penal Code also recognises substitute punishments. For example, community service may be substituted for imprisonment (§ 69), while unpaid pecuniary punishment, a fine, or a fine to the extent of assets may be replaced by imprisonment, detention, or community service, respectively (Chapter 4, Division 3). Substitute punishment is definitely a sanction.

2.2. Other sanctions

Chapter 7 of the Penal Code, 'Other sanctions', comprises three types of legal consequences — confiscation (§§ 83–85), coercive psychiatric treatment (§ 86), and sanctions applied to minors (§ 87).

The classification of the latter as sanctions does not cause any problems, as, in the legal sense, a minor is released from punishment due to his diminished capacity for guilt; nevertheless, the sanctions imposed instead have features characteristic of penalties — these are measures designed to express social and ethical condemnation imposed for a wrongful act (see also section 4.2 below).

The two following measures described in Chapter 7 of the Penal Code can also be imposed for acts that are not wrongful. It is true that the object used to commit an offence may be confiscated from a person who has been convicted and punished (§ 83 (1) and (2)). However, this is not a punitive sanction by nature, since its

[2] Concerning the characteristics of the notion of punishment in terms of 'punishment is' and 'punishment must be', see N. Androulakis. Über den Primat der Strafe. – Zeitschrift für die gesamte Strafrechtswissenschaft 1996/8, p. 309 et seqq.

application does not depend on the degree of the person's guilt or the gravity of the offence. Such a measure is called a *securing non-punitive sanction*.[*3] Application of confiscation against a person who has aided in the use of the object for the commission or preparation of the offence or has acquired it in order to avoid confiscation (§ 82 (3)) resembles a penalty even less. In the absence of the permission necessary for the possession of a substance or object, confiscation is applied always, even if the person (for example, a child or a person of unsound mind) has not committed the offence wrongfully (§ 83 (5)).Recent professional literature in the field of law has pointed out that the regulation of confiscation contains much of that which might make it punitive. If assets acquired through an offence have been transferred or the confiscation thereof is impossible for another reason, the court may order the offender to pay an amount corresponding to the value of the assets subject to confiscation (§ 84). On the basis of § 73d (covering 'extended confiscation') German *Strafgesezbuch*, assets may be confiscated from a person committing an unlawful act if there are grounds to believe that the assets were derived from an offence or used therefor. The net principle used to be applied to calculate the value of the assets to be confiscated, so that the amount of the assets to be confiscated was obtained via consideration of the balance of profit and loss, but the gross principle has been adopted more recently. According to that principle, everything obtained through an offence is confiscated, regardless of the expenditure involved. Such trends have given rise to complaints that, in essence, confiscation is a form of sanctions that should be applied in accordance with the principle of guilt.[*4] The objection proceeds from a purely legal argument — confiscation is not a punishment, and thus it is not necessary to take account of the principle of guilt.[*5] Here we also have to bear in mind the fact that while in Germany the underlying fine to the extent of assets related to confiscation in § 43a has been revoked as unconstitutional[*6], its analogue found in the Estonian Penal Code (§ 53) continues to apply.

It is a matter of substantive decision whether to regard confiscation as sanction or not. This may be done with regard to a convicted offender, while in the case of third parties such a conclusion is disputable. In such a case, confiscation is a legal consequence following an unacceptable act, but, as confiscation does not follow the unlawful act (for example, preparation for offence is not punishable according to applicable law, with the necessary elements of an offence not being present), there is no link between the unlawfulness of the act under penal law and its consequence.

An unlawful act with the elements necessary to be considered an offence may be followed by coercive psychiatric treatment. Manslaughter or arson on the part of a person of unsound mind is unlawful but not wrongful. By applying this measure, the state does not express condemnation (there is no point in condemning a disease) but responds to a dangerous situation by localising the danger (by hospitalising the dangerous person) or working toward its elimination (curing the ill person). The act and the consequence are directly linked, and the link is much stronger than it is in the case of confiscation.

It may be deduced from the above information that the two large categories of legal consequences in substantive penal law — punishments and other sanctions — can be regarded as sanctions. The treatment of non-penal measures as sanctions derives, according to the system applied in the Penal Code, from their inclusion in the same chapter but even more from the fact that they follow an act qualified under penal law. If we consider the direct link of the legal consequence with the unlawful act to be an essential feature of a sanction, the classification of confiscation as a form of sanctioning is questionable.

2.3. Procedural law

There is no doubt that procedural coercive measures whose objective is to ensure that the procedure proceeds may be eliminated from among the class of sanctions. The problem is, however, that procedural law also contains sanctions that are characterised as having a substantive law nature. Punishments applied in the course of simplified proceedings, such as alternative, settlement, and summary proceedings (Chapter 9 of the Code of Criminal Procedure, CCrP), are definitely sanctions because they are both legally and substantively punishments imposed by courts (CCrP §§ 238 (2), 248 (1) 4), and 254 (4) 2)).

In some cases, a legal consequence is applied to the accused also when the proceeding is not finalised, based on the principle of opportunity or proportionality, and the case is not sent to court. In certain cases, termination of a proceeding is not followed by a sanction, such as in the case of termination of a proceeding due to

[3] See, e.g., Karistusseadustik. Kommenteeritud väljaanne (Penal Code. Commented edition). J. Sootak, P. Pikamäe (eds.). Tallinn: Juura 2004, § 83 comm. 1 (in Estonian).

[4] F. Herzog. Gewinnabschöpfung und Vermögenssanktionen: Verbrechensbekämpfung durch Kostenmaximierung des Normbruchs? – Festschrift für Klaus Lüdersen. Baden-Baden: Nomos 2002, p. 247.

[5] This is also the position adopted by the German Federal Constitutional Court. For details, see: U. Kindhäuser. Strafgesetzbuch. Lehr- und Praxiskommentar. Baden-Baden: Nomos 2005, § 73d/1.

[6] Bundesgesetzblatt I, 1340.

lack of proportionality (CCrP § 203) and when criminal offences committed by foreign citizens or in foreign states are involved (§ 204). Neither is a legal consequence imposed upon an accused with respect to whom proceedings are terminated in connection with assistance received from the person upon the carrying out of proceedings (§ 205). The legal consequences imposed in other cases have to be discussed separately.

As we said above, according to § 87 of the Penal Code (PC), the court may impose on a minor aged 14 to 18 a sanction for a wrongful act if the court decides to release the person from punishment. Section 201 of the CCrP provides for certain legal consequences in the case of termination of proceedings. Namely, proceedings may be terminated with regard to a minor on two grounds: (a) if he is incapable of guilt because of age (below 14 years of age) under PC § 33 or (b) he is capable of guilt (at age 14 to 18) but his prosecution is not considered reasonable. In such cases, the investigative body or the Prosecutor's Office sends the materials on the case to a juvenile committee that may impose some of the sanctions provided for in the Juvenile Sanctions Act[*7] (§ 3: a warning, the obligation to live with a parent, community service, attending a special school, etc.). In the case of option *a*, a person is incapable of guilt who analogously with a mentally incompetent person (e.g., a person of unsound mind) has committed a non-wrongful act that still has the necessary elements of an offence and is unlawful, and thus the sanction imposed by the juvenile committee is not a punishment but a sanction because of the direct relationship between the unlawful act and the legal consequence. According to the same logic, any other sanctions imposed by the juvenile committee on a person capable of guilt (option *b*) must be regarded as sanctions, even more so on account of their following an act that, besides having the necessary elements to constitute an offence and being unlawful, is also wrongful.

As is known, criminal proceedings may be terminated on the basis of the principle of opportunity not only with regard to a minor but also with regard to an adult under CCrP § 202 if the person's guilt is negligible and there is lack of public interest in the pursuit of proceedings. It is possible for the proceedings to be simply terminated with no legal consequence, so we cannot speak of sanctions in this case. However, in certain cases the prosecutor or the court may apply particular sanctions — for example, imposing an obligation for the accused to pay a fixed amount into the public coffers or to perform community service. It is not difficult to notice that such legal consequences are either close to those specified by law as punishments (payment of an amount of money and pecuniary punishment) or coincide with them (community service), and their classification as punitive sanctions should be considered fully justified.

3. Punitive sanctions outside penal law

3.1. Suspension of the right to drive a vehicle

Outside penal law, the provisions of the Traffic Act[*8] (TA) in §§ 41 (3) 5) and 41^3 governing suspension of the right to drive a motor vehicle deserve attention from the sanction problems standpoint. This is true regardless of the fact that we have had to use the past tense when speaking about the provisions since 1 October 2005, because the Riigikogu repealed the provisions of the Traffic Act governing the suspension of the right to drive on 16 June 2005 and replaced withdrawal of the right to drive by the Estonian Motor Vehicle Registration Centre (MVRC) with a supplementary punishment applicable for a traffic-related misdemeanour.[*9] Why is discussion of suspension of the right to drive still justified?

Firstly, we cannot disregard the fact that, as driving of vehicles has become an important part of daily life, the prohibition of driving is everywhere perceived as an important restriction; thus, it is an area causing disputes in various countries — testified by the fact that the European Court of Human Rights has had to repeatedly rule on issues related to driving prohibitions based on appeals submitted from different countries.[*10] The Estonian regulation has not been free of criticism and court actions either: in several instances, they even reached the Supreme Court *en banc*[*11], while the Supreme Court had to adopt a position, *inter alia*, on whether suspension of the right to drive constitutes an administrative measure or a punitive coercive

[7] Alaealise mõjutusvahendite seadus (Juvenile Sanctions Act). – RT I 1998, 17, 264 (in Estonian).

[8] Liiklusseadus (Traffic Act). – RT I 2001, 3, 6; 2005, 40, 311 (in Estonian).

[9] Väärteomenetluse seadustiku, karistusseadustiku ja liiklusseaduse muutmise seadus (Code of Misdemeanour Procedure, Penal Code, and Traffic Act Amendment Act). – RT I 2005, 40, 311 (in Estonian), which entered into force on 1 October 2005.

[10] In addition to the decisions discussed in this article in the cases *Escoubet v. Belgium* and *Malige v. France*, the cases *Blokker v. Netherlands* and *Hangl v. Austria* could be mentioned. The judgements of the European Court of Human Rights are available at http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (15.09.2005).

[11] Regardless of the fact that the Supreme Court did not declare the regulation unconstitutional, continuing criticism brought about the amendment of the act.

measure.*[12] It is obvious that suspension of the right to drive on the basis of these provisions definitely served as a sanction — it was applied for violation of the traffic requirements specified in TA § 41^3 (1)–(8), while suspension of the right to drive or a temporary prohibition to drive a motor vehicle definitely has a negative effect on the person concerned (demonstrated by widespread contestation of the decisions on suspension of the right to drive). Disputes were provoked by the question of whether it was an administrative measure or a punitive sanction — the persons concerned perceived it as a punishment, which gave rise to a question of violation of the *ne bis in idem* principle when a person is punished by a fine or detention in a misdemeanour procedure and, after the decision in the misdemeanour procedure has entered into force, the MVRC suspends the right to drive on that basis.

That is why there is a sufficient amount of court practice concerning the regulation, which, we might note, is not true about any similar provisions. Yet various laws still in force contain similar regulations concerning the withdrawal or suspension of special rights/licences*[13], which may give rise to the same issues that appeared in the disputes about the suspension of the right to drive. Thus, the opinions expressed in the cases involving suspension of the right to drive serve as guidelines from which to proceed in similar cases in the future.

3.2. The Traffic Act's regulation of suspension of the right to drive

According to TA § 41 (3) 5), a person's right to drive shall be suspended if a decision on punishment that prescribes suspension of the right to drive has entered into force in respect of the driver in misdemeanour proceedings. The list was given and the terms of suspension provided in TA § 41^3 (1)–(8). Suspension was prescribed for more serious traffic misdemeanour*[14], such as driving while intoxicated, exceeding the speed limit by more than 20 km/h, and causing damage to property or the health of a person through negligence by violation of traffic requirements (i.e., causing a traffic accident). Somewhat more unexpected is the list's inclusion of the driving of a vehicle that has not been registered or that carries a wrong registration plate (the full list has been provided below). As a rule, suspension of the right to drive has been prescribed if several violations continue to apply, the exceptions being driving while intoxicated and activities impeding ascertainment of the state of intoxication (evasion of the examination for determination of the state of intoxication, consumption of alcohol after a traffic accident by the driver), ignoring a stop signal for vehicles, and failure to give notification of a traffic accident.

A decision on misdemeanours that entered into force in the particular case of traffic violations was not the only basis for suspension of the right to drive*[15] under the Traffic Act. The act's § 41 (3) provided for suspension of the right to drive in the following cases:

1. the driver violated the provisions of § 20 (2)–(5) and (7) of the same act — i.e., drove the vehicle while intoxicated*[16], ill, or fatigued — or the owner, possessor, or driver of a motor vehicle per-

[12] To avoid a situation in which a person's procedural fundamental rights that must be respected in infringement proceedings are not ensured merely because due to the legislature's mistake or conscious choice a punitive sanction has been placed outside penal law, the Supreme Court has in its practice of constitutional review, following the example of the European Court of Human Rights, proceeded from the notion of autonomous criminal charges.

[13] An example could be § 43 (1) 1) of the Weapons Act (RT I 2001, 65, 377; 2004, 54, 388; in Estonian), according to which the police prefecture that issued an acquisition permit or a weapons permit shall suspend the permit for one year if the holder of the permit has been punished under administrative procedure for driving a motor vehicle or rail vehicle, or flying an aircraft, under the influence of alcohol or narcotic, psychotropic, or psychotoxic substances.

[14] The most serious violations of traffic requirements — driving a motor vehicle while intoxicated, if the person has been previously punished for the same act (PC § 424); intentional violation of traffic requirements or vehicle operating rules by a driver, thereby causing major damage to the health of a person or the death of a person through negligence (PC § 422); and violation of traffic requirements or vehicle operation rules by a driver through negligence, thereby causing major damage to the health of a person or the death of a person (PC § 423) — serve as criminal offences and remain beyond the scope of such regulation. This does not mean that the prohibition to drive may not be imposed for them — deprivation of driving privileges for up to three years has been provided for as supplementary punishment for traffic violations (PC § 50 (1)). The Supreme Court *en banc* expressed in para. 50 of the decision made in matter 3-4-1-2-05 on 27 June 2005 (RT III 2005, 24, 248; in Estonian) the position that the right to drive could not be withdrawn only in exceptional cases.

[15] In addition, it is worth mentioning that, besides suspension of the right to drive, the Traffic Act recognises two other prohibitions on driving: the withdrawal of the right to drive (a supplementary punishment for a traffic violation, see also Note 2) and revocation of the right to drive (the title of Chapter 8 of the Traffic Act mentioned cancellation of the right to drive, but the chapter did not actually contain the institution replaced by revocation of the right to drive).

[16] Prohibition of driving in a state of intoxication is actually contained only in TA § 20 (3), but according to Supreme Court practice (Criminal Chamber of the Supreme Court decision (CCSCd) 3-1-1-119-03. – RT III 2003, 32, 330; CCSCd 3-1-1-89-04. – RT III 2004, 34, 359; CCSCd 3-1-1-47-05. – RT III 2005, 21, 220; all in Estonian) also situations in which the alcohol content of the blood or exhaled breath of a person exceeds the permitted levels (TA § 20 (4)) must be qualified as intoxication. In turn, TA § 20 (5) considers the leaving of the

mitted a person who met these criteria or who did not have the right to drive the vehicle to drive the vehicle;

2. the driving licence was sent for expert assessment due to suspicion regarding its authenticity;
3. the driver did not pass the theory and driving tests specified in TA § 44[*17];
4. the state of health of the driver did not conform to the requirements specified in TA § 28 (2)[*18]; and
5. a decision on punishment that prescribed suspension of the right to drive had entered into force in respect of the driver in misdemeanour proceedings.

It is obvious that the latter basis for suspension of the right to drive — i.e., the one that is of interest to us — differs somewhat from the rest. Suspension of the right to drive in the cases described in items 1–4 in the list serves as a measure for the prompt prohibition of the right to drive[*19] until the circumstances specified in the law cease to exist[*20] as regards persons who are temporarily unsuitable as drivers of a vehicle due to there being reason to believe that they could, in driving, violate traffic safety. This is particularly obvious in the case of intoxicated, fatigued, or ill drivers[*21], who experience difficulties with clear perception of traffic conditions and adequate response, but also in the cases specified in the second and third items in the list. Thus, these are definitely administrative measures. Although the acts for which TA § 41 (3) 1)–4) prescribed suspension of the right to drive and which violate traffic requirements also serve as misdemeanours, such suspension of the right to drive is in no manner related to the guilt of the person and its ascertainment in infringement proceedings (the right to drive is suspended before guilt is ascertained in infringement proceedings, and independently thereof). It is the relationship of the measure to guilt that indicates that the measure is a punishment (*nulla poena sine culpa*).[*22] It is the punishment that expresses condemnation for unlawful behaviour[*23], while guilt expresses disapproval of the person for opting for a wrongful activity and behaving contrary to rules.[*24] The European Court of Human Rights (ECHR), which, similarly to the notion of a criminal charge, views the notion of punishment as autonomous of national law[*25], has also emphasised that assessment of whether a measure is a punishment proceeds from whether the application of the measure follows the conviction of the person of the criminal charge brought against him.[*26] In the case *Escoubet v. Belgium*[*27], the court specifically stressed that the prompt suspension of the right to drive served as a preventive measure to secure the safety of other road users and that this was why the potentially dangerous driver was temporarily prohibited from driving a vehicle. This could be compared to a procedure for issue of driving licences that is definitely administrative in nature and aimed at ensuring that an individual is fit and qualified to drive on a public highway (para. 37 of the judgement).

The Administrative Law Chamber of the Supreme Court has explained the same position in its judgement in matter 3-3-1-1-04 of 23 February 2004[*28]: 'Suspension of the right to drive on the bases provided in TA

scene of an accident by the driver, refusal to allow the state of intoxication to be ascertained, or consumption of substances that may induce intoxication after it has been suggested that the state of intoxication be ascertained to be equivalent to driving while intoxicated. Thus, all the violations contained in TA § 20 (3)–(5) may be encompassed by driving while intoxicated. The prohibition of permitting a person to drive while intoxicated, ill, or fatigued arises from TA § 20 (2).

[17] Section 44 of the Traffic Act governs the restoration of the right to drive of a person whose right to drive has been suspended or withdrawn. According to that section of the law, a person must pass a theory test if his right to drive has been suspended or withdrawn for longer than six months but for not longer than 12 months (TA § 44 (1). A person must pass both the theory and driving test if his right to drive has been suspended for longer than 12 months. Thus, suspension of the right to drive on these grounds serves as an extension of the earlier prohibition to drive until the requirements prescribed by law are complied with.

[18] This clause is in fact pointless, as the same basis for suspension is already contained in TA § 41 (3) 1).

[19] This is testified to by the provisions governing the procedure for suspending the right to drive. Namely, suspension of the right to drive enters into force from the adoption of the decision, according to TA § 41 (6). This could not be applied unless the person became aware of the decision. Thus, TA § 41 (5) prescribes that a decision on suspension shall be prepared in two original copies, of which the first shall be immediately given to the driver, who shall confirm the receipt thereof by his signature.

[20] Pursuant to TA § 41 (7), the right to drive is restored after the grounds for suspension of the right to drive cease to exist.

[21] However, the suspension of the right to drive of a person who has granted an intoxicated, ill, or fatigued person permission to drive a vehicle has been included in the list obviously mistakenly, as in such a case we cannot speak about the unfitness of the **person who has granted permission to drive the vehicle or transferred control of the vehicle**, so it is in no way justified to prohibit him immediately from driving. Also, a question arises of when the right to drive should be restored.

[22] K. Kühl emphasises that, in Germany, the requirement that the punishment be related to guilt derives from the Constitution (arts. 1 and 20 of the GG). K. Kühl. Karistusõigus: üldosa (Penal law: general part.). Tallinn 2002, p. 224 (in Estonian).

[23] J. Sootak. Karistusõiguse alused (Foundations of penal law). Tallinn 2003, p. 178 (in Estonian).

[24] Karistusseadustik. Kommenteeritud väljaanne (Note 3), § 32 comm. 3.

[25] See *Welch v. UK*, judgement of 9 February 1995, para. 27; *Malige v. France*, judgement of 23 September 1998, para. 34.

[26] See *Welch v. UK* (Note 25), para. 28.

[27] Judgement of 28 October 1999.

[28] RT III 2004, 7, 73 (in Estonian).

§ 41 (1)–(4) can be regarded as an administrative measure, aimed at preventing a driver not meeting the requirements provided in the Traffic Act from driving a vehicle until the circumstance causing suspension of the right to drive ceases to exist (i.e., prevention of further violation) or until the substantive resolution of the relevant administrative matter. Such a measure infringes the person's freedom-right but is formally legitimate and generally proportional.'

3.3. Suspension of the right to drive based on enforced misdemeanour decision: administrative measure or punishment?

Unlike TA § 41 (3) 1)–4), clause 5 provided that the right to drive was suspended on the basis of a decision on punishment in misdemeanour proceedings that had entered into force. Consequently, there were grounds to ask whether this could have been a punitive sanction. Suitable criteria for determining whether it was a punishment have been developed by the ECHR in its practice, specifying the circumstances to be taken into account in the cases *Welch v. UK* (para. 28) and *Malige v. France* (para. 35): **treatment of** the measure **according to national law**[*29], its **nature** and **objective**, the **procedure for its application**, and the **severity** of the measure. Here it must be noted that the latter case examined a regulation rather similar to that dealt with in TA § 41 (3) 5) — that concerning the violation points system used in France, according to which a certain number of points is associated with licence to drive. If a person is punished for a traffic violation, a particular number of points prescribed by law are deducted; if no more points are left, the driving licence becomes invalid. The compliance of the procedure with the requirements of Art. 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms[*30] was disputed at ECHR level. The appellant was of the opinion that the deduction of points that was formally considered to be an administrative sanction actually functioned as punishment and that human rights prescribed at international level as protected were not ensured upon discussion of criminal charges.

The court established that in the case concerned, there was no doubt that the violation leading to the deduction of the points was a crime by nature.

After doing so, the ECHR noted that although deduction of points was an administrative sanction under national law and not related to penal law, the points were deducted in the context of, and after the outcome of, a prosecution. The criminal court first assesses the facts and then imposes a punishment. After this, proceeding from the conviction of the person, the Minister of the Interior deducts points according to the nature of the violation and using the scale established by law. Thus, deduction of points was an automatic consequence of the conviction. With regard to the severity of the measure, the ECHR noted that deduction of points could lead to withdrawal of the right to drive; nowadays, the right to drive a motor vehicle is very useful in everyday life and for carrying on an occupation.

The ECHR concluded that although the deduction of points had a preventive character, it also had a punitive and deterrent character and was, accordingly, similar to a secondary penalty.

What about withdrawal of the right to drive on the basis of TA § 41 (3) 5)? Suspension of the right to drive is by nature a restriction of a person's rights that may, depending on its reasons and objectives, serve both as a punishment and as an administrative sanction. Which one the legislation wished it to be cannot be said, unfortunately, since the draft act enacting the relevant regulation is silent on the matter.

The drivers whose right to drive was suspended regarded the measure as a punishment. In administrative courts, they requested that TA § 41^3 (1), (4), and (8) not be applied, due to their perceived conflict with the prohibition of being punished again, which is provided in § 23 (3) of the Constitution. The Tallinn Administrative Court did not apply the relevant provisions of the Traffic Act and requested that the Supreme Court declare the provisions unconstitutional. The Supreme Court, which consequently had to establish the nature of the measure, arrived at the conclusion that it was a punitive sanction subject to § 23 (3) of the Constitution.[*31]

[29] The ECHR discusses that in the reasons for its judgement, but, as the notion of punishment used by the ECHR is autonomous, it is not a decisive factor; rather, it is more important what the Court considers to be the actual nature and objective of the measure.

[30] Inimõiguste ja põhivabaduste kaitse konventsioon (Convention for the Protection of Human Rights and Fundamental Freedoms). – RT II 1996, 11/12, 34 (in Estonian).

[31] Although the Supreme Court considered suspension of the right to drive to be a punitive sanction, the Supreme Court *en banc* did not see a conflict with the prohibition of double punishment contained in § 23 (3) of the Constitution. The Supreme Court *en banc* established that in the case of an automatic consequence of conviction, the misdemeanour procedure and the procedure for suspension of the right to drive in the MVCR could be regarded as a single whole. Double punishment such as imposition of a principal and supplementary punishment is in fact not forbidden. However, it is prohibited to conduct proceedings for the second time and punish in an independent proceeding (related to double jeopardy). Such a prohibition is related to the principle of legal certainty, protecting a person against the arbitrary action of the state — this guarantees the person's possibility of knowing the consequences characterised by the enforcement powers of the state such as may be imposed if his having committed the offence is established, and the possibility that he may be surprised by consideration of supple-

The Supreme Court admitted that formally it was an administrative sanction, as TA § 41^3 (1), (4), and (8) did not formally serve as the provisions of the special part of penal law. The General Part of the Penal Code does not provide for supplementary punishments for misdemeanours; the principal punishments are only a fine and detention, according to PC § 3 (4). Finally, the Supreme Court *en banc* inferred that the legislature had positioned suspension of the right to drive on account of traffic violations in the Traffic Act (Chapter 8) apart from the necessary element of a misdemeanour provided in the same act (Chapter 14^1).

The above information may be supplemented by the fact that suspension of the right to drive had been placed within the competence of an administrative body — the MVRC. Märt Rask, the Minister of Justice at the time, explained the need for the regulation at the Riigikogu sitting on 12 June 2002 as follows: 'The new procedure was caused by the fact that the General Part of the Penal Code does not provide for the withdrawal of the driving licence as a punishment imposed for a misdemeanour. The drivers committing dangerous violations must be removed from traffic, which is possible through suspension of the right to drive.'[*32] Indeed, also the fact that a person has repeatedly committed serious traffic violations is indicative of his unfitness to drive a motor vehicle. The driver so demonstrates his general careless attitude to traffic requirements and thus poses a danger to other road users.

At the same time, it must be admitted that suspension of the right to drive depended on the outcome of the misdemeanour proceedings — suspension of the right to drive was based on an enforced decision on punishment. Thus, suspension of the right to drive was directly related to the guilt of the person — if the danger that the person represented were taken as the basis, suspension would be justified also if the violation had been established as fact but the person had for some reason not been punished. The Traffic Act did not enable the MVRC to assess the person as a traffic hazard and decide on that basis whether and for how long to suspend the person's right to drive; rather, it provided for the obligatory suspension of the right to drive for a specified term. The freedom of choice of the MVRC (more specifically, the absence thereof) is demonstrated by the fact that the Traffic Act used not the wording 'shall decide on the suspension of the right to drive', but 'shall formalise the suspension of the right to drive by its decision'. Thus, the only one assessing the circumstances of the violation was the person processing the misdemeanour, who did so proceeding from the guilt angle. However, suspension of the right to drive may be considered an automatic consequence, similar in nature to the deduction of points discussed in the case *Malige v. France*.

A long time interval between the violation and suspension of the right to drive is also contrary to the treatment of suspension of the right to drive as an administrative sanction, and there are even two aspects to it. On the one hand, the person can continue driving; i.e., the danger persists. On the other hand, if the person does not commit any new violations during that time, this indicates that he has improved and thus there are no grounds for suspension of the right to drive.[*33]

Finally, we have to mention lack of combination possibilities as an argument against the administrative law measure and as a significant weakness of the system. To take an example, the Traffic Act prescribed suspension of the right to drive for one month if a person who had been given valid punishment for exceeding the speed limit by over 20 km/h again exceeded the speed limit by more than 20 km/h (TA § 41^3 (2)); suspension of the right to drive was also prescribed if a person who had been given valid punishment for causing a traffic accident did so again (TA § 41^3 (2)). Nevertheless, it was not possible to suspend the right to drive if a person who had been given a valid punishment for exceeding the speed limit caused a traffic accident and *vice versa*. The only provision that did not keep different violations apart was TA § 41^3 (8), according to which a person's right to drive was suspended for 24 months in the event of a fourth or subsequent violation if suspension of the right to drive was prescribed for the violation. However, it is obvious that the general traffic hazard of a driver is not manifested only by the fact that the person has exceeded the speed limit twice or caused a traffic accident twice but also by the fact that he commits more serious traffic violations over a relatively short span of time. In relation to this consideration, the points system is more flexible: in such a system, each violation specified in the law has a particular number of violation points associated with it, and after a certain number of points have accumulated, the right to drive is suspended.

The Supreme Court summarised that part as follows (Supreme Court *en banc* decision 3-4-1-10-04, para. 19): 'No substantive proceedings are carried out in the MVRC upon suspension of the right to drive; the role of the agency is only to formalise suspension of the right to drive. Thus, an administrative body does not assess upon suspension of the right to drive the traffic hazard caused by a person. The person processing the misdemeanour is the only one to assess the circumstances of the violation but assesses only the guilt of the person when he hears the offence, which is why the fact that the person is guilty of committing a traffic offence must be regarded as a basis for suspending the right to drive.'

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mentary punishment for the same act after the decision has entered into force is precluded. In this case, the person could foresee the suspension of the right to drive since its imposition on the basis of the punishment decision made in a misdemeanour procedure was prescribed at the level of a legal act. Supreme Court *en banc* decision 3-4-1-10-04. – RT III 2004, 28, 297 (in Estonian).

[32] Shorthand notes of the sitting of the Riigikogu of 12 June 2002. Available at: http://web.riigikogu.ee/ems/ (in Estonian).

[33] The same position was adopted by, e.g., the Administrative Court of Austria (decision of 24 August 1999 in matter 99/11/0168).

As to the severity of the measure, we have to agree with the position of the ECHR that the right to drive a motor vehicle is very useful in everyday life today and that, although the right to drive is not a fundamental right in itself, several fundamental rights can be exercised through it.*[34] The duration of the suspension of the right to drive provided in TA § 41^3 (1)–(8) ranged from one month (subsection 1) to 24 months (subsection 8). The Supreme Court established that prohibition of the right to drive that lasted for years was sufficiently severe. Shorter-term prohibitions are not sufficient, but the Supreme Court *en banc* did not consider it reasonable to draw a line within the regulation.

On the basis of the above, the suspension of the right to drive provided in TA § 41 (3) 5) is judged to serve as a punitive sanction, upon application of which the fundamental rights prescribed as applying upon hearing of criminal charges must be ensured for the person concerned.

4. Prohibition of business as punishment contained in civil law?

4.1. The notion and types of prohibition of business

Prohibition of business has been provided for in § 91 of the applicable Bankruptcy Act (BA). It is a restriction of freedom of enterprise that consists of a prohibition applied to certain persons to act as a sole proprietor, a member of a management body of a legal person or of the body replacing it, a member of the supervisory body, a general partner, the liquidator of a legal person, a procurator, and a trustee in bankruptcy.

The prohibition of business dealt with by BA § 91 (1) shall apply to a natural person automatically from the moment his bankruptcy is declared — he must not act as a sole proprietor, a member of a management body of a legal person, the liquidator of a legal person, or a procurator without the permission of the court. In the event of the bankruptcy of a debtor who is a legal person, the court may issue an order as to whom the prohibition of business should be applied to from among the persons specified in BA § 19 (1) and (3). It is common to subjects related to legal persons to whom the prohibition of business can be applied that they perform the management, representation, and supervisory function or at least one of these functions. The Civil Chamber of the Supreme Court established that with the existence of relevant bases, the prohibition of business could be applied to the persons specified in § 12 (4) of the Bankruptcy Act in effect before 1 January 2004 also if the person was released from his duties within one year before the commencement of the bankruptcy proceedings.*[35] In the applicable Bankruptcy Act, the principle has been provided in §§ 91 (3) and 19 (3) *expressis verbis*.*[36] Two types of prohibition of business are covered in BA § 91. The first one has been prescribed in subsections 1 and 2. It is a prohibition that is applicable during the bankruptcy proceedings and expires with the termination of the proceedings; i.e., it is a prohibition of business during bankruptcy proceedings. A prohibition of business can be applied starting from the declaration of bankruptcy. A relevant ruling may be issued later also, but if the bankruptcy is not declared because of abatement, the application of the prohibition of business during the proceedings is precluded. Bankruptcy Act § 91 (3) prescribes a prohibition that can be applied within three years after the termination of the bankruptcy proceedings — i.e., a prohibition of business following the bankruptcy proceedings. The prohibition of business following the bankruptcy proceedings can be applied only simultaneously with the termination of the proceedings, and it is valid for three years from termination of the bankruptcy proceedings. As BA § 91 does not contain the words 'as long as', the literal interpretation may lead to the conclusion that the court has no right of consideration as regards the length of the term.

4.2. Prohibition of business as punishment

The applicable law has given rise to a situation in which prohibition of business that is in fact equivalent to a criminal sanction is contained in bankruptcy law while performing its penal law function.

Prohibition of business is a means of liability under bankruptcy law for causing insolvency. In addition to liability for causing insolvency, the debtor's liability may also comprise liability for non-performance of the

[34] The Supreme Court *en banc* has mentioned, above all, the right to free self-realisation (Supreme Court *en banc* decision (SCebd) 3-3-1-69-03; para. 33. – RT III 2004, 28, 297), as well as the freedom to choose a profession and the freedom of free movement (SCebd 3-4-1-2-05. – RT III 2005, 24, 248).

[35] SCebd 3-2-1-76-02. – RT III 2002, 21, 250 (in Estonian).

[36] Pankrotiseadus (Bankruptcy Act). – RT I 1997, 5, 32; 2002, 44, 284 (in Estonian).

duties arising during the bankruptcy proceedings. Such liability has been specified, above all, in Chapter 4 of the Bankruptcy Act. The debtor's duties may relate to criminal liability according to the Penal Code, civil liability manifested in the obligation to compensate for damage, or bankruptcy law liability manifested in specific legal remedies provided in the Bankruptcy Act (such as application of detention or the prohibition of business to the debtor).

The prohibition of business is a very serious restriction of freedom of enterprise. The goal of application of the prohibition of business after the end of the bankruptcy proceedings remains highly questionable. Doesn't such restriction of the freedom of enterprise imply the arbitrary action of the executive and judicial power, since prohibition of business is in several respects similar to a supplementary punishment in penal law — the occupational ban? At the same time, unlike in the case of the occupational ban, a clear basis or procedure has not been provided for application of prohibition of business.

4.2.1. Prohibition of business following bankruptcy proceedings *versus* the notion of punishment

The prohibition of business can be applied to the debtor according to BA § 91 (3) on the basis of a court ruling also during a term of up to three years after the end of the bankruptcy proceedings, if the debtor has been convicted of a bankruptcy offence or a criminal offence relating to execution procedure, a tax offence, or an offence related to a company. The guiding principle is that if the debtor has been convicted of any of the above offences, he is no longer trustworthy and, primarily due to preventive considerations, it is possible to subject him additionally to liability under bankruptcy law in the form of prohibition of business. However, relating the prohibition of business directly with conviction will further diminish the preventive nature of the measure and intensify its perception as a punitive measure.

Here it would be reasonable to compare the prohibition of business and the supplementary punishment provided for in PC § 49. Both the prohibition of business and an occupational ban restrict freedom of enterprise, which means a prohibition to act in a certain area. The prohibition of business prohibits specific areas of activity. In the case of the occupational ban, the court decides on the content of the restriction, determining the prohibited positions and areas of activity. The court may impose an occupational ban also so that it precisely coincides with the list of areas of activity covered by the prohibition of business. However, this cannot be said about the prohibition of business: the procedure for application of a prohibition of business is as concisely stated in the applicable Bankruptcy Act as in the Bankruptcy Act applicable before 1 January 2004 and has been largely left to develop in the course of legal practice. While the procedure for applying the prohibition of business is non-explicit, its implementation and monitoring procedures are also unclear, just as are the consequences accompanying a violation of the prohibition of business.[*37]

We have to ask whether the prohibition of business serves as a supplementary punishment provided in the Bankruptcy Act or as a coercive measure of the executive and judicial powers.

When the prohibition of business imposed during bankruptcy proceedings is, just as a detention, comparable with a sanction imposed by the legislator to complete the bankruptcy proceedings as quickly and smoothly as possible, the legislator's initiative is not sufficient to justify the application of a prohibition of business following the bankruptcy proceeding. Here we must also take account of constitutional positions and the penal law principles stemming from them.

Prohibition of business is explained as a means of liability under bankruptcy law for causing insolvency.[*38] If the debtor has destroyed, hidden, or wasted his assets or committed any other acts resulting in his insolvency or in a significant decrease in his solvency, prohibition of business following the bankruptcy proceedings can be imposed upon the conviction of the debtor in connection with an offence related to bankruptcy proceedings, execution procedure, a tax offence, or an offence related to a company. Thus, causing of insolvency is an unlawful act that may be followed by an imposition of a prohibition of business. Since the prohibition of business restricts a person's subjective right and freedom to engage in enterprise, causing loss and restriction to the person, the prohibition of business following the proceedings is, by nature, equivalent to punishment (see also 1.1). Although the prohibition of business is contained in bankruptcy law, it is applied as a supplementary punishment in relation to the offences related to companies that are specified in PC §§ 380–382 and for causing insolvency (§ 384).

Intentional causing of insolvency is covered under general penal law provisions, which are aimed against general legal rights. This arises from the meaning of PC § 385. There is no doubt about the general and special preventive content of the prohibition of business.

[37] P. Manavald. Ärikeeld kui ettevõtlusvabaduse riive (Prohibition of business as restriction of freedom of enterprise). – Juridica 2003/7, pp. 457–463 (in Estonian).

[38] P. Varul. Võlgniku vastutus pankroti korral (Debtor's liability in bankruptcy). – Juridica 2003/7, pp. 449–456 (in Estonian).

Based on the above, we may unambiguously conclude that the prohibition of business following the proceedings serves as a type of punishment used in bankruptcy law that resembles a supplementary punishment in criminal law. If the debtor is convicted of a bankruptcy offence or an offence relating to execution procedure, a tax offence, or an offence related to a company, he may, besides the principal punishment, be subjected to one or more supplementary punishments and on the basis of bankruptcy law also to the prohibition of business following the proceedings as a punishment. Thus, the Bankruptcy Act provides for a supplementary punishment outside the area of penal law, the application of which is independent of the criminal procedure and penal law principles. Such regulation, however, is contrary to § 23 (3) of the Constitution, according to which no-one shall be prosecuted or punished again for an act of which he has been finally convicted or acquitted pursuant to the law.

5. Conclusions

The events related to the regulation of suspension of the right to drive demonstrate well how thin the line can be between a punishment and an administrative measure. The features that are characteristic of both are inevitably intertwined: both the punishment and the administrative measure aimed at preventing a further offence have a repressive effect, both can be regarded as having as one of their goals raising people's awareness and motivating them to refrain from further offences, etc. However, court practice has developed criteria that allow for judging which of the two is involved in a particular case. An answer to the question of what the objective of a sanction is must be sought already at the legislative stage — the answer may be of significance in deciding whether the regulation is in accordance with the Constitution. Serious consideration should also be given to transferring the prohibition of business to penal law.

Since the objectives of the application of prohibition of business and the related procedure must both be inferred by the legislator through interpretation of law, there is a danger that this restriction of freedom of enterprise may be applied by violating people's fundamental rights. Whereas the simplified procedure for applying a prohibition of business during the proceedings can be justified by the preventive nature of the measure, in the case of prohibition of business applied following the proceedings its preventive nature is not sufficient justification. Prohibition of business that is applied after the proceedings is a sanction provided in the Bankruptcy Act whose content and duration coincide with a supplementary punishment provided for in the Penal Code — the occupational ban. Prohibition of business that is applied after the proceedings has been reduced to a subtype of occupational ban, and its application without adherence to the procedural rules provided for the application of an occupational ban is not justified.

We may say that in addition to substantive penal law, punitive sanctions are contained also in other branches of law. From the point of view of the further development of Estonia's relatively young legal system it is important to address the question of whether some sanctions contained in specific branches of law should belong to the sanction system of penal law as supplementary punishments.