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Panel II: Enforcement in EU Financial Services law: legal yardsticks, judicial scrutiny, charting the way ahead

Banking Crises – law, policy and practice: European and global perspectives

SRB, Brussels, 18 June 2025

Outline

1. A European integrated approach: ECHR and EU
2. The ECHR leading cases: a triptych
3. The rise of the EU punitive sanctions
4. The dialogue between the ECHR and the EU
5. Intra-systemic effects of the punitive sanction's doctrine
6. ...and its limits: *nemo tenetur* and separation between investigation and adjudication
7. Provisional conclusions

The ECHR leading cases: a Triptych

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Engel (1976)

- military offence in the Netherlands
- disciplinary detention
- 'criminal charge' as autonomous concept'
- Engel's criteria merely sketched:
1. Domestic definition
2. Nature of the offence
3. Severity (and nature) of the penalty
- full applicability of Article 6 ECHR

Öztürk (1984)

- depenalisation of traffic offence in Germany
- right to interpretation
- definition of the « nature of the offence »
- incidental final remark: « conventionally criminal charges » do not imply the general application of Article 6 guarantees
- it is sufficient the right to full judicial review by a Court

Jussila (2006)

- TVA fraud in Finland
- no right to be heard and no public hearing
- Unity of the notion of "criminal matters"
- No sector-based application of Engel's criteria according to the relevance of the specific field (sensitiveness of fiscal matters)
- Hard core of criminal law
- "Conventionally criminal charges"

The evolution of « punitive justice »

‘criminal charge’ as autonomous Conventional concept

The Convention leaves the States free to designate as a criminal offence an act or omission not constituting the normal exercise of one of the rights that it protects. . Such a choice has the effect of rendering applicable Articles 6 and 7, in principle escapes supervision by the Court.

The converse choice, for its part, is subject to the Engel’s criteria:

- Formal qualification in domestic order
- Nature of the offence
- Severity and nature of the penalty
- The second and the third are alternative and non-cumulative

Consequences: variable applicability of procedural safeguards foreseen by Article 6 (criminal limb)

Which ones?

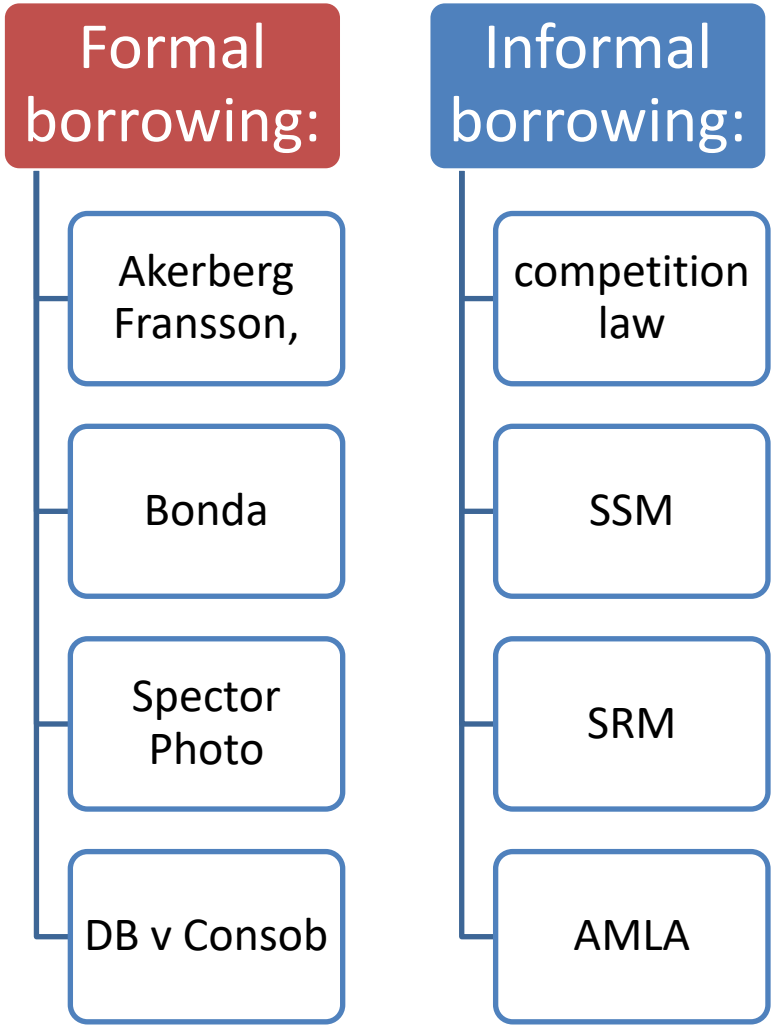
EU and punitive sanctions: a brief history of the institutional framework

Before the 70's

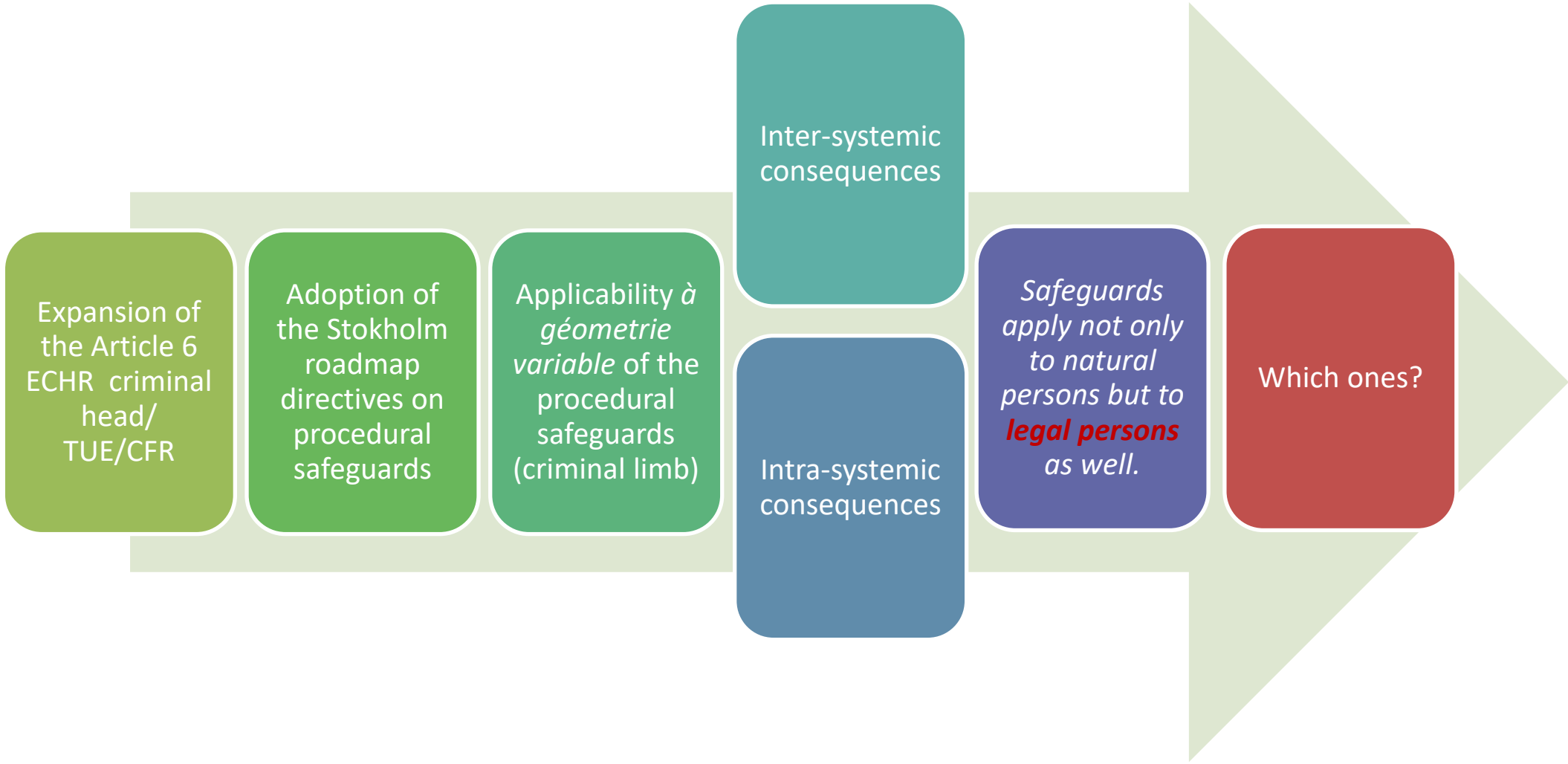
- EC law remained silent on the enforcement of EC policies.
- Duty of loyal cooperation: Member States had to enforce EC law but free to decide whether to use private law, disciplinary law, administrative law or criminal law to sanction violations of EC obligations

Administrative sanctions started to be developed during the 70's

- More integrated enforcement: admin sanctions adopted in various areas:
  - Via **negative integration**: mobilising the four freedoms
  - Via **positive integration** with sectot-by-sector approach (with common policies, such as the agricultural policy, the fishery policy, or with flanking policies such as environmental protection, EC financial interests protection, banking supervision, market manipulation, banking resolution, AML/CTF etc.)
  - Internal evolution of administrative sanctions:
    - Severe sanctions, for both individuals and legal entities (turn-over based sanctions)
    - Applied by specialised agencies endowed with autonomous coercive investigative powers
    - Lower standard of evidence
    - Limited judicial review


Formal borrowing:
Akerberg Fransson,
Bonda
Spector Photo
DB v Consob
Informal borrowing:
competition law
SSM
SRM
AMLA

The dialogue between the ECHR and the EU



Intra-systemic impact of the punitive sanctions (based on the case-law of ECtHR and CJEU): criminal-head guarantees

- on procedural issues imposed by the Due Process/Fair Trial :

Procedural issues only related to the fundamental rights of the individual/legal entity	Procedural issues implying structural features
- culpability principle - privilege against self-incrimination - duty to disclose incriminating documents or data - access to a laywer - access to the file	- principle of separation between investigative and decision-making functions - the principle of full jurisdiction (review by a court having full jurisdiction) - ne bis in idem (inter-systemic)

“Criminalising” administrative procedure: what Constitutional framework?

CL Procedural safeguards sufficiently protected in adm proc	CL Procedural safeguards not sufficiently protected in adm punitive proc
Principle of culpability (*mens rea* requirements) Intent or negligence	Legality principle
Right to be heard	Presumption of innocence
Access to the file	Proportionality
Right to legal assistance	Separation between investigative and decision-making
Duty to state reasons	Public hearing
Right to judicial review (meta principle)	Privilege against self incrimination/ACP
	Evidence and BARD

- The privilege against self-incrimination is not an absolute right (*John Murray v the UK* (n 92), § 49).

- *The right to silence does not cover:*

- The **refusal to appear** at a hearing planned by those authorities
- Any **delaying tactics** designed to postpone it' (§ 41).

- *The right to silence does apply:*

- **To direct inculpatory statements:**
- When a **sanction** to individuals for refusing to answer may apply (CJEU, *DB v Consob 2021*);

- When the requested information may be **shared with criminal judicial authorities** in an ongoing proceeding that is '**sufficiently closely**' linked to the administrative one (ECHR, *Ibrahim and o. v*. (n 92), § 269; *Chambaz v Switzerland*, 5.04.2012, App no. 11663/04, §§ 50-58).

- ECHR case-law on documents: **De Legé v the Netherlands (2022):**
- Coercion is possible as long as it does not breach Article 3 ECHR
- Hardly applicable to legal entities

- §76: where the use of **documentary evidence** obtained under **threat of penalties** in the context of financial law matters is concerned such use **does not fall within the scope of protection of the privilege against self-incrimination where the authorities are able to show that the aim is to obtain specific pre-existing documents** – thus, documents that have not been created specifically for the criminal proceedings – that are **relevant** to the investigation and that the authorities know **exist**, and so long as the information is not obtained by methods in breach of Article 3 (prohibition of inhuman or degrading treatment).

- No fishing expeditions:
- Strict relationship with the existing coercive investigative powers

- Legal entities: mostly related to documents/data/information disclosure
- No ECHR case-law
- **CJEU on competition law:** *Orkem* (1989) and floow-up case-law
- *Orkem, SGL Carbon* "obliged to answer purely factual questions" and pre-existing documents
- *Orkem:* "the Commission remains entitled 'to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establishthe existence of anti-competitive conduct'.

- *Orkem, SGL Carbon*: A right to silence can be recognised only to the extent that the undertaking concerned would be compelled to provide answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove (Case T-112/98 Mannesmannröhren-Werke v Commission [2001] ECR II-729, paragraphs 66 and 67)

- Recital 23 of Regulation 1/2003 confirms the Court of Justice's case law, consistently recognising that **undertakings have a right not to provide incriminating information.**

- <u>Possible balancing exercise:</u>
- I- The more coercive investigative powers are available to the supervisor, the more the *nemo tenetur* should be recognised
- II - The less investigative powers are available to the supervisor, the less the *nemo tenetur* should be guaranteed
- No recognition of *nemo tenetur* for legal entities (especially credit institutions) in relation to data that are vital for an effective supervisory function (existance of a previous **duty to report**)

Focus on the Separation between investigative and decision-making:

- “Menarini Pharmaceutics §**59.** Compliance with Article 6 of the Convention **does not preclude a “penalty” from being imposed by an administrative authority in proceedings of an administrative nature**. However, it is assumed that a decision by an administrative authority that does not meet the requirements of Article 6 § 1 must be subject to subsequent review by a **judicial body with full jurisdiction**.
- a judicial body with full jurisdiction:
  - it is independent from political power
  - It has the power to rule on both facts and law,
  - It has the power to modify the decision made by a lower body in any respect.
  - Pinto de Albuquerque Dissenting opinion:
    - He **adopts the criminal concept of unlimited jurisdiction**:

Menarini, Dissenting Opinion of Pinto de Albuquerque

- “The notion of "full jurisdiction" in **criminal matters** has a **broad and unlimited scope:**
  - the *quid* of administrative sanctions (were the imposed sanctions provided for by law?)
  - the *quantum* of such sanctions (were the sanctions proportionate to the seriousness of the facts?),
  - but also the reality of the administrative offence itself (did the individuals, through acts or omissions, culpably commit an offence punishable by law?).
- Jurisdiction **extended to the merits** requires that the judge go beyond merely checking for manifest (or "illogical," "incoherent," "unreasonable") errors in assessment, and be able to reject even those assessment errors that are not manifest (or "illogical," "incoherent," "unreasonable").
- The entire process of **evaluating evidence, qualifying facts, interpreting the applicable law, and quantifying sanctions in relation to the seriousness of the infraction can be overturned** and redone by the judge, regardless of whether the sanction provided by law is fixed or variable, because the judge has no obligation to refer the case back to the administrative authorities”.

- Erratic case law developing Fairly-fair punitive trial: fragmented and incoherent!
- Absolute need of a legislative intervention at the European level (national level is not enough)
- Legal uncertainty for the actor (institution, agency, regulator)
- Legal uncertainty for the targeted person or entity
- Impunity (Dieselgate)
- Competition, Tax, Banking, Market abuse and insider trading, AML: One-size-fits-all?

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Thank you for your attention!

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