SUPRANATIONAL ADMINISTRATIVE CRIMINAL LAW

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I. Introduction: EU Administrative Criminal Law, What's in a Name?

In this contribution, we will engage in a comparative stocktaking of the existing sanctions and the safeguards in the field of 'EU administrative criminal law'. with the aim to identify some general characteristics, distinguishing this field of law from 'traditional criminal law' or, to use a concept introduced by the European Court of Human Rights (hereinafter: ECtHR), the 'hard core of criminal law'.[3]

To make such a cross-section of EU administrative criminal law is not a straightforward task, for a number of reasons, which will be explained in more detail below: the highly fragmented character of EU administrative law, the fact that it constitutes a vertically and horizontally integrated regulatory system resulting inevitably in multi-level enforcement, and the difficulty to define both 'administrative criminal law' and 'criminal law'. Next, the search for distinguishing characteristics which juxtapose 'administrative criminal law' with 'traditional criminal law' is also quite challenging, especially because the boundaries between those two concepts are not always clear.

First, EU administrative law spans a wide variety of 'administrative activity pursued by the EU institutions'.[4] Generally speaking, the term 'EU administrative law' refers to rules and procedures adopted by the EU to administer its policies, whether directly or indirectly.[5] It covers a large variety of policy areas and consists of a com-

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[3] ECtHR (Grand Chamber), *Jussila v. Finland*, 23 November 2006, para. 43.

[4] H.C.H. Hofmann, G.C. Rowe, and A.H.Türk, *Administrative Law and Policy of the European Union*, Oxford, Oxford University Press, 2011, at 60.

[5] J. Schwarze, 'European Administrative Law in the light of the Treaty of Lisbon: Introductory Remarks', in: European Parliament, Directorate-General for Internal Policies, *Workshop on EU Administrative Law: State of Play and Future Prospects*, 2011, at 9, available at: http://www.europarl.europa.eu/RegData/etudes/divers/join/2011/453215/IPOL-

prehensive body of rules, dispersed over primary and secondary EU legislation, complemented by national legislation that is increasingly influenced by or simply implementing EU law.[6] Examples of EU administrative law can be found in the fields of competition law, financial markets, data protection, and public procurement,[7] but also in the areas of agriculture and food safety.[8] OLAF's administrative anti-fraud investigations may be included as well. Considering the variety of policy fields that come within the Union's competence, whether exclusive or shared with the Member States, EU administrative law today is a highly fragmented field of law. While the need to depart from a sector-specific approach in order to achieve more coherence has been the subject of an academic and institutional debate for quite some years now[9] and several attempts have been made to formulate general principles of EU administrative law,[10] it still holds true that EU administrative law is regulated by

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JURI_DV(2011) 453215_EN.pdf (last accessed 12 June 2018). *Cf.* H.C.H. Hofmann, G.C. Rowe, and A.H.Türk, *Administrative Law and Policy of the European Union*, Oxford, Oxford University Press, 2011, at 4.

[6] H.C.H. Hofmann, G.C. Rowe, and A.H.Türk, *Administrative Law and Policy of the European Union*, Oxford, Oxford University Press, 2011, at 12 and, for a more in-depth analysis of the sources of EU administrative law, 67 *et seq*.

[7] See *e.g.* S. Braconnier, 'Public Procurement by the European Union Institutions', in: European Parliament, Directorate-General for Internal Policies, *Workshop on EU Administrative Law: State of Play and Future Prospects*, 2011, at 113 *et seq.*, available at: http://www.europarl.europa.eu/RegData/etudes/divers/join/2011/453215/IPOL-JURI_DV (2011) 453215_EN.pdf (last accessed 12 June 2018).

[8] See M. Simonato, 'The EU Dimension of "Food Criminal Law"', 87 *R.I.D.P.* 97 (2016). See also B. van der Meulen and A. Corini, 'Food Law Enforcement in the EU: Administrative and Private Systems', 87 *R.I.D.P.* 71 (2016).

[9] See *e.g.* J. Ziller, 'Is a Law of Administrative Procedure for the Union Institutions Necessary? Introductory Remarks and Prospects', in: European Parliament, Directorate-General for Internal Policies, *Workshop on EU Administrative Law: State of Play and Future Prospects*, 2011, at 29 *et seq.*, available at: http://www.europarl.europa.eu/RegData/etudes/divers/join/2011/453215/IPOL-JURI_DV(2011)453215_EN.pdf (last accessed 12 June 2018); T. Evas, European Parliamentary Research Service, *EU law for an open, efficient and independent European administration. Summary Report of the public consultation*, July 2018, available at: http://www.europarl. europa.eu/RegData/ etudes/STUD/2018/621830/EPRS_STU (2018)621830_EN.pdf (last accessed 16 April 2019).

[10] See *e.g.* European Parliament, Resolution 2012/2024(INL) of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union; European Parliament, Directorate-General for Internal Policies, *The General Principles of EU Administrative Procedural Law*, available at: http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/519224/IPOL_IDA(2015)519224_EN.pdf (last accessed 12 June 2018); European Parliament, Proposal for a Regulation of the European Parliament and of the Council on the Administrative Procedure of the European Union's institutions, bodies, offices and agencies, 2016, available at: http://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/JURI/DV/2016/01-28/1081253EN.pdf (last accessed 16 April 2019); European Parliament, Resolution 2016/2610(RSP) of 9 June 2016 for an open, efficient and independent European Union administration, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0279+0+DOC+XML+V0//EN#BKMD-8 (last accessed 16

sector or policy field and will likely continue to be so. As some authors have pointed out, '[t]he phenomenon of variation of decision-making mechanisms and institutional rules across different policy fields (…) has proved to be a long-term characteristic of European integration'.[11] What is more, many of those policy areas are 'in a permanent state of development'.[12] This explains why 'general EU administrative law exists almost exclusively in the form of general principles of law'.[13] Yet, those principles do not necessarily adequately reflect the specificities of certain sectors or the different ways in which EU administrative law is enforced.

Second, considering that the EU, in most sectors, is not exclusively competent and cannot directly apply nor enforce its rules throughout the Union, it needs to rely on the action of national authorities and their cooperation with the competent EU institutions, bodies, and/or agencies. Indirect administration is, indeed, the 'default position'.[14] Therefore, when it comes to enforcing EU administrative law, the nature of such enforcement often depends on the choices made by national legislators, which may entrust either administrative or judicial authorities with that task, as long as this enforcement meets the EU's criteria. EU administrative law is thus a prime example of a multi-level regulatory system,[15] *i.e.* a complex legal system regulated by several levels of legislation, which correspondingly is enforced at different levels, by various national and supranational authorities, through administrative law, criminal law or hybrid legal regimes.[16] As a result, the true nature of EU administrative law is not

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April 2019). The European Commission, however, replied to the European Parliament that it was 'not convinced that the benefits of using a legislative instrument that would codify administrative law would outweigh the costs' and that a codification of EU administrative law would be 'a highly complicated exercise'. European Commission, *Follow up to the European Parliament resolution for an open, efficient and independent European Union administration*, SP(2016)613, 4 October 2016, as quoted by T. Evas, European Parliamentary Research Service, *EU law for an open, efficient and independent European administration. Summary Report of the public consultation*, July 2018, at 20, available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2018/621830/EPRS_STU(2018)621830_EN.pdf (last accessed 16 April 2019).

[11] B. De Witte, 'Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?', 11 *EuConst* 434 (2015), at 454.

[12] H.C.H. Hofmann, G.C. Rowe, and A.H.Türk, *Administrative Law and Policy of the European Union*, Oxford, Oxford University Press, 2011, at 916.

[13] H.C.H. Hofmann, G.C. Rowe, and A.H.Türk, *Administrative Law and Policy of the European Union*, Oxford, Oxford University Press, 2011, at 917.

[14] H.C.H. Hofmann, G.C. Rowe, and A.H.Türk, *Administrative Law and Policy of the European Union*, Oxford, Oxford University Press, 2011, at 12–13 and, for a more in-depth analysis, 259 *et seq*.

[15] *Cf*. H.C.H. Hofmann, G.C. Rowe, and A.H.Türk, *Administrative Law and Policy of the European Union*, Oxford, Oxford University Press, 2011, at 11–12.

[16] Considering the complexity of multi-level regulatory systems and enforcement, several research institutions have recently developed cross-cutting, interdisciplinary research programmes on this topic. For instance, the University of Utrecht has created RENFORCE, the Utrecht Centre for Regulation and Enforcement in Europe (http://renforce.rebo.uu.nl/) and the University of Luxembourg, in partnership with the Max Planck Institute Luxembourg

obvious to determine (some describe it as 'multifaceted'[17]) because, even if the (organizational/institutional) label used by the EU legislator is 'administrative'. it interacts almost necessarily with criminal or other enforcement regimes at national level, and sometimes also at EU level. A clear illustration of such hybrid multi-level enforcement is the protection of the Union's financial interests, which is the joint responsibility of the European Commission (in particular, its anti-fraud office OLAF), the Member States and the soon to be established European Public Prosecutor's Office.[18] While OLAF has the power to conduct EU-wide administrative anti-fraud investigations, further investigations and enforcement take place at the national level, involving national administrative and judicial authorities,[19] resulting in complex 'multidisciplinary investigations'.[20] Competition law and, more recently, the protection of financial markets are other well-known examples. Market abuse, in particular, illustrates the delicate interaction between EU administrative law and EU approximation of criminal rules.

Third, the concept of 'administrative criminal law' (or 'administrative penal law'[21]) raises some questions. At first sight, the term may even seem a *contradictio in terminis*: how can a field of law be both administrative and criminal? In that respect, the term 'punitive administrative law'[22] is probably less confusing because it clearly indicates that the label used by the EU legislator is administrative. This implies that the applicable procedures, competent authorities, and sanctions provided by law formally belong to the field of administrative law. The adjective 'punitive'

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for Procedural Law and the Fonds National de la Recherche of Luxembourg, has set up REMS, a doctoral training unit on enforcement in multi-level regulatory systems (https://wwwfr.uni.lu/recherche/fdef/research_unit_in_law/dtu_rems).

[17] H.C.H. Hofmann, G.C. Rowe, and A.H.Türk, *Administrative Law and Policy of the European Union*, Oxford, Oxford University Press, 2011, at 57.

[18] Council Regulation (EU) No 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office, *OJ L* 283, 31 October 2017, at 1.

[19] L. Kuhl, 'Cooperation between Administrative Authorities in Transnational Multiagency Investigations in the EU: Still a Long Road Ahead to Mutual Recognition?', in: K. Ligeti and V. Franssen (eds.), *Challenges in the Field of Economic and Financial Crime in Europe and the US*, Oxford/Portland, Hart, 2017, at 135–165.

[20] K. Ligeti and M. Simonato, 'Multidisciplinary Investigations into Offences against the Financial Interests of the EU: A Quest for an Integrated Enforcement Concept', in: F. Galli and A. Weyembergh (eds.), *Do labels still matter? Blurring boundaries between administrative and criminal law, The Influence of the EU*, Brussels, Editions de l'Université de Bruxelles, 2014, at 83.

[21] See *e.g.* A. Nieto Martín, 'General Report on Food Regulation and Criminal Law', 87 *R.I.D.P.* 17 (2016), at 46.

[22] See *e.g.* K. Ligeti and M. Simonato, 'Multidisciplinary Investigations into Offences against the Financial Interests of the EU: A Quest for an Integrated Enforcement Concept', in F. Galli and A. Weyembergh (eds.), *Do labels still matter? Blurring boundaries between administrative and criminal law, The Influence of the EU*, Brussels, Editions de l'Université de Bruxelles, 2014, at 81; A. Nieto Martín, 'General Report on Food Regulation and Criminal Law', 87 *R.I.D.P.* 17 (2016), at 46.

has a restrictive and qualifying function: it signals that we are only referring to a specific subset of rules within the field of administrative law, namely those that have a punitive goal and present certain similarities to the punitive rules encountered in other fields of law, in particular criminal law, which is the *ius puniendi* par excellence. Alternatively, one could use the concept of 'quasi-criminal law' or 'quasi-criminal enforcement'. which takes the opposite approach: it suggests there is a set of rules whose characteristics resemble those of 'traditional criminal law', without however fully corresponding to the latter ('quasi'. almost).[23] In what follows, we will use the terms 'EU administrative criminal law' and 'EU punitive administrative law' interchangeably.

Last but not least, the concept of 'criminal law' is far from being unequivocal, especially due to the tensions between the broad autonomous meaning of the European Court of Human Rights, based on the *Engel* criteria, and the much more restrictive, competence-based definition at the EU level.[24] This will be further explained in Part III.

Considering the foregoing difficulties and the overall purpose of this contribution, we have chosen to make a targeted cross-section of *three areas of EU administrative criminal law that clearly relate to economic crime*: competition law, banking law, and market abuse. In each of these areas, EU law gives considerable supervisory and/or sanctioning powers to EU institutions (the European Commission and the European Central Bank) and authorities (the European Securities and Markets Authority), which are shared or supplemented with sanctioning powers of national competent authorities. In that respect, they are quite unique sectors of EU administrative law.[25]

Nevertheless, as the subsequent analysis will reveal, there are also important differences between those three fields, making their cross-section particularly interesting and relevant in view of defining the 'general nature, characteristics and safeguards of EU administrative criminal law'. Whereas EU competition law is a well-established field of EU administrative law, where the EU institutions rely on extensive case experience, the EU legal framework on banking law, which clearly draws

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[23] See V. Franssen and C. Harding (eds.), *Criminal and Quasi-criminal Enforcement Mechanisms in Europe: Origins, Concepts, Future*, Oxford/Portland, Hart, forthcoming 2020.

[24] For a more in-depth analysis of the term 'criminal' from a European perspective and the tensions between the EU and ECHR approaches, see *e.g.* V. Franssen, 'La notion "pénale": mot magique ou critère trompeur? Réflexions sur les distinctions entre le droit pénal et le droit quasi pénal', in: D. Brach-Thiel (ed.), *Existe-t-il un seul* non bis in idem *aujourd'hui?*, Paris, L'Harmattan, 2017, at 57–91; 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? Blurring boundaries between administrative and criminal law, The Influence of the EU*, Brussels, Editions de l'Université de Bruxelles, 2014, at 175–190.

[25] *Cf.* H.C.H. Hofmann, G.C. Rowe, and A.H.Türk, *Administrative Law and Policy of the European Union*, Oxford, Oxford University Press, 2011, at 259–260.

inspiration from EU competition law, is much younger and is only starting to produce its first case examples. As far as market abuse is concerned, the EU legal framework was thoroughly revised in 2014 in the wake of the 2008 financial crisis in order to increase its effectiveness. To that end, the EU legislator decided to put in place an explicit two-pronged approach, involving both administrative and criminal enforcement.

To be clear, our ambition is by no means to analyse these three areas in an exhaustive manner. As we are aiming at defining the general nature of EU administrative criminal law, the analysis will rather be centred on the specific sanctioning powers regulated and (wholly or partly) exercised at EU level (involving supranational but potentially also national competent authorities), a critical assessment of their criminal or punitive nature, and the safeguards guaranteed by the EU legal framework and the potential tensions with the minimum standards set in that respect by the ECtHR. By contrast, the enforcement action that is organized at the national level will be largely disregarded.

Admittedly, in order to assess the potential criminal nature of those three fields of EU administrative law, it would also be useful to analyse more closely the investigative powers of the competent authorities, especially because one of the sub-criteria used by the ECtHR to determine the criminal nature of a charge is the similarity between the administrative and the criminal procedure.[26] Nevertheless, this would lead us too far and, more importantly, it would probably not alter the overall outcome of our assessment of the nature and general characteristics of EU administrative criminal law, and the need for adequate substantive and procedural safeguards.

The structure of this contribution will be as follows. In Part II, we will give an overview of the sanctioning powers and various sanctions that apply in the three selected fields of EU administrative law. Next, in Part III, we will evaluate the nature of those sanctions in light of the case law of the ECtHR – are they really of an administrative nature as indicated by their label, or are they instead criminal sanctions 'in disguise'? In function of the answer to that question, we will reflect, in Part IV, on the safeguards that apply and should apply in the field of EU administrative criminal law. Part V will draw the main conclusions of our research, presenting some distinctive features of EU punitive administrative law, and reflect on the way forward.

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[26] V. Franssen, 'La notion "pénale": mot magique ou critère trompeur? Réflexions sur les distinctions entre le droit pénal et le droit quasi pénal', in: D. Brach-Thiel (ed.), *Existe-t-il un seul* non bis in idem *aujourd'hui?*, Paris, L'Harmattan, 2017, at 72–73.

II. Sanctioning Powers and Applicable Sanctions in Three Areas of EU Punitive Administrative Law

A. Introduction

In this Part, we will give an explorative overview of the sanctioning powers in three selected areas of EU punitive administrative law: competition law, banking law, and market abuse. The analysis below will describe the sanctioning powers that are regulated at EU level (but potentially exercised by national authorities too), the applicable types and levels of sanctions, and their personal and material scope of application. The question whether these sanctions are of a criminal nature will be addressed in Part III below.

B. EU Competition Law

1. Introduction

The field of EU competition law being particularly vast, the analysis below will concentrate on that part of EU competition law that most likely entails sanctioning powers that are punitive in nature: EU antitrust law and, more specifically, 'EU cartel law'.

Cartels are a type of anti-competitive agreement prohibited by Article 101 of the TFEU. There is, however, no precise legal definition of cartels in EU law;[27] one will search in vain for the word 'cartel' in Article 101 of the TFEU. Consequently, the outer limits of this infringement are somewhat imprecise.

On its website, the European Commission describes cartels as follows:

– A cartel is a group of similar, *independent companies* which join together to fix prices, to limit production or to share markets or customers between them. Action against cartels is a specific type of antitrust enforcement.
– Instead of competing with each other, cartel members rely on each others' [sic] agreed course of action, which *reduces their incentives* to provide new or better products and services at competitive prices. As a consequence, their clients (consumers or other businesses) end up paying more for less quality.
– This is why cartels are illegal under EU competition law and why the European Commission imposes heavy *fines* on companies involved in a cartel.

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[27] See C. Harding, Capturing the Cartel's Friends: Cartel Facilitation and the Idea of Joint Criminal Enterprise, 34 *E.L. Rev.* 298 (2009), 298; C. Harding and J. Joshua, *Regulating Cartels in Europe*, Oxford, Oxford University Press, 2010 (2nd ed.), 11–16.

– Since cartels are illegal, they are generally highly secretive and evidence of their existence is not easy to find.[28]

Put differently, cartels are prohibited horizontal agreements between undertakings about prices, output, markets, or customers, which restrict or distort competition and which are kept secret as much as possible.[29] Typical examples are price-fixing, market-sharing, output restrictions, and bid-rigging.[30] These are also called 'hard core cartels'. a notion that goes back to the 1998 Recommendation of the OECD.[31]

Considering the above definition, cartels are clearly *intentional* infringements, meaning that corporations violate knowingly or even willingly the competition rules. The burden of proof is on the European Commission,[32] but experience shows it interprets the requirement of intent quite broadly, an approach which has been approved by the EU Courts (*i.e.* the Court of Justice and the General Court). It suffices that the undertaking was aware or should have reasonably been aware of its involvement in a cartel.[33] In practice this means that if someone somewhere in the undertaking was engaged in a cartel, the undertaking as a whole can be held liable.

Cartel members typically cover up their concerted practices to make sure that authorities, customers, and consumers do not suspect anything. This *secretive element* adds to the offensive nature of cartel behaviour and, in combination with its collective element, recalls the idea of conspiracy, which is central to the cartel offence in

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[28] European Commission, Cartels: Overview, original emphasis, http://ec.europa.eu/competition/cartels/overview/index_en.html (last consulted on 13 June 2018).

[29] For another approach, see *e.g.* C. Harding and J. Joshua, *Regulating Cartels in Europe*, Oxford, Oxford University Press, 2010 (2nd ed.), at 12 ('an organization of independent enterprises from the same or similar area of economic activity, formed for the purpose of promoting common economic interests by controlling competition between themselves'.). For a further analysis, see *e.g.* A. Jones and B. Sufrin, *EU Competition Law. Text, Cases, and Materials*, Oxford, Oxford University Press, 2016 (6th ed.), at 662 *et seq.*

[30] *Cf.* Article 101 (a)–(c) TFEU.

[31] OECD, Recommendation C(98)35 concerning Effective Action against Hard Core Cartels, 25 March 1998, point 2a) ('A "hard core cartel" is an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce'.).

[32] See *e.g.* A. Jones and B. Sufrin, *EU Competition Law. Text, Cases, and Materials*, Oxford, Oxford University Press, 2016 (6th ed.), at 115.

[33] For a telling example, see European Commission, Decision relating to a proceeding under Article 81 EC Treaty and Article 53 EEA Agreement (COMP/38.695 – Sodium Chlorate), C(2008)2626 final, 11 June 2008, recital 401 ('The lack of due diligence of the higher management of Atochem and Elf Aquitaine in exercising their duties, resulting in the alleged lack of awareness of the statutory and management bodies of Atochem and Elf Aquitaine of the actions taken by employees, cannot serve as an argument for the two companies to escape the liability for such actions'.). See *e.g.* I. Simonsson, *Legitimacy in EU Cartel Control*, Oxford, Hart Publishing, 2010, 309–310 and the case law references there.

Section 1 of the Sherman Act in the US.[34] Harding argues that 'the combination of conscious defiance and collusive action (…) lies at the heart of *cartel delinquency*'.[35]

Furthermore, considering that cartels are notoriously hard to detect, investigations (and subsequent litigation) tie up a lot of resources of the European Commission. For these (and other) reasons the Commission decided to set up a leniency programme in 2006,[36] thereby following the example of its American counterpart, the U.S. Department of Justice. Two years later, the Commission also introduced the possibility of a settlement.[37] More recently, in 2017, the Commission created a whistle-blower tool to encourage individuals who have inside knowledge of cartel activities to report them to the Commission.[38] In the subsequent analysis, we will only briefly consider these enforcement strategies to the extent that they have an impact on the Commission's fining practice.

2. The Sanctioning Powers of the European Commission

– *General Overview*

The basic rules and principles of the sanctioning system applicable to cartels are laid down in Articles 101 and 103 of the TFEU, and concretized in Regulation No 1/2003.[39] The European Commission (DG Competition) is the competent authority at EU level to enforce the rules on EU competition law.

The European Commission, however, is not solely competent. Since the entry into force of Regulation No 1/2003, the enforcement of EU competition law rules has become much less centralized than before, 'essentially in an effort to increase enforcement capacity in the wake of the enlargement of the EU'.[40] To facilitate the

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[34] See C. Harding, 'Forging the European Cartel Offence: The Supranational Regulation of Business Conspiracy', 12 *Eur. J. Crime Crim. L. & Crim. Just.* 275 (2004), at 284 and 293–294.

[35] C. Harding, 'A Pathology of Business Cartels: Original Sin or the Child of Regulation?', 1 *NJECL* 44 (2010), at 58, emphasis added. See also *ibid.*, at 54 ('cartelists (…) knowingly defy clear legal prohibitions and use subterfuge to do so effectively: they are cognizant, contumacious and covert'.).

[36] Commission Notice on Immunity from fines and reduction of fines in cartel cases, *OJ C* 298, 8 December 2006, 17 (hereinafter: 2006 Leniency Notice).

[37] Commission Notice on the conduct of settlement proceedings in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, *OJ C* 167, 2 July 2008, 1 (hereinafter: 2008 Settlement Notice).

[38] See European Commission, Anonymous Whistleblower Tool, http://ec.europa.eu/competition/cartels/whistleblower/index.html (last accessed on 20 April 2019).

[39] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty (hereinafter: Regulation No 1/2003), *OJ L* 1, 4 January 2003, at 1.

[40] M.J. Frese, *Sanctions in EU Competition Law: Principles and Practices*, Oxford, Hart Publishing, 2014, at 1.

close cooperation of the European Commission and National Competition Authorities, a European Competition Network was created.[41] Today, national competent authorities are thus significantly involved in the enforcement of EU competition law.[42] Most recently, a Directive was adopted to make National Competition Authorities 'even more effective enforcers'[43] by putting in place 'fundamental guarantees of independence, adequate financial, human, technical and technological resources and minimum enforcement and fining powers for applying Articles 101 and 102 of the TFEU'.[44] This Directive has to be transposed into national law by 4 February 2021.[45]

– *Personal Scope of Application*

Article 101 of the TFEU applies to 'undertakings', a concept which has been defined by the Court of Justice (hereinafter also: CJEU) as 'encompass[ing] every entity engaged in an economic activity,[46] regardless of the legal status of the entity or the way it is financed'.[47] An undertaking is a 'single economic unit' which may consist of multiple legal (or sometimes natural) persons (*e.g.* the parent company and its subsidiary). To define the single economic unit in a specific case is not always easy, especially considering the many mutations businesses and legal persons may go through, and this is often the subject of tough litigation before the EU Courts.[48]

This focus on undertakings instead of legal entities or corporations has a huge impact on the scope of liability—the perpetrator is not a person but potentially a

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[41] See http://ec.europa.eu/competition/ecn/index_en.html.

[42] A more in-depth analysis of the sanctioning powers and practices of national competent authorities in the field of EU competition law exceeds the scope of this contribution. For a further analysis, see *e.g.* M.J. Frese, *Sanctions in EU Competition Law: Principles and Practices*, Oxford, Hart Publishing, 2014, at 6–21 and 121–242; A. Jones and B. Sufrin, *EU Competition Law. Text, Cases, and Materials*, Oxford, Oxford University Press, 2016 (6th ed.), at 1013 *et seq.*; I. Van Bael, *Due Process in EU Competition Proceedings*, Alphen aan den Rijn, Kluwer Law International, 2011, at 82 *et seq.* and 369 *et seq.*

[43] European Commission, *Commission welcomes provisional political agreement by European Parliament and Council on new rules to make national competition authorities even more effective enforcers*, Strasbourg, 30 May 2018, available at: http://europa.eu/rapid/press-release_STATEMENT-18-3996_en.htm (last accessed on 11 April 2019).

[44] Recital 8 of the Preamble of Directive (EU) No 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, *OJ L* 11, 14 January 2019, at 3.

[45] Article 34(1) of Directive (EU) No 2019/1.

[46] For a further analysis of the case law on what constitutes an 'economic activity', see A. Jones and B. Sufrin, *EU Competition Law. Text, Cases, and Materials*, Oxford, Oxford University Press, 2016 (6th ed.), at 118–124.

[47] A. Jones and B. Sufrin, *EU Competition Law. Text, Cases, and Materials*, Oxford, Oxford University Press, 2016 (6th ed.), at 116, citing Case C-41/90, *Höfner and Elser v. Macroton GmbH* (1991) and referring to case law where this definition was repeated.

[48] For a further analysis, see A. Jones and B. Sufrin, *EU Competition Law. Text, Cases, and Materials*, Oxford, Oxford University Press, 2016 (6th ed.), at 125–137.

group of persons—and, more important for this analysis, on the determination of the fine. For instance, the delimitation of the undertaking is determining for the maximum fine (*infra*). Still, while the perpetrators of cartel offences are undertakings, the addressees of the Commission's fining decisions are, necessarily, legal persons, because fines can only be enforced against a person, not an economic entity.[49]

– *Fines*

Article 23(2) of Regulation No 1/2003 gives the European Commission the power to impose fines for cartels and other agreements defined by former Articles 81 and 82 of the EC Treaty (current Articles 101 and 102 of the TFEU). As such, Regulation No 1/2003 does not give much guidance to the Commission as to how it should determine the fine in a concrete case.[50] The Regulation sets the *upper limit* for the fine, namely ten per cent of the undertaking's total turnover of the business year preceding the year in which the fine is imposed.[51] But there is no minimum fine. Furthermore, the Regulation provides two 'sentencing'[52] criteria as it requires the amount of the fine to reflect the *gravity* and the *duration* of the infringement.[53]

Considering the marginal guidance offered by Regulation No 1/2003, it was up to the European Commission to develop a fining policy and to determine which criteria matter for setting fines. The Commission's fining policy as it exists today is the product of many years of practice.

In 1998 the Commission published for the first time *guidelines* explaining its method for calculating fines.[54] The 2006 Guidelines on Fines replaced the 1998 Guidelines and entered into force on 1 September 2006.[55] These 'new' guidelines constitute an update of the old guidelines in the light of the practice the Commission

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[49] For a more in-depth analysis, see V. Franssen, 'Corporate Criminal Liability and Groups of Corporations. Need for a More Economic Approach?', in: K. Ligeti and S. Tosza (eds.), White Collar Crime: A Comparative Perspective, Oxford/Portland, Hart, 2018, at 298–303.

[50] A. Jones and B. Sufrin, *EU Competition Law. Text, Cases, and Materials*, Oxford, Oxford University Press, 2011 (4th ed.), 1098.

[51] Article 23(2) of Regulation No 1/2003.

[52] The term 'sentencing' may sound a bit odd in the context of administrative proceedings, even though these proceedings are criminal in the meaning of Article 6 ECHR. In essence, though, the fining practice of the Commission is very comparable to the sentencing task of criminal courts.

[53] Article 23(3) of Regulation No 1/2003.

[54] Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty, *OJ C* 9, 14 January 1998, 3 (hereinafter: 1998 Guidelines on Fines).

[55] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, *OJ C* 210, 1 September 2006, 2 (hereinafter: 2006 Guidelines on Fines).

had developed since 1998 and also incorporated the case law of the EU Courts in this respect.[56]

Both sets of Guidelines were meant to bring transparency, impartiality, consistency, and 'some degree of legal certainty'[57] with respect to the European Commission's fining practice.[58] Nevertheless, the 2006 Guidelines also state expressly that the Commission 'enjoys a *wide margin of discretion within the limits* set by Regulation No 1/2003'.[59] In Part IV, we will briefly discuss the conformity of the Commission's fining practice to the principle of legality.

The Guidelines on Fines follow a *two-step method*. First, the Commission determines the basic amount of the fine, taking the value of sales as a starting point, which also reflects the gravity and duration of the infringement. Second, this amount will be adjusted in the light of specific circumstances which enable the Commission to set a more individualized fine for each cartelist. In particular, adjustments are based on aggravating and mitigating circumstances. Furthermore, the basic amount can be increased for the purpose of deterrence and reduced to avoid bankruptcy. The ultimate fine, however, cannot exceed the legal maximum of ten per cent of the undertaking's turnover.[60]

The European Commission's case experience is solid and examples of its fining practice are numerous. Interestingly, since the publication of the 1998 Guidelines on Fines, the imposed fines have substantially increased. Before those Guidelines, fines were substantially lower than the ten per cent turnover ceiling. Since then, however, there have been several cases in which the fine calculated on the basis of the Fining Guidelines had to be reduced in order not to exceed the legal maximum of ten per cent.[61] The 2006 Guidelines have produced a second wave of increasingly harsh

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[56] Point 3 2006 Guidelines on Fines; H. de Broca, The Commission Revises its Guidelines for Setting Fines in Antitrust Cases, 3 Competition Policy Newsletter 1 (2006), 1, available at: http://ec.europa.eu/competition/publications/cpn/.

[57] H. de Broca, The Commission Revises its Guidelines for Setting Fines in Antitrust Cases, 3 Competition Policy Newsletter 1 (2006), 1, available at: http://ec.europa.eu/competition/publications/cpn/.

[58] Point 3 2006 Guidelines on Fines; H. de Broca, The Commission Revises its Guidelines for Setting Fines in Antitrust Cases, 3 Competition Policy Newsletter 1 (2006), 1, available at: http://ec.europa.eu/competition/publications/cpn/. See also N. Kroes, Enforcement of Prohibition of Cartels in Europe, opening address, in: C.-D. Ehlermann and I. Atanasiu (eds.), European Competition Law Annual 2006: Enforcement of Prohibition of Cartels, Oxford/Portland, Hart Publishing, 2007, (3) 5 ('I intend to (…) give companies greater predictability as to the level of the fines'.).

[59] Point 3 of the 2006 Guidelines on Fines, emphasis added.

[60] For a more in-depth analysis of the sentencing factors set out by the 2006 Guidelines on Fines, see V. Franssen, *European Sentencing Principles for Corporations*, doctoral dissertation, Leuven, KU Leuven, 2013, at 321–324.

[61] See *e.g.* J.M. Connor, 'Has the European Commission Become More Severe in Punishing Cartels? Effects of the 2006 Guidelines', 32 *E.C.L.R.* 27 (2011), 31.

fines, but this evolution seems to be primarily due to the value of sales now being the starting point for the calculation of the fine.

– *Other Sanctions and Measures*

Fines are definitely the most prominent type of sanction applied to cartels. Nevertheless, Regulation No 1/2003 also contains a number of other sanctions and measures which may be relevant in the context of cartels and thus merit a brief analysis.

First, based on Article 7(1) of Regulation No 1/2003, the European Commission may order an undertaking to bring the established infringement to an end. Article 7 decisions are referred to as '**prohibition decisions**' or 'cease and desist orders'.[62] Such decisions formally find 'there is an infringement'.[63] In practice, prohibition decisions are nearly[64] always combined with the imposition of a fine, particularly in cartel cases, where it is essential to bring the infringement to an end if it has not been terminated yet and regardless of whether the fine is imposed on the basis of the leniency or settlement rules.[65]

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[62] A. Jones and B. Sufrin, *EU Competition Law. Text, Cases, and Materials*, Oxford, Oxford University Press, 2016 (6th ed.), at 943.

[63] See http://europa.eu/rapid/press-release_MEMO-13-189_en.htm. Interestingly, the European Commission is generalizing the finding of an infringement, whereas Article 7(1) of Regulation No 1/2003 was less affirmative, leaving this up to the discretion of the Commission ('If the Commission has a legitimate interest in doing so, it *may* also find that an infringement has been committed in the past'. (emphasis added))

[64] On the basis of a cursory analysis of the decisions taken by the European Commission since 2012, the imposition of a fine indeed goes hand in hand with a prohibition decision. A rare exception is the re-adoption of the fining decision in the paper envelopes cartel after the General Court had annulled the first decision (decision of 16 June 2017; http://ec.europa.eu/competition/antitrust/cases/dec_docs/39780/39780_3807_3.pdf). But the original decision of 10 December 2014 did include a prohibition clause based on Article 7 of Regulation No 1/2003: see http://ec.europa.eu/competition/antitrust/cases/dec_docs/39780/39780_3528_6.pdf , at 18.

[65] A prohibition decision was, for instance, taken in the TV and computer monitor tubes cartel (decision of 5 December 2012; http://ec.europa.eu/competition/antitrust/cases/dec_docs/39437/39437_6784_3.pdf), the automotive wire harnesses (decision of 10 July 2013; http://ec.europa.eu/competition/antitrust/cases/dec_docs/39748/39748_3911_5.pdf), the North Sea shrimps price-fixing cartel (decision of 27 November 2013; http://ec.europa.eu/competition/antitrust/cases/dec_docs/39633/39633_2636_9.pdf); the high voltage power cables cartel (decision of 2 April 2014; http://ec.europa.eu/competition/antitrust/cases/dec_docs/39610/39610_9899_5.pdf), the parking heaters cartel (decision of 17 June 2015; http://ec.europa.eu/competition/antitrust/cases/dec_docs/40055/40055_713_11.pdf), the optical disk drivers cartel (decision of 21 October 2015; http://ec.europa.eu/competition/antitrust/cases/dec_docs/39639/39639_3631_8.pdf), the Euro interest rates derivatives cartel (decision of 6 December 2016; http://ec.europa.eu/competition/antitrust/cases/dec_docs/39914/39914_8910_5.pdf), and the braking systems cartel (decision of 21 February 2018; http://ec.europa.eu/competition/antitrust/cases/dec_docs/39920/39920_738_3.pdf).

In order to make sure the undertaking puts an end to the infringement, the Commission, however, also has the possibility to impose '*behavioural or structural remedies* which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end'.[66] Still, this intrusive power is 'not to be used lightly'.[67] In cartel cases, there are hardly any examples of such behavioural or structural remedies.[68] Indeed, in practice, decisions taken on the basis of Article 7(1) of Regulation No 1/2003 are nearly always limited to the obligation to terminate the infringement and all reiterate the following standard clause:

> Given the secrecy in which the cartel arrangements are usually carried out and the gravity of such infringements, it is appropriate for the Commission to require the undertakings to which this Decision is addressed to immediately bring the infringement to an end if, they should have not already done so, and to refrain from any agreement or concerted practice which may have the same or a similar object or effect.[69]

The Commission seems very reluctant to adopt actual behavioural or structural remedies, at least in the area of cartels,[70] leaving it up to the undertakings concerned to make the necessary changes to end the infringement and avoid re-offending.

Second, Article 9 of Regulation No 1/2003 gives the Commission the option to adopt a **commitment decision**. Like Article 7 decisions, commitment decisions require the undertakings concerned to terminate the infringement. Nevertheless, commitment decisions differ from prohibition decisions in two respects: they do not formally find that there is an infringement and they require the undertakings to *voluntarily offer* certain commitments that 'meet the concerns expressed to them by the Commission'.[71] Such commitment decisions may involve behavioural or structural obligations. Commitment decisions are obviously based on a more consensual, regulatory kind of enforcement and they are only possible when the Commission

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[66] Article 7(1) of Regulation No 1/2003, emphasis added. See also Recital 12 of the Preamble of Regulation No 1/2003.

[67] A. Jones and B. Sufrin, *EU Competition Law. Text, Cases, and Materials*, Oxford, Oxford University Press, 2016 (6th ed.), at 945.

[68] Jones and Sufrin only give one example, a price-fixing cartel between shipping companies, where the Commission imposed behavioural remedies such as the obligation 'to inform customers that they were entitled to renegotiate the terms of contracts concluded within the context of the agreement or to terminate them'. Nevertheless, the General Court annulled this part of the decision, considering it was beyond what was necessary to end the infringement. See A. Jones and B. Sufrin, *EU Competition Law. Text, Cases, and Materials*, Oxford, Oxford University Press, 2016 (6th ed.), at 944, referring to case T-395/94, *Atlantic Container Line AB* [2002].

[69] See *e.g.* the braking systems cartel (decision of 21 February 2018; http://ec.europa.eu/competition/antitrust/cases/dec_docs/39920/39920_738_3.pdf), at 18.

[70] With respect to other infringements of EU competition law, the Commission apparently requires more often behavioural or structural remedies, though usually on the basis of a commitment decision (*infra*). See A. Jones and B. Sufrin, *EU Competition Law. Text, Cases, and Materials*, Oxford, Oxford University Press, 2016 (6th ed.), at 945.

[71] These two characteristics are emphasized by the Commission on its website. See http://europa.eu/rapid/press-release_MEMO-13-189_en.htm.

does not intend to impose a fine.[72] That being said, if the undertaking does not comply with its commitments, the Commission can still decide to impose a fine, in accordance with its 2006 Guidelines on Fines. Considering that cartels are 'among the most harmful restrictions of competition', which need to be punished and deterred '[a]s a matter of policy',[73] it would require a complete policy shift for the European Commission to adopt a commitment decision in cartel cases.[74]

While limited resources and other practical reasons could explain the Commission's reluctance[75] to engage in reformative cartel sanctions, it is noteworthy that, in other areas of competition law (*e.g.* with respect to dominant abuse), the Commission has adopted commitment decisions[76] which clearly aim at reform but, as indicated, exclude the possibility of a fine. These commitment decisions may even include monitoring to ensure that the undertaking complies with the commitments it agreed to. If the undertaking violates the terms of the commitment decision, it can be fined.[77] Therefore, as we have argued elsewhere,[78] these commitment decisions are, to some extent, comparable to corporate probation.

Third and finally, the Commission may also impose a periodic penalty payment on undertakings to compel them:

– to end a cartel or another infringement of Articles 101 and 102 of the TFEU;
– to comply with interim measures based on Article 8 of Regulation No 1/2003;

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[72] Recital 13 of the Preamble of Regulation No 1/2003 ('Commitment decisions are not appropriate in cases where the Commission intends to impose a fine'.).

[73] Point 23 of the 2006 Guidelines on Fines.

[74] According to the European Commission's website, '[c]ommitment decisions are not appropriate in cases where the Commission considers that the very nature of the infringement calls for a fine. Consequently, the Commission in particular does not apply the commitment procedure to secret cartels that fall under the Leniency Notice. Furthermore, in cases like cartels, there is no commitment possible to solve the competition problem. In such cases, an order to stop the practice and/or to pay a fine is the only appropriate outcome'. See http://europa.eu/rapid/press-release_MEMO-13-189_en.htm (last accessed on 11 April 2019).

[75] It has been argued that undertakings are also 'not overly enthusiastic about being rehabilitated' and would engage in intensive lobbying to reduce the Commission's powers to adopt reformative sanctions. See I. Simonsson, *Legitimacy in EU Cartel Control*, Oxford, Hart Publishing, 2010, 300, with reference to Parker (2006).

[76] For a recent example, see the decision of 24 May 2018 taken against Gazprom: in the case at hand, the Commission suspected Gazprom of abusing its dominant position and imposing contractual territorial restrictions. Under this decision Gazprom committed to a variety of structural modifications. A 'Monitoring Trustee' was appointed to 'enable full and effective monitoring of the Commitments'. See http://ec.europa.eu/competition/antitrust/cases/dec_docs/39816/39816_10148_3.pdf , at 11 and 28–30.

[77] Article 23(2), para. 1(c) of Regulation No 1/2003. For a further analysis of commitment decisions, see A. Jones and B. Sufrin, *EU Competition Law. Text, Cases, and Materials*, Oxford, Oxford University Press, 2016 (6th ed.), at 945–954.

[78] See V. Franssen, *European Sentencing Principles for Corporations*, doctoral dissertation, Leuven, KU Leuven, 2013, at 275–276 and 334.

– to comply with an Article 9 decision;
– to supply complete and correct information requested by the Commission; or
– to submit to an inspection.[79]

In other words, this penalty payment serves as a stick to make sure the undertaking complies with the Commission's sanctioning decision or investigative measure; therefore, they are coercive *measures* rather than *sanctions*.[80] The amount of the period penalty payment shall not exceed five per cent of the average daily turnover in the preceding business year. It is calculated from the date indicated in the decision.[81]

– *Publication of Fining and Other Decisions of the European Commission*

The Preamble of Regulation No 1/2003 states that the European Commission's decisions, including its fining decisions, 'should be widely publicised'.[82] Pursuant to Article 30 of Regulation No 1/2003, the Commission's decisions based on Articles 7 to 10 and 23 to 24 shall all be published. This encompasses all sanctions and decisions discussed above. According to paragraph 2, '[t]he publication shall state the names of the parties and the main content of the decision, including any penalties imposed'. Contrary to what we will see when analysing EU banking law (*infra*, Part II, C.), there is no possibility to refrain from publication or to anonymize the publication. The only possible limitation relates to the protection of business secrets.

As a result, all fining decisions of the Commission are published on its website, in a non-confidential version, in addition to a summary of the decision which is published in the Official Journal of the European Union. Notwithstanding the fact that the non-confidential versions cannot reveal any business secrets of the cartel participants, these public versions of the decisions are sometimes very extensive and highly detailed, also containing a lot of information about the calculation of the fines. As we will see, this is far from being the case in the field of EU banking law, where the European Central Bank only published very brief summaries of its decisions providing hardly any transparency about the sanctioning process (*infra*, Part II, C.2.).

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[79] Article 24(1) of Regulation No 1/2003.

[80] Sanctions are imposed because the person in question has committed an offence; they can be punitive (in which case we use the term 'criminal sanctions') or (purely) preventive. The term 'sanctions' is thus a general, overarching term that refers to all consequences an offender faces as a result of a (criminal) offence or (civil or administrative) infringement and that may encompass various kinds of intermediate or hybrid sanctions. By contrast, measures are purely preventive responses to (potentially) dangerous persons *or* situations. They do not necessarily have a link with an offence or infringement and can be imposed *in personam* or *in rem*. For a further analysis of the difference between the terms 'sanctions' and 'measures', see V. Franssen, *European Sentencing Principles for Corporations*, doctoral dissertation, Leuven, KU Leuven, 2013, at 151–152.

[81] Article 24(1) of Regulation No 1/2003.

[82] Recital 32 of the Preamble of Regulation No 1/2003.

Moreover, the Commission's decisions are *promptly* accompanied by a press release[83]—press releases which are characterized by a 'tough-on-crime' language, even if there are definitely some differences in style between the successive competent Commissioners.[84] As such, the publication policy clearly contributes to the sanctioning goals of the Commission, namely deterrence and, to some extent, also retribution (*infra*, Part III, B.2.).

C. EU Banking Law

1. Introduction

It is no secret that EU banking law is a quite complex field of law. This has to do with the legal and institutional structure of the European Banking Union and its scope of application. Therefore, it seems appropriate to first give a brief general presentation of the structure of the European Banking Union and the applicable legal framework before turning to the (supervisory and) sanctioning powers of the competent authorities.[85]

Put simply, the European Banking Union was created in response to the Euro crisis, which was one of the consequences of the global financial crisis in 2008, 'to

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[83] All the Commission's decisions and press releases in cartel cases are available at: http://ec.europa.eu/competition/cartels/cases/cases.html (last accessed 17 April 2019).

[84] Ms Kroes' language was clearly tougher than the language of her successor, Mr Almunia, even though he too referred to the 'fight on cartels'. (J. Almunia, quoted in: European Commission, *Antitrust: Commission fines 17 bathroom equipment manufacturers €622 million in price fixing cartel*, press release, 23 June 2010.) Ms Kroes would, for instance, say the following with respect to the producers of sodium chlorate paper bleach: 'These companies have to *learn the hard way* that the Commission will impose high fines when they *rip off* their customers, and ultimately consumers, by forming a cartel'. (N. Kroes, quoted in: European Commission, *Antitrust: Commission fines sodium chlorate paper bleach producers €79 million for market sharing and price fixing cartel*, press release, 11 June 2008, emphasis added.) Under the current Commissioner, Ms Vestager, the Commission's language seems to have softened—even if the same can definitely not be said about the amounts of the fines that have been imposed in recent years. Ms Vestager focuses more on the harm caused to consumers than the adverse impact on the competitiveness of an economic sector. See *e.g.* M. Vestager, quoted in: European Commission, *Antitrust: Commission fines maritime car carriers and car parts suppliers a total of €546 million in three separate cartel settlements*, press release, 21 February 2018: 'The three separate decisions taken today show that we will not tolerate anticompetitive behaviour affecting European consumers and industries. By raising component prices or transport costs for cars, the *cartels ultimately hurt European consumers* and *adversely impacted the competitiveness* of the European automotive sector, which employs around 12 million people in the EU' (emphasis added).

[85] For a more comprehensive presentation, see S. Allegrezza and O. Voordeckers, 'Investigative and Sanctioning Powers of the ECB in the Framework of the Single Monetary Mechanism, Mapping the Complexity of a New Enforcement Model', 4 *eucrim* 151 (2015), at 151–154.

prevent a future banking crisis putting the whole currency union at risk'.[86] It is composed of two elements: the Single Supervisory Mechanism (hereinafter: SSM) and the Single Resolution Mechanism (hereinafter: SRM)[87].

The SSM is the new system of banking supervision, bringing credit institutions, financial holding companies, and mixed financial holding companies incorporated in participating states (hereinafter: supervised entities) under the direct or indirect control of the European Central Bank (hereinafter: ECB).[88] Within the SSM, the prudential supervision of such entities is shared with the national supervisory authorities of participating states (hereinafter: National Competent Authorities or NCAs).[89]

Next to that, the SRM is concerned with the recovery and the resolution of the same supervised entities, or, put differently, it aims to ensure the efficient resolution of failing banks, resolution meaning the restructuring of a failing bank by a resolution authority. To this end, the supervised entities are brought under the scrutiny of the Single Resolution Board (hereinafter: SRB). The SRM also comprises the national resolution authorities of the participating states (hereinafter: National Resolution Authorities or NRAs).

The SSM[90] is based on Council Regulation (EU) No 1024/2013 of 15 October 2013[91] (hereinafter: SSM Regulation), which confers far-reaching tasks and powers on the ECB to supervise credit institutions and other supervised entities incorporated in participating states.[92] The SSM also covers banks that are not located in the Euro

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[86] M. Meister, 'The European Banking Union', 2 *E.C.F.R.* 115 (2015), at 116. For a broader analysis of the EU's responses to the Euro crisis, see B. De Witte, 'Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation', 11 *EuConst* 434 (2015).

[87] Fact Sheets on the European Union: http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_2.6.5.html.

[88] Ch. V. Gortsos, 'The power of the ECB to impose administrative penalties as a supervisory authority: an analysis of Article 18 of the SSM Regulation', *ECEFIL Working Papers*, No 2015/11, p. 11; C. Brescia Morra, 'From the Single Supervisory Mechanism to the Banking Union. The role of the ECB and the EBA', *Working Paper No 2*, Luiss Guido Carli School of European Polical Economy, Luiss University Press, Italy, 2014, at 2–3.

[89] For a more detailed presentation of the SSM, see ECB, SSM Supervisory Manual. European banking supervision: functioning of the SSM and supervisory approach, March 2018, available at: https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.supervisorymanual201803.en.pdf?1584b27046baf1e68f92f82caadb3a63 (last accessed 17 April 2019).

[90] The SSM was established in October 2013 and became operational as from 4 November 2014.

[91] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, *OJ L* 287, 29 October 2013, at 63.

[92] For a critical analysis of the SSM and the ECB's supervisory tasks, see *e.g.* K. Alexander, 'The European Central Bank and Banking Supervision: The Regulatory Limits of the Single Supervisory Mechanism', 3 *E.C.F.R.* 467 (2016), at 467–494. See also M. Goldmann, 'United in Diversity? The Relationship between Monetary Policy and Prudential Supervision in the Banking Union', 14 *EuConst* 283 (2018).

area but for which the state of incorporation has opted in.[93] On 16 April 2014, the ECB adopted Regulation (EU) No 468/2014 establishing the framework for cooperation within the SSM between the ECB and the NCAs[94] (hereinafter: SSM Framework Regulation).

When it comes to the SRM, the main legal source is Regulation No 806/2014 of 15 July 2014 establishing uniform rules and procedure for the resolution of credit institutions and certain investment firms in the framework of the SRM[95] (hereinafter: SRM Regulation).[96] The SRM[97] is directly responsible for the resolution of credit institutions under direct supervision of the ECB. The SRB being a resolution authority, most of its distinctive powers are ones that would be exercised during a resolution itself. However, the SRB does have certain powers that it can exercise independently of a resolution action and which are very similar to the sanctioning powers of the ECB. These powers are of particular interest for our analysis.

Within the European Banking Union, both the ECB and the SRB are given significant powers—including *sanctioning powers*—to deal with the supervision and the resolution of supervised entities respectively. This transfer of the supervision of banks to the EU level was considered necessary to avoid widespread financial crises, like the one experienced in 2008, in the future.[98] Thus, contrary to the decentralization evolution witnessed in the area of EU competition law (*supra*, Part II, B.2.), the European Banking Union essentially consists of a centralization of supervision at the

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[93] Fact Sheets on the European Union: http://www.europarl.europa.eu/atyourservice/en/displayFtu.html? ftuId=FTU_2.6.5.html; C. Brescia Morra, 'From the Single Supervisory Mechanism to the Banking Union. The role of the ECB and the EBA', Working Paper No 2, Luiss Guido Carli School of European Polical Economy, Luiss University Press, Italy, 2014, at 5.

[94] Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17), *OJ L* 141, 14 May 2014, at 1.

[95] Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, *OJ L* 225, 30 July 2014, at 1.

[96] Ch. V. Gortsos, The Single Resolution Mechanism (SRM) and the Single Resolution Fund (SRF), A comprehensive review of the second main pillar of the European Banking Union, *ECEFIL*, 2015.

[97] The SRM entered into force on 19 August 2014.

[98] Communication from the Commission of the European Parliament and the Council, A Roadmap towards a Banking Union, Brussels, 12 September 2012, COM(2012) 510 final, at 3; L. Wissink, T. Duijkersloot, and R. Widdershoven, 'Shifts in Competences between Member States and the EU in the New Supervisory System for Credit Institutions and their Consequences for Judicial Protection', 10 *Utrecht Law Review* 92 (2014); B. Reisenhofer and D. Jaros, 'Completing the Banking Union', European Law Blog, 22 April 2014, http://europeanlawblog.eu/2014/04/22/completing-the-banking-union/ (last accessed on 19 March 2019).

EU level. Another difference with EU competition law is that the ECB will sometimes apply national law (in particular, national law implementing EU directives or taking options that EU regulations left to the Member States); this is considered to be a novelty in EU law.[99] Yet this 'new mode of European integration' is by no means limited to the field of EU banking law: for instance, the future European Public Prosecutor will also apply national law in many respects, including national criminal procedure, which has hardly been approximated by EU law.

In the following we will provide an overview of the various sanctioning powers of the ECB and the SRB.

2. The Sanctioning Powers of the ECB

The supervision of banks by the ECB is effective provided that the ECB is also able to sanction breaches of prudential requirements. Therefore, the SSM Regulation sets out extensive sanctioning powers for the ECB to compel supervised entities to comply with EU banking law in general as well as with the supervisory decisions and regulations of the ECB. The ECB has thus been equipped with a 'toolbox' containing powers to conduct investigative measures (such as the power to require the submission and examination of documents, books, and records,[100] or to conduct necessary on-site inspections at the business premises of supervised entities[101]), to adopt administrative measures (such as the power to require supervised entities to hold own funds in excess of the capital requirements imposed on them[102] or to impose additional or more frequent reporting requirements[103] and specific liquidity requirements[104]) and to impose administrative penalties (such as the power to impose fines or periodic penalty payments to supervised entities in case of certain infringements).[105] In what follows, we will primarily focus on the imposition of administrative penalties by the ECB and the SRB when exercising their sanctioning powers.

For the purpose of effectively carrying out its supervisory tasks, the ECB has both direct and indirect sanctioning powers.

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[99] For a further analysis, see L. Boucon and D. Jaros, 'The Application of National Law by the European Central Bank within the Banking Union's Single Supervisory Mechanism: A New Mode of European Integration?', 10 *Eur. J. Legal Stud.* 155 (2018) (special issue), at 165 *et seq.*

[100] Article 11(1) of the SSM Regulation.

[101] Article 12 of the SSM Regulation.

[102] Article 16(2)(a) of the SSM Regulation.

[103] Article 16(2)(j) of the SSM Regulation.

[104] Article 16(2)(k) of the SSM Regulation.

[105] S. Allegrezza and O. Voordeckers, 'Investigative and Sanctioning Powers of the ECB in the Framework of the Single Monetary Mechanism, Mapping the Complexity of a New Enforcement Model', 4 *eucrim* 151 (2015), at 153.

Under its *direct sanctioning powers*, the ECB can opt for a variety of administrative sanctions, including administrative pecuniary penalties, fines, and periodic penalty payments. The main legal sources for administrative sanctions are Article 18 of the SSM Regulation and Article 120 of the SSM Framework Regulation,[106] which provide for two types of administrative sanctions that could be imposed by the ECB, namely (i) 'administrative pecuniary penalties provided for and imposed under Article 18(1) of the SSM Regulation'[107] and (ii) 'fines and periodic penalty payments provided for in Article 2 of Regulation (EC) No 2532/98 and imposed under Article 18(7) of the SSM Regulation'.[108] These types of sanctions differ as to their scope of application and the level of penalty imposed, as will be explained below.

By *indirect sanctioning powers*, we refer to the possibility of the ECB to give instructions to the NCAs (Art. 6(5)(a) and 9(1), para. 3 SSM Regulation). However, these indirect sanctioning powers will not analysed further here as this would be beyond the scope of this contribution.[109]

Furthermore, it is noteworthy that while the ECB has no power to impose criminal sanctions, it does have the possibility to report criminal offences to the competent national authorities. Article 136 of the SSM Framework Regulation provides that the ECB, when it has reasons to suspect that a criminal offence may have been committed, shall request the relevant NCA to refer the matter to the appropriate authorities for investigation and possibly criminal prosecution, in accordance with criminal law.

In what follows, we will take a closer look at the administrative sanctions the ECB can resort to and their material and personal scope of application.

– *Administrative Pecuniary Penalties*

Article 18(1) of the SSM Regulation provides that the ECB is given the power to impose administrative pecuniary penalties upon credit institutions and other supervised entities which committed—intentionally or negligently—a breach of relevant directly applicable acts of EU law for which such administrative penalties are made available.

• Scope of Application

The conditions for imposing administrative pecuniary penalties set out in Article 18(1) of the SSM Regulation are twofold: first, the entity committing the breach

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[106] Ch. V. Gortsos, 'The power of the ECB to impose administrative penalties as a supervisory authority: an analysis of Article 18 of the SSM Regulation', *ECEFIL Working Papers*, No 2015/11, at 9 and 10.

[107] Article 120 (a) of the SSM Framework Regulation.

[108] Article 120 (b) of the SSM Framework Regulation.

[109] See L. Boucon and D. Jaros, 'The Application of National Law by the European Central Bank within the Banking Union's Single Supervisory Mechanism: A New Mode of European Integration?', 10 *Eur. J. Legal Stud.* 155 (2018) (special issue), at 165–166 and 179–182.

should be a significant entity and second, the significant entity should have breached 'a requirement under relevant directly applicable acts of Union law'.[110]

As to the first condition, Article 18(1) provides that the ECB is competent to directly sanction 'credit institutions, financial holding companies, or mixed financial holding companies'. There is some discussion among scholars as to whether Article 18(1) only applies to significant supervised entities or includes less significant institutions as well.[111] In our view, the application of this provision to significant entities only may be deduced from Recital 53 of the Preamble of the SSM Regulation as well as Articles 124 and 134 of the SSM Framework Regulation. On the one hand, Recital 53 clearly states that:

> [n]othing in this Regulation should be understood as conferring on the ECB the power to impose penalties on natural or legal persons other than credit institutions, financial holding companies or mixed financial holding companies (…).

On the other hand, Article 124 of the SSM Regulation provides for a duty to refer alleged breaches to the investigation unit and only refers to infringements committed by significant supervised entities, while Article 134 of the same Regulation explicitly provides that significant supervised entities fall under the direct supervision of the ECB.[112] This interpretation also seems to be confirmed by the ECB's Supervisory Manual.[113]

The second condition imposed by Article 18(1) is that the significant entity should have breached 'a requirement *under relevant directly applicable acts of Union*

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[110] L. Wissink, T. Duijkersloot, and R. Widdershoven, 'Shifts in Competences between Member States and the EU in the New Supervisory System for Credit Institutions and their Consequences for Judicial Protection', 10 *Utrecht Law Review* 92 (2014), at 102–103.

[111] S. Allegrezza and O. Voordeckers, 'Investigative and Sanctioning Powers of the ECB in the Framework of the Single Monetary Mechanism, Mapping the Complexity of a New Enforcement Model', 4 *eucrim* 151 (2015), at 156; S. Allegrezza and I. Rodopoulos, 'Enforcing Prudential Banking Regulations in the Eurozone: A Reading from the Viewpoint of Criminal Law', in: K. Ligeti and V. Franssen (eds.), *Challenges in the Field of Economic and Financial Crime in Europe and the US*, Oxford/Portland, Hart, 2017, at 239; S. Loosveld, 'The ECB's Investigatory and Sanctioning Powers under the Future Single Supervisory Mechanism', *Journal of International Banking Law and Regulation* (2013), at 423.

[112] For a list of the banks directly supervised by the ECB on 1 March 2019, see https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.listofsupervisedentities20190301.en.pdf. On 4 March, another bank was added to the list: ECB, *ECB takes over direct supervision of AS PNB Banka in Latvia*, press release, available at: https://www.bankingsupervision.europa.eu/press/pr/date/2019/html/ssm.pr190311~24201e56e0.en.html (last accessed 18 April 2019).

[113] European Central Bank, *SSM Supervisory Manual. European banking supervision: functioning of the SSM and supervisory approach*, March 2018, at 102, available at: https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.supervisorymanual201803.en.pdf?1584b27046baf1e68f92f82caadb3a63 (last accessed 17 April 2019).

law'.[114] This covers infringements of directly applicable provisions of EU banking law, such as the Capital Requirements Regulation.[115]

- Level of Penalty

Pursuant to Article 18(1) of the SSM Regulation, administrative pecuniary penalties that may be imposed by the ECB are the following:

– up to twice the amount of the profits gained or losses avoided because of the breach where those could be determined;
– up to ten per cent of the total annual turnover[116] of the concerned supervised entity in the preceding business year; and
– other pecuniary penalties as provided for under EU banking law.

Moreover, the penalties applied shall be effective, proportionate, and dissuasive.[117]

On the basis of the above criteria the ECB clearly enjoys a wide fining discretion. Unlike the European Commission in the area of EU competition law (*supra*, Part II, B.2.), the ECB has not published any guidelines to provide transparency about its fining practice. This should not surprise considering the interplay between banking supervision and monetary policy,[118] and the sometimes delicate, even political nature of its fining decisions.

- Some Case Examples

As explained earlier, the Banking Union and the sanctioning powers of the ECB were created only a few years ago. Compared to EU competition law, where the EU institutions acquired a lot of practical experience over the last decades, case examples remain quite limited in the field of EU banking law. Between August 2017 and the time of finalizing this report,[119] seven relevant decisions have been published on the ECB's website in accordance with Article 18(1) of the SSM Regulation.[120] It is noteworthy that most decisions (six out of seven) were adopted very recently, *i.e.* between March 2018 and February 2019. This recent increase clearly illustrates the

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[114] Emphasis added.

[115] See Regulation (EU) No 575/2013 on prudential requirement for credit institutions and investment firms and amending Regulation (EU) No 648/2012, *OJ L* 176, 27 June 2013, at 1. For an example, see https://www.bankingsupervision.europa.eu/press/pr/date/2017/html/ssm.pr170915.en.html (last accessed 17 April 2019).

[116] As defined under Article 128 of the SSM Framework Regulation.

[117] Article 18(3) of the SSM Regulation.

[118] For a further analysis of this interplay, see M. Goldmann, 'United in Diversity? The Relationship between Monetary Policy and Prudential Supervision in the Banking Union', 14 *EuConst* 283 (2018).

[119] This report was finalized in April 2019.

[120] For an overview of the ECB's supervisory sanctions, see https://www.bankingsupervision.europa.eu/banking/sanctions/html/index.en.html (last accessed 17 April 2019).

new tendency of the ECB to fully exercise its sanctioning powers towards the entities it supervises.

On 24 August 2017,[121] the ECB imposed its first administrative pecuniary penalty under Article 18(1) of the SSM Regulation upon the Italian bank, Banco Popolare di Vicenza S.p.A., for breaching reporting and public disclosure requirements and for breaching the large exposures limit laid down in Regulation (EU) No 575/2013[122] and Commission Implementing Regulation (EU) No 680/2014.[123] The ECB imposed two penalties, which amounted to a total of €11.2 million. The full decision is not public; the ECB only publishes the 'main elements of the decision' on its website. As regards the calculation of the fines, the press release only states that 'the penalties imposed take into account the severity of the breaches and the degree of responsibility of the entity'.[124]

From March 2018 until February 2019, the ECB imposed six administrative pecuniary penalties pursuant to Article 18(1) of the SSM Regulation upon six different supervised entities for a total amount of €7 million:

– on 14 March 2018, Banco Sabadell S.A.[125] was sanctioned with an administrative pecuniary penalty of €1.6 million for a continuous breach of the own funds requirement laid down in Regulation (EU) No 575/2013[126] and Regulation (EU) No 241/2014.[127] The justification for the amount of the penalty imposed is hardly existent: the ECB public summary of the decision only states that 'this penalty is

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121 ECB, *ECB sanctions Banca Popolare di Vicenza S.p.A. in L.C.A. for breaching supervisory requirements between 2014 and 2016*, press release, 15 September 2017, available at: https://www.bankingsupervision.europa.eu/press/pr/date/2017/html/ssm.pr170915.en.html (last accessed 17 April 2019).

122 Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012.

123 Commission Implementing Regulation (EU) No 680/2014 of 16 April 2014 laying down implementing technical standards with regard to supervisory reporting of institutions according to Regulation (EU) No 575/2013 of the European Parliament and of the Council, *OJ L* 191, 28 June 2014, at 1.

124 ECB, *ECB sanctions Banca Popolare di Vicenza S.p.A. in L.C.A. for breaching supervisory requirements between 2014 and 2016*, press release, 15 September 2017, available at: https://www.bankingsupervision.europa.eu/press/pr/date/2017/html/ssm.pr170915.en.html (last accessed 17 April 2019).

125 ECB, *ECB sanctions Banco de Sabadell, S.A.*, press release, 8 May 2018, available at: https://www.bankingsupervision.europa.eu/press/pr/date/2018/html/ssm.pr180508.en.html (last accessed 17 April 2019).

126 Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012.

127 Commission Delegated Regulation (EU) No 241/2014 of 7 January 2014 supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to regulatory technical standards for Own Funds requirements for institutions.

imposed in respect of a continuous breach of [the legal obligations under the foregoing regulations] without the permission of the competent authority';[128]

– on 16 July 2018, CA Consumer Finance,[129] Crédit Agricole S.A., and Crédit Agricole Corporate[130] and Investment Bank[131] were sanctioned to pay an administrative pecuniary penalty in an amount of €200,000, €4.3 million, and €300,000 respectively for a breach of the own funds requirement laid down in Regulation (EU) No 575/2013[132]. According to the ECB's public summary of the decision, the amount of the penalty reflects the duration of the breach (in all three cases), the degree of responsibility of the supervised entity (in the case of CA Consumer Finance[133] and Crédit Agricole Corporate and Investment Bank[134]), and/or the fact that the supervised entity 'continued classifying the instruments without the necessary permissions' (in the case of Crédit Agricole S.A.[135]);
– and finally, on 15 February 2019, Sberbank Europe AG[136] was sanctioned to pay an administrative pecuniary penalty in an amount of €630,000 for a breach of the large exposure requirements laid down in Regulation (EU) No 575/2013[137]. The ECB explains the amount of the penalty as follows:

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[128] See https://www.bankingsupervision.europa.eu/banking/sanctions/shared/pdf/ssm.180508_publication_template.en.pdf (last accessed 17 April 2019).

[129] ECB, *ECB sanctions CA Consumer Finance for breaching the procedure for classifying capital in 2016*, press release, 20 August 2018, available at: https://www.bankingsupervision.europa.eu/press/pr/date/2018/html/ssm.pr180820_2.en.html (last accessed 17 April 2019).

[130] ECB, *ECB sanctions Crédit Agricole, S.A. for breaching the procedure for classifying capital between 2015 and 2016*, press release, 20 August 2018, available at: https://www.bankingsupervision.europa.eu/press/pr/date/2018/html/ssm.pr180820.en.html (last accessed 17 April 2019).

[131] ECB, *ECB sanctions Crédit Agricole Corporate and Investment Bank for breaching the procedure for classifying capital between 2015 and 2016*, press release, 20 August 2018, available at: https://www.bankingsupervision.europa.eu/press/pr/date/2018/html/ssm.pr180820_1.en.html (last accessed 17 April 2019).

[132] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, *OJ L* 176, 27 June 2013, at 1.

[133] See https://www.bankingsupervision.europa.eu/banking/sanctions/shared/pdf/ssm.180820_2_publication_template.en.pdf (last accessed 17 April 2019).

[134] See https://www.bankingsupervision.europa.eu/banking/sanctions/shared/pdf/ssm.180820_1_publication_template.en.pdf (last accessed 17 April 2019).

[135] See https://www.bankingsupervision.europa.eu/banking/sanctions/shared/pdf/ssm.180820_publication_template.en.pdf (last accessed 17 April 2019).

[136] ECB, *ECB sanctions Sberbank Europe AG for breaching large exposure limits in 2015*, press release, 25 February 2019, available at: https://www.bankingsupervision.europa.eu/press/pr/date/2019/html/ssm.pr190225~463a5a728e.en.html (last accessed 17 April 2019).

[137] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012.

> Among other circumstances, the amount of the penalty takes into account that the large exposure limit was exceeded on an individual as well as on a consolidated basis, the duration of the breaches and the level of excess over the large exposure limit.[138]

In addition to the very limited public information justifying the amount of the imposed penalties, it is noteworthy that the ECB's press releases are often published with some delay. More importantly, there is an astonishing difference in style between these very concise and 'dry' press releases and the harsh, deterring, and even condemning tone of the European Commission's press releases in the field of EU competition law (*supra*, Part II,B.2.).

– *Fines and Periodic Penalty Payments*

Next to the administrative pecuniary penalties discussed above, Article 18(7) of the SSM Regulation provides that the ECB may also impose 'sanctions' in accordance with Council Regulation (EC) No 2532/98 of 23 November 1998 concerning the powers of the European Central Bank to impose sanctions (hereinafter: Regulation No 2532/98),[139] in case of a breach of ECB regulations or decisions. Article 120(b) of the SSM Framework Regulation, referring to 2(1) of Regulation No 2532/98, determines which sanctions can be imposed on the basis of Art. 18(7) of the SSM Regulation: fines and periodic penalty payments.

Fines are defined as 'a single amount of money which an undertaking is obliged to pay as a sanction',[140] and thus in essence strongly resemble the above administrative pecuniary penalties, despite the different scope of application, as will be explained below. Periodic penalty payments are, by contrast, 'amounts of money which, in the case of continued infringement, an undertaking is obliged to pay *either as a punishment, or with a view to forcing* the entities concerned *to comply* with the ECB supervisory regulations and decisions'.[141]

- Scope of Application

The scope of application of fines and periodic penalty payments is largely identical. Article 1a(1) of Regulation No 2532/98 lays down two conditions that must be fulfilled.

First, as for the *personal* scope of application, the ECB is competent to impose such penalties on 'undertakings', which are defined as:

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[138] See https://www.bankingsupervision.europa.eu/banking/sanctions/shared/pdf/ssm.20190220_publication_template.en.pdf (last accessed 17 April 2019).

[139] Regulation (EC) No 2532/98 concerning the powers of the European Central Bank to impose sanctions, as amended by Council Regulation (EU) No 2015/159 of 27 January 2015, *OJ L* 318, 27 November 1998, 4.

[140] Article 1(5) of Regulation No 2532/98.

[141] Article 1(6) of Regulation No 2532/98, emphasis added.

> those natural or legal persons, private or public (…) in a participating Member State which are the subject of obligations arising from ECB regulations and decisions (…).[142]

One will immediately note that this term has a more specific meaning in the field of EU banking law than in EU competition law (*supra*, Part II, B.2.).

Although this definition may create the impression that natural persons fall within the scope of application of fines and periodic pecuniary penalties to be imposed under Article 18(7) of the SSM Regulation, this is not the case. Recital 53 of the Preamble of the SSM Regulation indeed clearly states that:

> [n]othing in this Regulation should be understood as conferring on the ECB the power to impose penalties on natural or legal persons other than credit institutions, financial holding companies or mixed financial holding companies (…).

The meaning of the term 'undertakings' is further defined by Article 122 of the SSM Framework Regulation. Contrary to administrative pecuniary penalties (*supra*), fines and periodic penalty payments may be imposed on both significant and less significant supervised entities.[143] As to the latter, such penalties are to be imposed 'only if the relevant ECB regulations or decisions impose obligations on such less significant entities vis-à-vis the ECB'.[144] The latter case is thus the only scenario where the ECB is entitled to directly impose administrative penalties on a less significant entity.

Second, as regards the *material* scope of application, fines and periodic penalty payments may be imposed in case of a failure to comply with obligations arising from 'ECB regulations or decisions'.[145] This is different from administrative pecuniary penalties, which are to be imposed in case of failures to comply with EU banking legislations (*supra*).

- Level of Penalty

While the administrative sanctions provided for by Regulation No 2532/98 apply to all infringements of ECB decisions or regulations, it should be stressed that the upper limits of the fines and periodic penalty payments are different when those sanctions are imposed by the ECB in the exercise of its supervisory tasks.[146] Contrary to the generally applicable upper limits which consist of lump sums (€500,000 for fines and €10,000 per day of infringement when it comes to the periodic penalty

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[142] Article 1(3) of Regulation No 2532/98.

[143] Article 122 of the SSM Framework Regulation. See also S. Allegrezza and I. Rodopoulos, 'Enforcing Prudential Banking Regulations in the Eurozone: A Reading from the Viewpoint of Criminal Law', in: K. Ligeti and V. Franssen (eds.), *Challenges in the Field of Economic and Financial Crime in Europe and the US*, Oxford/Portland, Hart, 2017, at 239.

[144] Article 122(b) of the SSM Framework Regulation.

[145] Article 1a(1) of Regulation No 2532/98.

[146] Article 4a of Regulation No 2532/98 derogates from the general upper limits set by Article 2(1) of the same Regulation.

payments)[147], these specific upper limits are more flexible and take into account the undertaking's ability to pay.

The upper limit applicable to *fines* is identical to the one applicable to administrative pecuniary penalties imposed under Article 18(1) of the SSM Regulation (*supra*): the maximum fine is twice the amount of the profits gained or losses avoided by the infringement, to the extent that the profits or losses can be determined, or ten per cent of the total annual turnover of the undertaking concerned.[148] Apart from the terminology and the material scope of application, fines are thus essentially the same as administrative pecuniary penalties.

As to *periodic pecuniary payments*, they shall be 'calculated for each complete day of continued infringement'.[149] The supervised entity may be sanctioned to pay a daily amount of up to five per cent of its average daily turnover. This maximum is identical to the one applicable in EU competition law (*supra*, Part II, B.2.). Nevertheless, the periodic pecuniary payment may only be imposed by the ECB during a maximum period of six months, starting from the date indicated in the ECB's sanctioning decision.[150]

Pursuant to Article 18(3) of the SSM Regulation, all administrative penalties imposed by the ECB should also be effective, proportionate, and dissuasive.[151] In addition to that, Article 2(3) of Regulation No 2532/98 identifies a number of circumstances that the ECB must take into account when imposing a sanction:

- the degree of culpability of the undertaking (good faith or wilful deceit);
- the degree of diligence and cooperation of the undertaking with the ECB;
- the seriousness of the effects of the infringement;
- the profits obtained by the undertaking thanks to the infringement;
- the economic size of the undertaking; and
- if applicable, the sanctions previously imposed by other authorities on the same undertaking and based on the same facts.

Some of these elements are also reflected in the upper limits discussed above (profits, economic size), others substantiate the application of the principle of proportionality (seriousness of effects, duration/frequency) or express the principle of culpability (good faith or deceit, cooperation). Interestingly, the last element suggests that, rather than applying the *ne bis in idem* principle as set forth by Article 50 of the EU

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147 Article 2(1) of Regulation No 2532/98.

148 Article 4a(1)(a) of Regulation No 2532/98.

149 Article 1(6) of Regulation No 2532/98.

150 Article 129(3) of the SSM Framework Regulation and Article 4a(1)(b) of Regulation No 2532/98.

151 The importance of the proportionality principle is also emphasized by Article 2(2) of Regulation No 2532/98, with respect to both the decision to impose a sanction and the decision on the appropriate (type and level of the) sanction.

Charter of Fundamental Rights (hereinafter: EU Charter), the principle of proportionality is favoured.

– *Some Case Examples*

Case examples of the above administrative fines are even rarer than the sanctioning decisions holding an administrative pecuniary penalty (*supra*). As far as we can tell, periodic pecuniary payments have not yet been imposed at all.[152]

According to the information provided on its website, the ECB issued its first administrative penalty under Article 18(7) of the SSM Regulation on 13 July 2017.[153] In the case at hand, the ECB imposed a total fine of €2.5 million upon the Irish bank Permanent tsb Group Holdings plc for infringements of ECB decisions imposing liquidity requirements.[154] Neither the summary version of the ECB's decision nor the press release explains how the amount of the penalty was determined. The press release, however, does mention that the infringement 'did not change the liquidity position' of the bank and adds that the bank has, in the meantime, 'fully remediated the issue',[155] thereby clearly wanting to reassure the financial market.

More than a year later, on 21 December 2018, the ECB imposed for the second time administrative penalties on the basis of Article 18(7) of Regulation No 2532/98. A closer look reveals that it is actually a mixed case consisting of two sanctioning decisions pursuant to Article 18(7) and one based on both Article 18(1) and Article 18(7). In this instance, Novo Banco SA was fined for a total amount of €610,000 for the infringement of prior decisions of the ECB consisting in the failure to comply with large exposure[156] and capital requirements,[157] and for not complying with EU regulations holding reporting requirements.[158] The amount of the various penalties imposed was justified on the basis of the following elements: the degree of respon-

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[152] In fact, the summary publications of the ECB's decisions on the basis of Article 18(7) of Regulation No 2532/98 only refer to 'administrative penalties', without distinguishing between fines and periodic penalty payments. Nevertheless, none of the decisions adopted so far refers to a daily amount to be paid for a certain period of time. That is why we conclude that periodic penalty payments have not yet been imposed.

[153] See https://www.bankingsupervision.europa.eu/banking/sanctions/shared/pdf/ssm.170828_publication_template.en.pdf (last accessed 18 April 2019).

[154] In particular, the ECB's Decisions of 20 February 2015 and of 20 November 2015 both imposing specific liquidity requirements.

[155] ECB, *ECB sanctions Permanent tsb Group Holdings plc*, press release, 28 August 2017, available at: https://www.bankingsupervision.europa.eu/press/pr/date/2017/html/ssm.pr170828_1.en.html (last accessed 18 April 2019).

[156] See https://www.bankingsupervision.europa.eu/banking/sanctions/shared/pdf/ssm.20181221_publication_template.en.pdf (last accessed 18 April 2019).

[157] See https://www.bankingsupervision.europa.eu/banking/sanctions/shared/pdf/ssm.20181221_publication_template_1.en.pdf (last accessed 18 April 2019).

[158] See https://www.bankingsupervision.europa.eu/banking/sanctions/shared/pdf/ssm.20181221_publication_template_2.en.pdf (last accessed 18 April 2019).

sibility of the bank, the duration of the breach, the seriousness of the breach (deviation from the capital requirement imposed and level of excess over the large exposure limit), the fact that 'the large exposure requirements were not complied with on an individual and a consolidated basis', and 'the specific circumstances of the restructuring process connected to the creation of Novo Banco, SA'—the latter element apparently functions as a mitigating circumstance.[159] While a summary version of the triple decision with regard to Novo Banco SA was published on the ECB's website, the ECB seems to have forgotten to send out a press release—it is hard to imagine DG Competition would ever forget to do so when fining cartel participants (*supra*).

– *Publication of the Sanctioning Decision*

Pursuant to Article 18(6) of the SSM Regulation and Article 132(1) of the SSM Framework Regulation, the ECB shall publish, 'without undue delay, and after the decision has been notified to the supervised entity concerned', on its website its decisions regarding administrative penalties imposed under Article 18(1) and (7) of the SSM Regulation, 'including information on the type and nature of the breach and the identity of the supervised entity concerned'.[160] Such information should remain published on the ECB's website for at least five years.[161] The same requirement is provided for by Article 1a(3) of Regulation No 2532/98, but then specifically with respect to fines and periodic penalty payments.

However, decisions regarding administrative penalties could be published on an anonymized basis in case the publication could either:

– 'jeopardise the stability of the financial markets or an on-going criminal investigation';[162] or
– 'cause, insofar as it can be determined, disproportionate damage to the supervised entity concerned'.[163]

As mentioned above, for the first time in the summer of 2017 and increasingly between March 2018 and February 2019, the ECB published on its website the penalties (and the amounts) it imposed. In each of those cases, the identity of these banks and their infringements are explicitly mentioned on the website of the ECB for at

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[159] See https://www.bankingsupervision.europa.eu/banking/sanctions/shared/pdf/ssm.20181221_publication_template.en.pdf (last accessed 17 April 2019).

[160] Article 132(1) of the SSM Framework Regulation. See also Ch. V. Gortsos, 'The power of the ECB to impose administrative penalties as a supervisory authority: an analysis of Article 18 of the SSM Regulation', ECEFIL Working Papers, No 2015/11, at 24–25.

[161] Article 132(3) of the SSM Framework Regulation.

[162] Article 132(1)(a) of the SSM Framework Regulation. See also Article 1a(3), para. 2 Regulation No 2532/98.

[163] Article 132(1)(b) of the SSM Framework Regulation. See also Article 1a(3), para. 2 Regulation No 2532/98.

least the next five years. Yet, there is a clear difference in style with the publication of sanctioning decisions under EU competition law.

3. The Sanctioning Powers of the SRB

After having analysed the sanctioning powers of the ECB, it is time to turn to those of the SRB. As explained above, the main purpose of the SRM is to ensure the efficient resolution of failing banks. Resolution means the restructuring of a failing bank by a resolution authority, in this case the SRB.

The scope of application of the SRB's enforcement powers is aligned to the supervision of credit institutions by the ECB. This means that the SRB is responsible for the resolution of banks directly supervised by the ECB, as opposed to NRAs, which are responsible for the remaining banks.[164]

As a resolution authority, most of the SRB's distinctive powers are ones that would be exercised during a resolution itself.[165] However, the SRB does have investigatory powers (such as the power to request information,[166] to require the submission of documents,[167] to obtain oral or written explanations,[168] or to conduct on-site inspections[169]) as well as sanctioning powers (such as the power to impose fines[170] or periodic penalty payments[171]) that it can exercise *independently* of a resolution action and that are very similar to those conferred on the ECB (*supra*, Part II, C.2.). According to Article 41(2) of the SRM Regulation, both types of penalties are administrative in nature.

– *Fines*

  • Scope of Application

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[164] J.-P. Servais, 'Les nouvelles structures de la régulation et de la supervision financières de l'Union européenne', in: *Evolutions récentes en droit financier*, Brussels, Bruylant, 2015, at 23–24; S. Allegrezza and I. Rodopoulos, 'Enforcing Prudential Banking Regulations in the Eurozone: A Reading from the Viewpoint of Criminal Law', in: K. Ligeti and V. Franssen (eds.), *Challenges in the Field of Economic and Financial Crime in Europe and the US*, Oxford/Portland, Hart, at 241.

[165] See Chapter 3 (*Resolution*) of the SRM Regulation.

[166] Article 34 of the SRM Regulation.

[167] Article 35(1)(a) of the SRM Regulation.

[168] Article 35(1)(c) of the SRM Regulation.

[169] Article 36 of the SRM Regulation.

[170] Article 38 of the SRM Regulation.

[171] Article 39 of the SRM Regulation.

Under Article 38(2) of the SRM Regulation, the SRB may fine a supervised entity if it finds that such entity has committed, intentionally or negligently,[172] one of the following infringements:

– the entity concerned did not supply the information requested pursuant to Article 34 of the SRM Regulation;
– the entity did not submit to a general investigation or an on-site inspection pursuant to Articles 35 and 36 of the SRM Regulation; or
– the entity did not comply with a decision addressed to it by the SRB pursuant to Article 29 of the SRM Regulation.

If one leaves aside the latter type of infringement, which takes place in the context of a resolution action, one could label the above sanctioning power of the SRB as the power to fine a supervised entity for 'obstruction of justice'.

• Level of Penalty

The fine imposed by the SRB is set on the basis of a *two-step method*, which is somewhat comparable to the fining method of the European Commission in cartel cases (*supra*, Part II, B.2.). First, the SRB will determine the basic amount of the fine, which should be a percentage ranging between 0.05 per cent and 0.5 per cent of the total annual net turnover of the supervised entity.[173] Second, this basic amount will subsequently be adjusted in the light of (a long list of) mitigating and aggravating factors[174] that are laid down in Article 38(5) and (6). Next, Article 38(9) of the SRM Regulation defines the coefficients linked to the various aggravating and mitigating factors, while Article 38(4) regulates how to calculate the fine in case there is more than one coefficient to apply. Together, these provisions almost render the calculation of the fine mathematical. The precision of this calculation process sharply contrasts with the wide discretion the ECB enjoys (*supra*, Part II, C.2.).

In principle, the total fine should not exceed one per cent of the supervised entity's annual turnover.[175] Nonetheless, it is possible to derogate from this absolute maximum 'where the entity has directly or indirectly benefited financially from that infringement and where profits gained or losses avoided because of the infringement

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[172] Article 38(1) of the SRM Regulation. It is noteworthy that paragraph 2 of the aforementioned provision explicitly defines the term 'intentionally': 'An infringement by such an entity shall be considered to have been committed intentionally if there are objective factors which demonstrate that the entity or its management body or senior management acted deliberately to commit the infringement'.

[173] Article 38(3) of the SRM Regulation.

[174] Article 38(4) of the SRM Regulation.

[175] Article 38(7), para. 1 of the SRM Regulation.

can be determined'.[176] In that case, the fine should be 'at least equal to that financial benefit'.[177]

Finally, in case an act or omission constitutes more than one infringement, only the higher fine will apply.[178]

– *Periodic Penalty Payments*

• Scope of Application

Next to that, Article 39 of the SRM Regulation provides that the SRB is entitled to impose periodic penalty payments to compel the supervised entity:[179]

– to comply with an information request pursuant to Article 34 of the SRM Regulation; or
– to submit to investigations or on-site inspections pursuant to the SRB's investigative powers under Articles 35 and 36 of the SRM Regulation.

It is noteworthy that, contrary to the periodic penalty payments that may be imposed by the ECB (*supra*, Part II, C.2.), the purpose here is not to punish but merely to ensure compliance.

• Level of Penalty

The amount of the periodic pecuniary payment shall be 0.1 per cent of the average daily turnover of the supervised entity in the preceding business year.[180] This amount may, however, be adapted (*i.e.* increased) to ensure that the penalty is effective and proportionate as required by Article 39(2) of the SRM Regulation.

A periodic penalty payment shall be imposed on a daily basis until the supervised entity complies with the relevant decisions, yet without exceeding a period of six months.[181]

– *Publication of the Sanctioning Decision*

Similar to the ECB, all sanctions imposed by the SRB should be published on the SRB website except where such publication could endanger the resolution of the supervised entity.[182] Under certain circumstances, the publication can also be anon-

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176 Article 38(7), para. 2 of the SRM Regulation.
177 Article 38(7), para. 2 of the SRM Regulation.
178 Article 38(7), para. 3 of the SRM Regulation.
179 Article 39 of the SRM Regulation.
180 Article 39(3) of the SRM Regulation.
181 Article 39(2) and (4) of the SRM Regulation.
182 Article 41 of the SRM Regulation.

ymized. This publication requirement could be considered as having a punitive character and as an additional 'sanction' for the supervised entities.[183] At the moment of finalizing this contribution, no such publication can be found on the SRB website, suggesting the administrative penalties explained above have not yet been applied, or if they have, that any publicity about those penalties was considered harmful for the resolution process.

4. Conclusion

The above leads us to conclude that the sanctioning powers of the SRB are quite similar to those of the ECB described above, even if their scope of application differ. The main differences between the two authorities are the level of sanctions and the discretion granted to the sanctioning authority. The upper limits of the fines and periodic penalty payments imposed under the framework of the SRM are well below those imposed by the ECB. Moreover, the ECB enjoys much wider discretion in determining the level of the penalty than the SRB and provides very limited public explanation about the way it calculates its penalties. Sanctioning practice, however, is still very limited and to the extent appeals have been lodged against the ECB's fining decisions, no judicial decision has been rendered so far.

D. EU Market Abuse

1. Introduction

The EU first set common minimum rules to combat market abuse and insider trading in 2003. The purpose was (and still is) to complete the single market for financial services, to ensure the smooth functioning of the securities markets, and to strengthen public confidence in securities and derivatives.[184] Despite some amendments in 2008 and 2010, the 2003 Market Abuse Directive[185] (hereinafter: 2003 MAD) was considered ineffective and replaced by two legal instruments, a new Market Abuse Directive[186] (hereinafter: 2014 MAD) and a Market Abuse Regulation[187] (hereinafter:

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[183] S. Allegrezza and O. Voordeckers, 'Investigative and Sanctioning Powers of the ECB in the Framework of the Single Monetary Mechanism, Mapping the Complexity of a New Enforcement Model', 4 *eucrim* 151 (2015), at 157–158.

[184] Recitals (2) and (3) of the Preamble of the 2003 MAD.

[185] Directive No 2003/6/EC of the European Parliament and the Council on insider dealing and market manipulation (market abuse), 28 January 2003, *OJ L* 96, 12 April 2003, at 16.

[186] Directive No 2014/57/EU of the European Parliament and the Council on criminal sanctions for market abuse, 16 April 2014, *OJ L* 173, 12 June 2014, at 179.

[187] Regulation (EU) No 596/2014 of the European Parliament and the Council on market abuse and repealing Directive No 2003/6/EC of the European Parliament and the Council

MAR), replacing the 2003 MAD. By means of these new legal instruments, the EU legislator adopted a dual-track (or two-pronged) approach combining an administrative track (where national and supranational authorities cooperate with one another to enforce EU law) with a criminal track (where national judicial authorities are in charge).

The MAR[188] contains a highly elaborated regime of administrative enforcement, which is directly applicable at national level. It contains far-reaching supervisory and investigative powers for (national) competent authorities,[189] and reinforces the cooperation between those authorities and the European Securities and Markets Authorities (hereinafter: ESMA).[190] Some of these powers are comparable to the investigative powers judicial authorities have (*e.g.* they may require existing recordings of telephone conversations, electronic communications or traffic data held by investment firms, credit institutions or financial institutions),[191] or may potentially require the intervention of judicial authorities (*e.g.* the search of premises and seizure of documents).[192]

The establishment of ESMA predates the new EU legal framework on market abuse, as it was established in 2010,[193] in the aftermath of the 2008 financial crisis, and became operational on 1 January 2011.[194] ESMA is one of the three European supervisory authorities which constitute the European System of Financial Supervision.[195] ESMA assumes, together with NCAs, a general supervisory role of the financial markets; as such, their powers definitely go beyond the mere enforcement of

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and Commission Directives No 2003/124/EC, 2003/125/EC, and 2004/72/EC, *OJ L* 173, 12 June 2014, at 1.

188 For a broader analysis of this Regulation, see *e.g.* J. Lau Hansen, 'Market Abuse Case Law – Where Do We Stand With MAR?', 2 *E.C.F.R.* 367 (2017), at 367–390.

189 Article 23(2) of the MAR.

190 Articles 24–25 of the MAR.

191 Article 23(2), para. 1(g) of the MAR.

192 Article 23(2), para. 1(e) and para. 2 of the MAR.

193 Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision No 2009/77/EC, *OJ L* 331, 15 December 2010, at 84 (hereinafter: ESMA Regulation).

194 See https://www.esma.europa.eu/about-esma/who-we-are (last accessed 17 June 2018).

195 The other two authorities are the European Banking Authority and the European Insurance and Occupational Pensions Authority. For more information about the European System of Financial Supervision and the applicable legal framework, see the European Commission's website: https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-supervision-and-risk-management/european-system-financial-supervision_en (last accessed 16 April 2019). For a further analysis of the European System of Financial Supervision, see *e.g.* I.H.-Y. Chiu, 'Power and Accountability in the EU Financial Regulatory Architecture: Examining Inter-Agency Relations, Agency Independence and Accountability', 8 *Eur. J. Legal Stud.* 67 (2015).

market abuse rules. As will be explained below, ESMA does not have any direct sanctioning powers; those powers are situated at the national level.

This contribution will mainly focus on the respective powers of ESMA and NCAs relating to the *administrative* sanctions and measures applicable to market abuse, as these powers most likely qualify as 'criminal' sanctions in the meaning of Articles 6 and 7 of the ECHR. A more in-depth analysis of the 2014 MAD, which imposes minimum rules for the definition of criminal offences and for criminal sanctions on the Member States, exceeds the purpose of this contribution; that legal framework clearly belongs to realm of EU criminal law.[196]

2. The Role of ESMA

Contrary to the European Commission in the field of EU competition law and the ECB and SRB in the area of EU banking law (*supra*, Part II, B. and C.), ESMA does *not* have *sanctioning powers of its own*. Instead, it fulfils a *coordinating role* between national competent authorities,

> in particular in situations where adverse developments could potentially jeopardise the orderly functioning and integrity of financial markets or the stability of the financial system in the Union.[197]

It shall, for instance, promote a coordinated response to market abuse by 'facilitating the exchange of information between competent authorities'.[198] This exchange of information is part of the NCAs' obligation to cooperate with each other and with ESMA as spelt out by Article 25 of the MAR. In accordance with paragraph 1 of this provision, competent authorities 'shall exchange information without undue delay and cooperate in investigation, supervision and enforcement activities'. In case the requested competent authority does not act within a reasonable time or reject the request for information or assistance, the competent authority which issued the request may refer that lack of action or that refusal to ESMA,[199] which may mediate and assist both authorities to reach an agreement,[200] or investigate the situation of non-compliance, address a recommendation to the requested competent authority, and if need be, even oblige it to comply.[201] To ensure uniform conditions of application for the cooperation between NCAs, ESMA is also mandated to develop 'draft

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196 See *e.g.* V. Franssen, 'EU Criminal Law and Effet Utile – A Critical Examination of the Use of Criminal Law to Achieve Effective Enforcement', in: J. Banach-Guttierez and C. Harding (eds.), *EU Criminal Law and Policy: Values, Principles and Methods*, Routledge, 2016, at 95–99.

197 Article 31, para. 1 of the ESMA Regulation.

198 Article 31, para. 2 of the ESMA Regulation.

199 Article 25(7) of the MAR.

200 Article 19(1) of the ESMA Regulation.

201 Article 17 of the ESMA Regulation.

implementing technical standards to determine the procedures and forms for exchange of information and assistance'.[202] On the basis of ESMA's draft,[203] the European Commission adopted an implementing regulation laying out those standards on 26 February 2018.[204]

Furthermore, ESMA shall also regularly conduct peer reviews of the activities of the NCAs to strengthen the consistency and effectiveness of the enforcement of EU market abuse rules, which includes an assessment of:

> the effectiveness and the degree of convergence reached with regard to the enforcement of the provisions adopted in the implementation of Union law, *including the administrative measures and sanctions imposed against persons responsible where those provisions have not been complied with*.[205]

To enable this oversight, NCAs have the obligation to give ESMA every year 'aggregated information regarding all *administrative* sanctions and other administrative measures' that they have imposed in accordance with Articles 30-32 of the MAR, as well as 'anonymized and aggregated data regarding all administrative investigations' that they have undertaken on that basis.[206] Similarly, Article 33(2) of the MAR obliges NCAs to provide ESMA annually information on all criminal investigations that have been undertaken and the *criminal* penalties that have been imposed by national judicial authorities, to the extent the Member States have opted for criminal enforcement pursuant to Article 30(1), para. 2 of the MAR.[207] On the basis of the information provided by the NCAs, ESMA shall then publish an annual report.[208] To streamline the exchange of that information, the European Commission adopted on

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[202] Article 25(9) of the MAR.

[203] ESMA, Final report: Draft Implementing Technical Standards on forms and procedures for cooperation between competent authorities under Regulation (EU) No 596/2014 on market abuse, 30 May 2017, available at: https://www.esma.europa.eu/sites/default/files/library/esma70-145-100_final_report_draft_its_cooperation_between_ncas_art_25_of_mar.pdf (last accessed 19 April 2019).

[204] Commission Implementing Regulation (EU) No 2018/292 of 26 February 2018 laying down implementing technical standards with regard to procedures and forms for exchange of information and assistance between competent authorities according to Regulation (EU) No 596/2014 of the European Parliament and of the Council on market abuse, *OJ L* 55, 27 February 2018, at 34.

[205] Article 30(2)(d) of the ESMA Regulation, emphasis added.

[206] Article 33(1) of the MAR, emphasis added.

[207] The following Member States exercised that option: Denmark, Finland, Germany, Ireland, and Poland. See ESMA, *Annual report on administrative and criminal sanctions and other administrative measures under MAR*, 15 November 2018, at 4, para. 6, available at: https://www.esma.europa.eu/file/49748/download?token=oQJfIQOk (last accessed on 19 April 2019) (hereinafter: ESMA's first annual report on sanctions).

[208] Article 33(1) and (2) of the MAR.

29 June 2017 an implementing regulation with technical standards determining the procedures and forms of exchange NCAs should follow.[209]

ESMA's first annual report on sanctions was published on 15 November 2018, covering the period from 3 July 2016, the date of entry into force of the MAR, until 31 December 2017.[210] This report indicates that the NCAs did not impose any sanctions under the new MAR legal framework in 2016, which is understandable as the adoption of a sanction is necessarily preceded by a proper investigation. But even if the NCAs did impose sanctions on the basis of the MAR in 2017, ESMA still does not consider the received data representative of the enforcement activities performed by national authorities and therefore is unable 'to observe trends or tendencies in the imposition of sanctions'.[211] In other words, it is definitely too soon to evaluate the impact of the MAR on the effectiveness of the new market abuse rules.

It should also be stressed that this first report does not provide a complete overview of all sanctions imposed by NCAs during the covered period. On the one hand, it does not include information about administrative or criminal sanctions that were imposed on the basis of national legislation implementing the 2003 MAD.[212] On the other, it does not cover the criminal investigations and sanctions based on the 2014 MAD. Indeed, ESMA only coordinates and supervises the enforcement action by national competent *administrative* authorities, not by national *judicial* authorities. This lack of supervision on the part of an EU authority has been identified, very early on, as a 'reason for concern' by certain authors: ultimately, national judicial authorities will simply continue to determine their own criminal policy as there is no EU authority which can force them to start an investigation or which coordinates potential cross-border investigations (market abuse does not belong to Eurojust's competences).[213] This may result in a waste of resources and a duplication of investigations

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[209] ESMA sent its draft implementing technical standards, elaborated on the basis of Article 33(5) MAR, to the European Commission on 26 July 2016. See https://www.esma.europa.eu/sites/default/files/library/2016-1171_final_report_mar_its_sanctions_and_measures.pdf (last accessed 19 April 2019). The Commission's implementing regulation was adopted one year later and entered into force on 20 July 2017: Commission Implementing Regulation (EU) 2017/1158 of 29 June 2017 laying down implementing technical standards with regards to the procedures and forms for competent authorities exchanging information with the European Securities Market Authority as referred to in Article 33 of Regulation (EU) No 596/2014 of the European Parliament and of the Council, *OJ L* 167, 30 June 2017, at 22.

[210] See ESMA, *ESMA reports on NCAs' use of sanctions and administrative measures under MAR* (hereinafter: ESMA's first annual report on sanctions), press release, 15 November 2018, available at: https://www.esma.europa.eu/press-news/esma-news/esma-reports-ncas%E2%80%99-use-sanctions-and-administrative-measures-under-mar.

[211] ESMA's first annual report on sanctions, at 6, para. 10.

[212] ESMA's first annual report on sanctions, at 6, para. 9.

[213] M. Luchtman and J. Vervaele, 'Enforcing the Market Abuse Regime: Towards an Integrated Model of Criminal and Administrative Law Enforcement in the European Union?', 5 *NJECL* 193 (2014), at 216.

and prosecutions across Member States, all the more since there is no EU authority either which 'is competent to solve conflicts of jurisdiction at the interface of criminal and administrative law'.[214] In our view, it is very likely that national judicial authorities will shy away from complicated, costly, and time-consuming criminal investigations in the area of market abuse, thereby undermining the main purpose of adopting minimum rules for criminal offences and sanctions in the field of market abuse.

3. The Sanctioning Powers of NCAs

While ESMA fulfils a coordinating and facilitating role, the actual sanctioning powers for market abuse infringements are thus entrusted to the NCAs. These sanctioning powers are regulated by Articles 30 and 31 of the MAR. The powers can be exercised against both natural and legal persons.

Among the variety of administrative sanctions and measures that Member States have to provide for at the national level are a cease and desist order,[215] the disgorgement of the profits or avoided losses,[216] a public warning,[217] the withdrawal or suspension of the authorization of an investment firm,[218] a temporary or sometimes even permanent ban of a person discharging managerial responsibilities or responsible for the infringement from exercising managerial responsibilities in investment firms and from dealing on his/her own account,[219] and maximum administrative pecuniary sanctions which, for the most serious infringements, amount to at least €5 million for natural persons[220] and to at least €15 million or 15 per cent of the total annual turnover for legal persons.[221] The same rules apply to the failure to cooperate or to comply with the administrative investigation (*i.e.* obstruction of justice).[222] The rules laid down in the MAR are only minimum rules; so national law may provide for (even) more severe sanctions.[223]

Furthermore, it should be noted that, although the MAR requires the foregoing administrative sanctions, it does not entirely annihilate the choice for Member States

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214 M. Luchtman and J. Vervaele, 'Enforcing the Market Abuse Regime: Towards an Integrated Model of Criminal and Administrative Law Enforcement in the European Union?', 5 *NJECL* 193 (2014), at 216.

215 Article 30(2)(a) of the MAR.

216 Article 30(2)(b) of the MAR.

217 Article 30(2)(c) of the MAR.

218 Article 30(2)(d) of the MAR.

219 Article 30(2)(e), (f), and (g) of the MAR.

220 Article 30(2)(i) of the MAR.

221 Article 30(2)(j) of the MAR.

222 Article 30(1)(b) of the MAR.

223 Article 30(3) of the MAR.

between administrative and criminal sanctions.[224] Indeed, when the market abuse infringements defined by the MAR are already subject to criminal sanctions at national level, Member States 'may decide' not to adopt the administrative sanctions listed in Article 30(1) of the MAR.[225] However, Member States are also free to lay down both administrative and criminal sanctions, provided that this 'does not lead to a breach of the *ne bis in idem* principle'.[226]

Article 32(1) of the MAR defines the relevant circumstances that NCAs should take into account in determining the type and level of administrative sanctions, including:

- the gravity and duration of the infringement;
- the degree of responsibility of the person who is responsible for the infringement;
- the financial strength of that person, which can be determined on the basis of that person's total turnover (in case of legal persons)[227] or annual income (in case of natural persons);
- the importance of the illegal profits;
- the level of cooperation of that person, though 'without prejudice to the need to ensure disgorgement of profits gained or losses avoided by that person';
- the previous infringements committed by that person; and
- the potential measures the person has taken to prevent future misconduct.

The above sanctioning criteria give expression to several sentencing principles, in particular the principle of proportionality and the principle of culpability.

Moreover, paragraph 2 of Article 32 of the MAR obliges Member States to cooperate closely to ensure that the administrative sanctions imposed are 'effective and appropriate' and to coordinate their action with respect to cross-border cases 'in order to avoid duplication and overlaps'. The latter, however, does not go as far as to explicitly recognize the application of the *ne bis in idem* principle.

In addition, in accordance with Article 34(1) of the MAR, NCAs have the obligation to publish:

> any decision imposing an administrative sanction or other administrative measure (…) on their website immediately after the person subject to that decision has been informed of that decision. Such publication shall include at least information on the type and nature of the infringement and the identity of the person subject to the decision.

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[224] This choice already existed under the 2003 MAD which required 'effective, proportionate and dissuasive' measures, 'without prejudice to the right of the Member States to impose criminal sanctions' (Art. 14(1)). For an application of this requirement, see *e.g.* Case C-45/08, *Spector v. CBFA*, 23 December 2009, ECLI:EU:C:2009:806.

[225] Article 30(1), para. 2 of the MAR.

[226] Recital (23) of the Preamble of the 2014 MAD.

[227] In case the legal person is a 'parent undertaking', 'the relevant total turnover shall be that total annual turnover'. Article 30(2), para. 3 of the MAR.

In principle, the publication shall remain accessible on the competent authority's website for at least five years.[228] The conditions of this publication obligation strongly resemble the ones set out previously with respect to the ECB's sanctioning decisions in the area of EU banking law (*supra*, Part II, C.2.).

Nevertheless, if the publication of the identity of the natural or legal person 'would be disproportionate (…) or where such publication would jeopardise an ongoing investigation or the stability of the financial markets',[229] the competent authority can defer or anonymize the publication of the decision or even refrain from publishing under certain conditions.[230] Again, this reminds us of the possibility of anonymizing or deferring the publication under EU banking law, with the difference that Article 132 of the SSM Framework Regulation does not allow to refrain from publication (*supra*, Part II, C.2.).

4. Conclusion

Based on the above analysis of the applicable legal framework, one can conclude that the exercise of the sanctioning powers with respect to EU market abuse differs from EU competition law and EU banking law in the sense that the ESMA has no direct sanctioning powers. Yet, while the enforcement of EU market abuse rules still remains strongly decentralized, the adoption of the MAR imposing minimum rules for administrative sanctions along with the supervisory and coordinating role of ESMA is meant to ensure a more coherent enforcement of market abuse rules by NCAs throughout the Union as well as 'swift and efficient cooperation' between those national authorities.[231] It is, however, too early to evaluate the impact of the new legal rules in this respect.

As regards the applicable administrative sanctions, one will have noted that, compared to EU competition law and EU banking law, the MAR provides for more diverse administrative sanctions, ranging from mainly preventive to strongly punitive ones, and their broader personal scope of application, including both legal and natural persons. In addition to pecuniary sanctions, the MAR also includes a cease and desist order (*cf.* EU competition law; *supra*, Part II, B.2.), a public warning, the withdrawal or suspension of the authorization of an investment firm and several types of professional bans.

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228 Article 34(3) of the MAR.

229 Article 34(1), para. 3 of the MAR.

230 Article 34(1), para. 3(a)–(c) of the MAR.

231 M. Luchtman and J. Vervaele, 'Enforcing the Market Abuse Regime: Towards an Integrated Model of Criminal and Administrative Law Enforcement in the European Union?', 5 *NJECL* 193 (2014), at 215–216.

E. Some Common Characteristics of Sanctions under EU Administrative Criminal Law

The foregoing analysis of the administrative sanctions and measures applicable in the three selected areas of EU administrative law has clearly revealed a *common preference for pecuniary sanctions*, despite the use of different labels (fines, pecuniary penalties, and periodic penalty payments) and the different objectives they pursue (deterrence, punishment of past behaviours, or a means of pressure to ensure compliance). This preference for pecuniary sanctions can probably be explained by the economic or financial nature of the infringements. Nevertheless, as we argued elsewhere, pecuniary sanctions are not always the most adequate sanctions, even in the area of economic and financial crime.[232] In all three areas, the maximum of the pecuniary sanctions is determined as a function of the annual turnover of the legal person or annual income of the natural person. Pecuniary sanctions must be effective, proportionate (mainly in the meaning of 'severe enough'),[233] and dissuasive (EU banking law and, less expressly, EU market abuse), or even plainly deterrent (EU competition law). Disgorgement of profits or avoided losses is an important recurring sanctioning factor: either the fine takes into account the profits made or losses avoided by the infringement (EU competition law and EU banking law) or disgorgement can be a self-standing sanction (EU market abuse).

In addition to pecuniary sanctions, *cease and desist orders* are common practice in EU competition law and also possible under the current legal framework of EU market abuse. The greatest diversity of sanctions is clearly offered by the MAR, but it remains to be seen to what extent these non-pecuniary sanctions will be applied.[234]

Perhaps most telling in view of distilling specific characteristics of EU administrative criminal law is the impossibility, in all three sectors, of imposing a *deprivation of liberty*. This is quite logical as EU competition law and EU banking law mainly or even only targets legal persons which, by nature, cannot be imprisoned. Nevertheless, even in the area of EU market abuse, administrative deprivation of liberty of the responsible natural persons is not provided for.

Finally, the *publication of sanctioning decisions* is an obligation in all three sectors, but this obligation can be attenuated (to avoid revealing business secrets—EU

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[232] See V. Franssen, 'The EU's Fight against Corporate Financial Crime: State of Affairs and Future Potential', 19 *German Law Journal* 1221 (2018), at 1242–1249.

[233] Elsewhere, we have argued to that the EU's three-pronged qualitative requirement as regards sanctions has both a sword and a shield function, comparing the proportionality principle in that standard requirement to a 'Janus face'. See V. Franssen, *European Sentencing Principles for Corporations*, doctoral dissertation, Leuven, KU Leuven, 2013, at 198–220.

[234] If one thing, ESMA's first annual report on sanctions (at 6–8, para. 14) revealed that non-pecuniary sanctions are less often applied than pecuniary ones, especially with respect to the core infringements of market manipulation, insider dealing, and unlawful disclosure of inside information. It is a pity, though, that the report did not specify which non-pecuniary sanctions were applied by NCAs.

competition law—, so as not to jeopardize the stability of the financial markets or ongoing criminal investigations, or to prevent disproportionate damage to the person/entity in point—EU banking law and EU market abuse) or even overruled (though only in the area of EU market abuse). Practice, however, varies strongly across the three sectors. The European Commission has a strong and tough publication (and communication) policy, insisting on the fact that cartel offences are not tolerated and are harmful to consumers and competition. Clearly, publication fulfils a 'naming and shaming' function in this sector and is meant to set an example for other undertakings. In doing so, the Commission also provides substantial transparency about its fining decisions. This practice is in stark contrast with the very minimalistic communication by the ECB, probably out of concern for the impact on the overall financial system. As far as we can tell on the basis of ESMA's first annual report on sanctions, the possibility to anonymize or to refrain from publishing has already been used by NCAs, but moderately.

After these first conclusions highlighting some common characteristics of the sanctions provided for in the three areas of EU punitive administrative law, it is now time to take a closer look at their 'true' nature: are they really (purely) administrative in nature; if not, which characteristics do they share with criminal sanctions? To this end, we will first briefly analyse the meaning of the term 'criminal' in the case law of the ECtHR and its impact at EU level.

III. Criminal Nature of Sanctions in EU Punitive Administrative Law?

A. Introduction

1. Definition of the Term 'Criminal' by the ECtHR

According to well-established case law, the ECtHR applies an autonomous definition to the notions of 'criminal charge' (Article 6 of the ECHR) and 'penalty' (Article 7 of the ECHR). The Court's definition of the terms 'criminal'/'penalty' is of key importance because it determines the scope of the criminal procedural and substantive rights of those two provisions. Furthermore, it is also relevant for the scope of application of other rights and principles under the Convention, such as the right to liberty and security ('offence' in Article 5(1) of the ECHR), the right to property ('penalties' in Article 1(2) of the First Protocol to the ECHR), and the principle of *ne bis in idem* ('penal procedure' in Article 4 of Protocol No 7).[235]

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[235] See *e.g.* ECtHR (Grand Chamber), *Zolotukhin v. Russia*, 10 February 2009, para. 52; ECtHR, *Ruotsalainen v. Finland*, 16 June 2009, para. 42; ECtHR, *Tomasovic v. Croatia*, 18

The logic behind the Court's approach is crystal clear: without such an autonomous definition, Contracting States could quite easily avoid the application of the Convention's safeguards by not labelling a charge or sanction 'criminal'.[236] because different labels (criminal, civil, or administrative) principally trigger different procedures, each with their own substantive and procedural safeguards.

The basis for the ECtHR's autonomous definition of the notion of 'criminal charge' was laid down in the famous judgment *Engel and others v. the Netherlands*.[237] Since then, the Court has further elaborated, clarified, and refined the defining criteria it put forward in *Engel*, in a large number of cases, an exercise that continues until today. The initial *Engel* criteria, however, remain at the core of its definition.

Briefly summarized,[238] the criminal nature of a penalty (charge or procedure) is to be assessed on the basis of the following criteria:

– the legal categorization of the penalty under domestic law;
– the very nature of the offence;
– the type and degree of severity of the penalty that the person concerned risks.

The first criterion solely relies on the legal classification given to the penalty under national law. This criterion is a starting point,[239] which means that if national law does not categorize an offence as criminal, the relevant national court ensuring respect of the Convention's safeguards will have to look 'behind' or 'beyond' the national classification and examine the second and/or third criterion.[240]

The second and third criteria entail a more substantial analysis of the proceedings and the penalty to be imposed. For instance, in evaluating the nature of the offence a number of factors (or sub-criteria) can be taken into account, such as (i) whether

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October 2011, paras. 18–19; ECtHR, *Muslija v. Bosnia and Herzegovina*, 14 January 2014, para. 25.

[236] See *e.g.* ECtHR (Plenary), *Engel and others v. the Netherlands*, 8 June 1976, para. 81. Since then explicitly reaffirmed in *e.g.* ECtHR (Grand Chamber), *Ezeh and Connors v. United Kingdom*, 9 October 2003, para. 100; ECtHR, *Matyjek v. Poland* (Dec.), 30 May 2006, para. 45.

[237] ECtHR (Plenary), *Engel and others v. the Netherlands*, 8 June 1976.

[238] For a much more extensive analysis, see V. Franssen, 'La notion 'pénale': mot magique ou critère trompeur? Réflexions sur les distinctions entre le droit pénal et le droit quasi pénal', in: D. Brach-Thiel (ed.), *Existe-t-il un seul* non bis in idem *aujourd'hui?*, Paris, L'Harmattan, 2017, at 64–80; V. Franssen, *European Sentencing Principles for Corporations*, doctoral dissertation, Leuven, KU Leuven, 2013, at 135 *et seq.*

[239] ECtHR, *Weber v. Switzerland*, 22 May 1990, para 31.

[240] ECtHR (Plenary), *Engel v. The Netherlands*, 8 June 1976, para 82.

the legal rule in question is of a generally binding character,[241] (ii) whether the proceedings are applied by a public body with statutory powers of enforcement,[242] (iii) whether the infringement concerns the general interests of society which are normally protected by the criminal law,[243] (iv) whether the legal rule has a punitive or deterrent purpose,[244] (v) whether the imposition of a penalty is dependent upon a finding of guilt,[245] or (vi) whether comparable procedures are classified as criminal in other national legal systems.[246] As to the third criterion, to determine the (nature and) severity of the penalty, the ECtHR considers 'the maximum potential penalty for which the relevant law provides' (*i.e.* the penalty the person concerned 'risks incurring'[247]), emphasizing that the actual penalty 'cannot diminish the importance of what was initially at stake'.[248] While it is definitely true that imprisonment occupies a central position in the Court's case law in respect of the third criterion,[249] one can observe, in recent years, a growing attention to financial penalties[250] and other types of sanctions, such as professional disqualification orders[251] or the dismissal from public office.[252] This evolution is, of course, particularly relevant for the three

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241 ECtHR, *Lauko v. Slovakia*, 2 September 1998, para 58; ECtHR, *Bendenoun v. France*, 24 February 1994, para 47.

242 ECtHR, *Benham v. the United Kingdom*, 10 June 1996, para 56.

243 ECtHR, *A. Menarini Diagnostics S.R.L. v. Italy*, 27 September 2011, paras. 40–41, with reference to ECtHR, *Stenuit v. France*.

244 ECtHR, *Blokhin v. Russia*, 23 March 2016, paras 179–180; ECtHR, *Jussila v. Finland*, 23 November 2006, para 38; ECtHR, *Ezeh & Connors v. the United Kingdom*, 9 October 2003, para 147; ECtHR, *Öztürk v. Germany*, 21 February 1984, para 53.

245 ECtHR, *Benham v. the United Kingdom*, 10 June 1996, para 56.

246 ECtHR, *Matyjek v. Poland*, 30 May 2006, paras 49–50; ECtHR, *Öztürk v. Germany*, 21 February 1984, Series A No. 73, para 53.

247 ECtHR (Plenary), *Engel v. The Netherlands*, 8 June 1976, para 82.

248 ECtHR (Grand Chamber), *Ezeh and Connors v. United Kingdom*, 9 October 2003, para. 120. See *e.g.* also ECtHR, *Tomasovic v. Croatia*, 18 October 2011, para. 23.

249 In *Engel* the Court established a rebuttable presumption that penalties involving a deprivation of liberty belong to the 'criminal' sphere unless, as discussed earlier, 'their nature, duration or manner of execution cannot be appreciably detrimental'. ECtHR (Plenary), *Engel and others v. the Netherlands*, 8 June 1976, para. 82. Nevertheless, the Court does not always rigorously follow its own logic in subsequent cases. See *e.g.* ECtHR, *Campbell and Fell v. United Kingdom*, 28 June 1984, para. 72. *Cf.* ECtHR (Grand Chamber), *Ezeh and Connors v. United Kingdom*, 9 October 2003, para. 127.

250 For instance, in *Öztürk*, the Court observed that 'according to the ordinary meaning of the terms, there generally come within the ambit of the criminal law offences that make their perpetrators liable to penalties intended, inter alia, to be deterrent and *usually consisting of fines and* of measures depriving the person of his liberty'. ECtHR (Plenary), *Öztürk v. Germany*, 21 February 1984, para. 53, emphasis added.

251 ECtHR, *Grande Stevens v. Italy*, 4 March 2014, para 97.

252 See *e.g.* ECtHR, *Matyjek v. Poland* (Dec.), 30 May 2006, paras. 54–55: in this case, the Court ruled that the Polish proceedings for lustration were criminal in nature, even though this offence is not punished with imprisonment or a fine, but with the automatic dismissal from the public function exercised by the offender and the prohibition to apply for a public post during the next ten years. The Court was in particular sensitive to the fact that

selected areas of EU punitive administrative law: while none of them entails the possibility of a deprivation of liberty, they all provide for (very) substantial financial penalties and, in the case of market abuse, also temporary or even permanent professional bans.

The second and third criteria are in principle alternative, not cumulative. One of these two criteria may thus suffice to regard a charge as criminal in its autonomous meaning under Article 6 of the ECHR.[253] In practice this means that when the nature of the offence in question is found to be criminal, the ECtHR does not even consider the third criterion anymore.[254] Nevertheless, 'where the separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a "criminal charge"', a cumulative approach may still be adopted.[255]

When the ECtHR comes to the conclusion that the penalty concerned is of a 'criminal' nature, this implies that the criminal law guarantees provided by the ECHR are, in principle, applicable to the person incurring such penalty, regardless of its national legal classification.[256]

It should be noted that the Court's definition of the notion of 'criminal charge' has substantially expanded over the years, to include many types of proceedings and offences which would probably not have been considered criminal back in the early years.[257] One could argue that the Court thereby simply tried to compensate for the increasing use at the national level of administrative and civil enforcement tools pursuing the same or analogous purposes as criminal sanctions. In other words, by expanding the scope of the notion of 'criminal', the Court only wanted to ensure that

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the prohibition to practise certain professions for such a long period 'may have a very serious impact on a person, depriving him or her of the possibility of continuing professional life'.

253 See *e.g.* ECtHR (Grand Chamber), *Ezeh and Connors v. United Kingdom*, 9 October 2003, para. 86.

254 See *e.g.* ECtHR (Plenary), *Öztürk v. Germany*, 21 February 1984, para. 54; ECtHR, *Lauko v. Slovakia*, 2 September 1998, para. 58.

255 ECtHR, *Lauko v. Slovakia*, 2 September 1998, para. 57. See *e.g.* also ECtHR, *Janosevic v. Sweden*, 23 July 2002, para. 67. Examples of a cumulative approach combining the second and third criterion can for instance be found in: ECtHR, *Campbell and Fell v. United Kingdom*, 28 June 1984, paras. 71–73; ECtHR (Grand Chamber), *Ezeh and Connors v. United Kingdom*, 9 October 2003, paras. 107 and 130.

256 V. Franssen, 'La notion 'pénale': mot magique ou critère trompeur? Réflexions sur les distinctions entre le droit pénal et le droit quasi pénal', in: D. Brach-Thiel (ed.), *Existe-t-il un seul* non bis in idem *aujourd'hui ?*, Paris, L'Harmattan, 2017, at 64–65; 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? Blurring boundaries between administrative and criminal law, The Influence of the EU*, Brussels, Editions de l'Université de Bruxelles, 2014, at 175.

257 The ECtHR has even admitted this explicitly. See *e.g.* ECtHR (Grand Chamber), *Jussila v. Finland*, 23 November 2006, para. 43 ('the autonomous interpretation adopted by the Convention institutions of the notion of a "criminal charge" by applying the *Engel* criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law').

the persons affected by these alternative enforcement tools receive adequate protection. Yet, the inevitable consequence of the Court's expanding definition is that the substantive and procedural rights of the ECHR now apply to a large number of cases, not only cases where the Contracting States never intended to apply those criminal rights—which has never been an obstacle for the Court to apply its own definition—but also to cases where criminal safeguards are perhaps not really necessary.[258]

Therefore, in an attempt to counterbalance its extending criminal universe, the ECtHR introduced in *Jussila v. Finland* a new distinction between the 'hard core of criminal law' and other types of criminal law, thereby creating two subcategories of 'criminal charges'.[259] Unlike criminal cases belonging to the hard core of criminal law, the Court argues there are 'criminal cases which do not carry any significant degree of stigma', that is, '"criminal charges" of differing weight'.[260] The latter include, for instance, administrative penalties in the field of customs law and competition law, and 'penalties imposed by a court with jurisdiction in financial matters'.[261] Hence, this *Jussila* distinction seems particularly relevant for the three areas of EU administrative criminal law this contribution focuses on.

We will come back to the relevance of this distinction when looking into the safeguards that apply to EU administrative criminal law (*infra*, Part IV).

2. Applicability under EU Law

The ECtHR's autonomous definition obviously applies to all EU Member States, as they all signed and ratified the ECHR. By contrast, whether it also applies under

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[258] *Cf.* Joint partly dissenting opinion Judges Costa, Cabral Barreto, and Mularoni joined by Judge Caflisch, ECtHR (Grand Chamber), *Jussila v. Finland*, 23 November 2006, para. 11. The Judges call the extension to the tax field 'unfortunate' because it is a 'specific' field. To support their argument, they refer to the *Ferrazzini* judgment where the Court acknowledged the different nature of tax matters with respect to the civil head of Article 6 ECHR (para. 4, with reference to ECtHR, *Ferrazzini v. Italy*, 12 July 2001, para. 29). Could the same argument also be made for other fields?

[259] ECtHR (Grand Chamber), *Jussila v. Finland*, 23 November 2006, para. 43.

[260] ECtHR (Grand Chamber), *Jussila v. Finland*, 23 November 2006, para. 43. Admittedly, this distinction does not entirely come out of the blue. In fact, as early as the *Öztürk* case, the Court acknowledged that there were minor criminal offences which were 'hardly likely to harm the reputation of the offender'. ECtHR (Plenary), *Öztürk v. Germany*, 21 February 1984, para. 53. The difference is that the Court now explicitly makes this distinction *and* attaches procedural consequences to this distinction.

[261] ECtHR (Grand Chamber), *Jussila v. Finland*, 23 November 2006, para. 43. Admittedly, this distinction does not entirely come out of the blue. In fact, as early as the *Öztürk* case, the Court acknowledged that there were minor criminal offences which were 'hardly likely to harm the reputation of the offender'. ECtHR (Plenary), *Öztürk v. Germany*, 21 February 1984, para. 53. The difference is that the Court now explicitly makes this distinction *and* attaches procedural consequences to this distinction.

EU law, is much less evident. As long as the EU has not acceded to the ECHR,[262] neither the Union nor its institutions and authorities are, formally speaking, bound by the ECHR. Nevertheless, in practice, the case law of the ECtHR already has a significant impact on EU institutions and authorities, also due to the fact that they are obliged to comply with the EU Charter, which offers the same protection as the ECHR and, in some cases, even a higher level of protection.[263] Indeed, Article 52(3) of the EU Charter sets out that:

> [i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

In its case law, the CJEU is clearly influenced by the case law of the ECtHR. In some cases, it even explicitly refers to the *Engel* criteria;[264] in others, it prefers to stick to its own interpretation of those criteria.[265]

At the same time, it is important to highlight that the constitutional framework of the EU imposes important limitations on the margin of interpretation of the CJEU. Indeed, the term 'criminal' in the TFEU does not have the same broad meaning as under the ECHR but refers to the national qualification used by Member States.[266] Therefore, when it comes to defining the competences of the EU in the field of criminal law, the national label still prevails.

To conclude, the case law of the ECtHR undoubtedly has an impact in areas where the EU institutions themselves have the authority to impose 'administrative' sanctions. EU institutions and authorities must ensure that the 'accused' effectively enjoys the 'criminal' rights enshrined in the EU Charter, interpreted in light of the case law of the ECtHR. Nonetheless, the fact that a charge or offence is considered 'criminal' under the Convention does *not* imply that all EU rules on criminal procedure

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262 After the CJEU handed down its critical opinion on the accession to the ECHR (Opinion 2/2013 of 18 December 2014), the accession negotiations between the EU and the Council of Europe ended up on a side-track. For a current state of affairs, see P. Tacik, 'After the Dust Has Settled: How to Construct the New Accession after Opinion 2/2013 of the CJEU', 18 *German L.J.* 919 (2017). For some thoughts on the way forward, see T. Lock, 'The Future of the European Union's Accession to the European Convention on Human Rights after Opinion 2/13: Is It Still Possible and Is It Still Desirable?', 11 *EUConst* 239 (2015).

263 See also 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? Blurring boundaries between administrative and criminal law, The Influence of the EU*, Brussels, Editions de l'Université de Bruxelles, 2014, at 182.

264 Case C-489/10 (Grand Chamber), *Bonda*, 5 June 2012, ECLI:EU:C:2012:319, § 37.

265 Case C-617/10 (Grand Chamber), *Åklagaren v. Åkerberg Fransson*, 26 February 2013, ECLI:EU:C:2013:105, where the Court deliberately referred to the '*Bonda* criteria'.

266 See *e.g.* Case C-60/12, *Baláž*, 14 November 2013, ECLI:EU:C:2013:733. For a further analysis, see V. Franssen, 'La notion 'pénale': mot magique ou critère trompeur? Réflexions sur les distinctions entre le droit pénal et le droit quasi pénal', in: D. Brach-Thiel (ed.), *Existe-t-il un seul* non bis in idem *aujourd'hui?*, Paris, L'Harmattan, 2017, at 89 *et seq.*

would all of a sudden become applicable. The EU qualification as administrative thus remains relevant. The crucial question will therefore be to what extent it remains relevant or, put differently, to what extent the substantive and procedural safeguards applicable to 'criminal' penalties could apply differently or less strictly to punitive administrative penalties (*infra*, Part IV).

In the subsequent sections we will examine whether the sanctions applicable in the field of EU competition law, EU banking law, and EU market abuse are of a criminal nature. It is important to stress from the outset that the analysis below is largely a theoretical assessment in light of the criteria applied by the ECtHR[267] —unless there is relevant case law on the issue—and thus remains a provisional assessment which, in the future, might be invalidated by the ECtHR (or the CJEU) in a concrete case. As illustrated above, under the umbrella of the three *Engel* criteria, the Court in reality applies a whole array of different elements to determine the criminal nature of a charge, an offence, or a penalty. Which element weighs most tends to fluctuate because the Court may consider any relevant fact or circumstance of a case. This explains why, despite the Court's efforts to further clarify the *Engel* criteria, the outcome of the Court's assessment in an individual case often remains uncertain.[268]

B. EU Competition Law

1. Introduction

We learnt from the analysis in Part II that the principal sanction in cartel cases is a fine. This sanction is nearly always combined with a cease and desist order (or prohibition decision) based on Article 7 of Regulation No 1/2003 and could be combined with a periodic penalty payment pursuant to Article 24(1) of Regulation No 1/2003. Furthermore, the sanctioning decisions of the European Commission are promptly announced by a press release and followed by the publication of a summary decision in the Official Journal as well as a non-official, non-confidential but still very comprehensive version of the decision on the Commission's website. In what follows, we will examine the true nature of these sanctions and measures, in the light of the existing case law and some of the *Engel* criteria discussed above.

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[267] We will, however, not consider the sub-criterion on the similarity between the administrative procedure and the national criminal procedure, as this would require, on the one hand, an analysis of the applicable administrative procedural rules and, on the other, a comparison to national criminal procedure—which still varies substantially from one Member State to another.

[268] See also A. Weyembergh and N. Joncheray, 'Punitive Administrative Sanctions and Procedural Safeguards. A Blurred Picture that Needs to be Addressed', 7 *NJECL* 189 (2016), at 196–197.

2. Cartel Fines

Article 23(5) of Regulation No 1/2003 states explicitly that decisions imposing fines for a violation of Articles 81 or 82 of the EC Treaty (now Articles 101 and 102 of the TFEU) 'shall not be of a criminal law nature'. Nonetheless, as we will explain below, there are important reasons to believe that, despite the label used by the EU legislator, cartel fines are punitive and qualify as criminal sanctions under Articles 6 and 7 of the ECHR. To that effect, we will first analyse the sanctioning goals of the fines put forward by the European Commission and, second, examine the existing case law of the EU Courts and the ECtHR.

– *Sanctioning Goals*

The primary goal of sanctioning undertakings for cartel offences is definitely *deterrence*. But in addition to deterrence there are also many indications of a *retributive or punitive* concern in EU competition law, especially with regard to so-called 'hard core' cartels. This double sanctioning goal can be substantiated in several ways.

For a start, the deterrence goal is explicitly laid down in the 2006 Guidelines on Fines:

> Fines should have a *sufficiently deterrent effect*, not only in order to *sanction* the undertakings concerned (*specific deterrence*) but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles 81 and 82 of the EC Treaty (*general deterrence*).[269]

Deterrence, in combination with retributive denunciation,[270] is also expressed by the 'tough-on-crime' language of the European Commission in its policy documents and press releases announcing the fines imposed in cartel cases and the increasingly severe fines for cartels since the publication of the first Guidelines on Fines in 1998.

The EU Courts (see also *infra*) have explicitly recognized that the fines imposed for cartels do 'not only [pursue] a preventive, but also a *punitive* objective'.[271] This

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[269] Point 4 of the 2006 Guidelines on Fines, emphasis added.

[270] The term 'retributive denunciation' refers to a particular theory of retribution which is, in our view, particularly fit for legal persons: under this theory, retributive punishment does not just express moral disapproval but more generally strong social disapproval of the offender and his behaviour. In a way, retributive denunciation is quite similar to consequentialist denunciation, the main difference being that the former focuses more on the offender and his past behaviour, whereas the latter is more concerned about the beneficial, educative consequences of punishment. Both versions of denunciation, however, highlight the expressive function of criminal law and punishment. This expressive (or symbolic) function of criminal sanctions is precisely what distinguishes them from administrative or civil sanctions. For a further analysis, see V. Franssen, *European Sentencing Principles for Corporations*, doctoral dissertation, Leuven, KU Leuven, 2013, at 254–260.

[271] Case T-410/09, *Almamet GmbH v. Commission*, 12 December 2012, ECLI:EU:T:2012:676, para. 271, emphasis added, with reference to Case T-279/02, *Degussa v. Commission* (2006). See also F. Castillo de la Torre, 'The 2006 Guidelines on Fines: Reflections on the Commission's Practice', 33 *World Competition* 359 (2010), at 360–361,

punitive objective explains why fines for participating in a cartel 'cannot be set at a level which merely negates the profits of the cartel'.[272]

Furthermore, turning to the 2006 Guidelines on Fines, one will recognize, on the one hand, that many of the sanctioning factors in the Guidelines on Fines are based on an economic logic and translate the Commission's objective to achieve general and/or special deterrence, such as the value of sales being the basis for the calculation of the fine, the entry fee, and the possibility of a gains-based and turnover-based increase.[273] On the other hand, those guidelines contain a number of elements which are typical of criminal sentencing and retributive justice.[274] At the time of their publication, the European Commission highlighted that 'fines should not only *punish past behaviour*, but also that their level will *deter* that particular company, or any other, from entering into illegal behaviour in the future'.[275] The fines calculated on the basis of the 2006 Guidelines are thus meant to be both backward-looking and forward-looking.

For instance, with respect to the basic amount of the fine, the gravity of the infringement is not only determined in function of economic criteria but also by the 'nature of the infringement' and 'whether or not the infringement has been implemented'.[276] By taking into account whether the infringement is implemented or not to determine the gravity of the infringement, the Guidelines show that even non-implemented agreements (comparable to inchoate offences or attempt), which have not caused any concrete harm yet, deserve to be punished—abstract harmfulness thus suffices.

Some authors argue that even the 'entry fee' is not exclusively based on deterrence because it has nothing to do with the costs of criminal behaviour.[277] It is also telling

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with reference to Case C-289/04 P, *Showa Denko v. Commission* [2006]; I. Simonsson, *Legitimacy in EU Cartel Control*, Oxford, Hart Publishing, 2010, at 276 and the case law references there.

[272] Case T-410/09, *Almamet GmbH v. Commission*, 12 December 2012, ECLI:EU:T:2012:676, para. 271, with reference to Case T-59/02 *Archer Daniels Midland v. Commission* (2006).

[273] For a more extensive analysis of those deterrent sanctioning criteria, see V. Franssen, *European Sentencing Principles for Corporations*, doctoral dissertation, Leuven, KU Leuven, 2013, at 321–324.

[274] See also C. Harding and J. Joshua, *Regulating Cartels in Europe*, Oxford, Oxford University Press, 2010 (2nd ed.), 327 and 329; I. Simonsson, *Legitimacy in EU Cartel Control*, Oxford, Hart Publishing, 2010, 304–305.

[275] European Commission, Competition: Commission revises Guidelines for setting fines in antitrust cases, press release, 28 June 2006, emphasis added.

[276] Point 22 of the 2006 Guidelines on Fines.

[277] *Cf.* I. Simonsson, *Legitimacy in EU Cartel Control*, Oxford, Hart Publishing, 2010, 305 ('Entrance fees [sic] have no apparent relation to the costs to society of cartel activity'.).

that in practice the percentage of the value of sales used for the entry fee is usually identical to the percentage reflecting the gravity of the infringement.[278]

Furthermore, some 'aggravating' and 'mitigating circumstances' in the Guidelines relate to the degree of culpability of the offender. For instance, the undertaking which took a leading role in the agreement or instigated others to form a cartel could face a higher fine.[279] Conversely, if the undertaking's involvement was 'substantially limited', it may receive a lighter fine.[280] Other authors have argued that the increase for repeat offenders is a retributive element.[281] More in general, as argued before, the secrecy of hard core cartels also points to the culpability of the offender, characterizing the offensive nature of their behaviour.[282]

Finally, the Guidelines include the possibility to impose a 'symbolic fine' in 'certain cases'.[283] Depending on the concrete circumstances, this message can be of a retributive nature, communicating social disapproval, or of consequentialist nature, as a warning to other potential offenders (general deterrence or educative purpose).[284]

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[278] See *e.g.* European Commission, Decision relating to a proceeding under Article 81 EC Treaty and Article 53 EEA Agreement (Case COMP/38.695 – Sodium Chlorate), C(2008) 2626 final, 11 June 2008, recitals 521 and 523 (19%); European Commission, Decision relating to a proceeding under Article 81 EC Treaty and Article 53 EEA Agreement (Case COMP/39.396 – Calcium Carbide and Magnesium), C(2009) 5791 final, 22 July 2009, recitals 301 and 306 (17%); European Commission, Decision relating to a proceeding under Article 81 EC Treaty and Article 53 EEA Agreement (Case COMP/39.129 – Power Transformers), C(2009) 7601 final, 7 October 2009, recitals 247 and 251 (16%); European Commission, Decision relating to a proceeding under Article 101 TFEU and Article 53 EEA Agreement (Case COMP/38.866 – Animal Feed Phosphates), 20 July 2010, recitals 205 and 210 (17%).

[279] Point 28 third indent of the 2006 Guidelines on Fines.

[280] Point 29 third indent of the 2006 Guidelines on Fines.

[281] I. Simonsson, *Legitimacy in EU Cartel Control*, Oxford, Hart Publishing, 2010, at 305.

[282] See Point 23 of the 2006 Guidelines on Fines, emphasis added ('horizontal price-fixing, market-sharing and output-limitations, which are *usually secret*, are *by their very nature*, among the most harmful restrictions of competition'.).

[283] Point 36 of the 2006 Guidelines on Fines. The 2006 Guidelines on Fines do not further define the cases in which the Commission can impose such a symbolic fine, which suggests that it has ample discretion in this respect, as long as it gives a justification for doing so.

[284] For instance, in the organic peroxides cartel the Commission imposed a symbolic fine of €1,000 (Point 5(d) 1998 Guidelines on Fines) on AC-Treuhand because it was the first time that the Commission held a consultancy firm liable for being involved in a cartel. See European Commission, Decision C(2003)4570 relating to a proceeding under Article 81 EC Treaty and Article 53 EEA Agreement (Case COMP/E.2/37.857 – Organic Peroxides), 10 December 2003, recital 454. This fine was not contested in the proceedings before the Court of First Instance: Case T-99/04, *AC-Treuhand AG v. Commission*, 8 July 2008, ECLI:EU:T:2008:256, para. 155. For a more in-depth analysis of the nature of the AC Treuhand's liability, see C. Harding, Capturing the Cartel's Friends: Cartel Facilitation and the Idea of Joint Criminal Enterprise, 34 *E.L. Rev.* 298 (2009).

– *Further Analysis in the Light of Other Engel Criteria*

The purpose of cartel fines being clearly both punitive and deterrent, this is already a strong indication of their criminal nature in the meaning of Articles 6 and 7 of the ECHR. When looking at some of the other *Engel* (sub-)criteria, this impression is confirmed.

First, the prohibition against cartel is a generally applicable rule and the fines are inflicted by a public authority with statutory powers of enforcement.

Second, as also pointed out, fines can only be imposed if the Commission proves the undertaking knowingly participated in the cartel. Any doubt about the existence of the infringement (involving both *actus reus* and *mens rea*) must benefit the undertaking.[285]

Third, one may add to that the maximum fine of ten per cent of the undertaking's total turnover is substantial and, in some cases, may even threaten the undertaking with insolvency.[286] Moreover, in practice, the fines imposed by the European Commission are quite severe and clearly of a different level than the ones that have been imposed so far by the ECB in the area of EU banking law.

Finally, it is noteworthy that some authors argue that the '[a]ntitrust proceedings brought by the Commission (…) may culminate in non-negligible stigma for the legal or natural persons involved'.[287]

– *Criminal Nature Confirmed by the Courts?*

• EU Courts

Considering the wording of Article 23(5) of Regulation No 1/2003, it is quite understandable that the EU Courts are rather reluctant to admit that EU fines for cartels are 'criminal' in nature.[288] Nevertheless, an analysis of the Courts' case law reveals a growing awareness over the past few decades that those fines are in fact of a criminal nature, in particular because the Courts apply the case law of their counterpart

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[285] See A. Jones and B. Sufrin, *EU Competition Law. Text, Cases, and Materials*, Oxford, Oxford University Press, 2016 (6th ed.), at 115 and the case law references mentioned there.

[286] For a further analysis on the role the insolvency risk (or inability to pay) plays in the setting of the fine in cartel cases, see V. Franssen, *European Sentencing Principles for Corporations*, doctoral dissertation, Leuven, KU Leuven, 2013, at 359–364.

[287] A. Jones and B. Sufrin, *EU Competition Law. Text, Cases, and Materials*, Oxford, Oxford University Press, 2016 (6th ed.), at 115.

[288] By contrast, some Advocates General of the CJEU have been more explicit on this issue. For instance, Advocates General Vesterdorf and Leger both took the view that EU competition law involves a criminal charge in the meaning of Article 6. Advocate General Kokott argued that the Court of Justice should closely conform to the case law of the ECtHR even though Article 6(1) of the ECHR does not directly apply to the proceedings before the European Commission. See A. Andreangeli, *EU Competition Enforcement and Human Rights*, Cheltenham/Northampton, Edward Elgar, 2008, at 26–27 and the references mentioned there.

in Strasbourg, the ECtHR, regarding the criminal prong of Article 6 of the ECHR. It is indeed the case law on the applicable substantive and procedural safeguards in EU competition law through which the criminal nature of this area of EU administrative law becomes apparent.

For instance, in the sodium chlorate cartel, the Court of Justice ruled on the applicability of the presumption of innocence —a fundamental right that only applies in criminal matters—, to cartel cases as follows:

> It must also be accepted that, given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (see, to that effect, in particular the judgments of the European Court of Human Rights of 21 February 1984, *Öztürk*, Series A No 73, and of 25 August 1987 *Lutz*, Series A No 123-A).[289]

Interestingly, the Court referred to both the fines *and* the periodic penalty payments that can be imposed in such cases.

In the same cartel, but against a different undertaking, the General Court ruled as follows with respect to the principle of legality:

> According to the case-law, the principle that penalties must be strictly defined by law requires that legislation must clearly define offences and the penalties which they attract. That condition is satisfied where the individual concerned is in a position, on the basis of the relevant provision and if need be with the help of the interpretative assistance given by the courts, to know which acts or omissions will make him *criminally* liable.[290]

That being said, even if the criminal nature of EU cartel law and of the sanctions that can be imposed is established, this does not necessarily mean that all rights of the criminal prong of Article 6 of the ECHR apply to the *same* extent in EU competition law. Indeed, as we will further explain in Part IV, the real questions or stakes are elsewhere.

- ECtHR

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[289] Case C-199/92 P, *Hüls* v *Commission*, 8 July 1999, ECR I-4287, para. 150, emphasis added.

[290] Case T-299/08, *Elf Aquitaine SA v. Commission*, 17 May 2011, ECLI:EU:T:2011:217, para. 187, emphasis added.

The ECtHR, for its part, has taken a clear stance on the nature of *national*[291] competition law, at least with respect to hard core cartels.[292]

In *Menarini Diagnostics*, the ECtHR indeed ruled that a €6 million fine for price-fixing and market-sharing (*i.e.* hard core cartels) is a criminal penalty in the meaning of Article 6 of the ECHR.[293] The Court based its ruling on a cumulative application of three *Engel* subcriteria: the general character of the rule, the fact that the offence concerns the general interests of society which are normally protected by the criminal law, as well as the punitive and preventive purpose of the fine.[294]

While some authors draw far-reaching conclusions from the above case,[295] we believe it is important to emphasize that the ECtHR concluded in other, earlier competition law cases, which also involved concerted practices and the restriction of competition but *not* hard core cartels, that the charges were *not* criminal in the meaning of Article 6 of the ECHR. These cases are, in our view, equally interesting as *Menarini Diagnostics*, because they enable us to better understand what parts of competition law are criminal in nature and why. For instance, in *OOO Neste St. Petersburg and Others v. Russia*, the Court stressed that:

> the Convention case-law, including the cases invoked by the applicant companies [*e.g. Stenuit v. France*], *does not contain an explicit conclusion* that competition law offences should be regarded as 'criminal' within the meaning of Article 6.

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[291] The ECtHR has not yet ruled on the nature of EU competition law. As long as the EU has not acceded to the ECHR (*supra*), the ECtHR is unlikely to take any cases on EU competition law. See A. Bailleux, 'The Fiftieth Shade of Grey. Competition Law, "Criministrative Law" and "Fairly Fair Trials"', in: F. Galli and A. Weyembergh (eds.), *Do labels still matter? Blurring boundaries between administrative and criminal law, The Influence of the EU*, Brussels, Editions de l'Université de Bruxelles, 2014, at 140 and the references there to past cases declared inadmissible by the ECtHR.

[292] Some authors draw more general conclusions from *Menarini Diagnostics*, arguing that '(European) *competition law* has a criminal law nature'. See R. Wesseling and M. van der Woude, 'The Lawfulness and Acceptability of Enforcement of European Cartel Law', 35 *World Competition* 573 (2012), 577, emphasis added.

[293] ECtHR, *A. Menarini Diagnostics S.R.L. v. Italy*, 27 September 2011, para. 42. To note also that the ECtHR assesses the nature of the penalty based on Article 6 of the ECHR, not on Article 7 of the ECHR. This shows how much the notion 'criminal charge' and 'penalty' are entwined in the Court's case law.

[294] ECtHR, *A. Menarini Diagnostics S.R.L. v. Italy*, 27 September 2011, paras. 40–41, with reference to ECtHR, *Stenuit v. France*. The *Stenuit* case is generally considered as the first case where a competition case was considered under the criminal limb of Article 6 ECHR, even though the ECtHR never pronounced/ruled on the merits of the case because the case was struck out of the list. See *e.g.* A. Andreangeli, *EU Competition Enforcement and Human Rights*, Cheltenham/Northampton, Edward Elgar, 2008, 25–26.

[295] See *e.g.* A. Weyembergh and N. Joncheray, 'Punitive Administrative Sanctions and Procedural Safeguards. A Blurred Picture that Needs to be Addressed', 7 *NJECL* 189 (2016), at 196.

> The Court hence considers it *more appropriate to consider the applicant companies' individual situation* against the principal criteria defining the notion of 'criminal'.[296]

In that case, the ECtHR rejected the applicants' argument that the Russian competition law was a generally applicable rule, because it 'applies only to "relations which influence competition in commodity markets"'.[297] Moreover, the sanction imposed on the applicant, namely the confiscation of the profit the applicants had gained from the infringement, is 'aimed at prevention of disturbances of competition and its restoration if disturbances take place'[298] rather than at 'punishment to deter re-offending'.[299] Furthermore, the Court also observed that:

> certain monopolistic behaviour may even be authorized by the State if proven to serve common good. *Genuinely criminal behaviour is not usually subject to such utilitarian justification*. Lastly, freedom of market competition is a relative, situational value and encroachments on it are *not inherently wrong* in themselves.[300]

It follows from the foregoing argumentation that anti-competitive behaviour which is not unambiguously prohibited does not qualify as criminal. In other words, if we translate this to the EU level, not all anti-competitive practices which fall under Articles 101–102 of the TFEU will be criminal in the meaning of Article 6 of the ECHR. Some agreements can be legal (*i.e.* pro-competitive) or illegal (*i.e.* anti-competitive), depending on an *ad hoc* economic appreciation[301] of the European Commission. Such agreements are most likely non-criminal. This is, for instance, the case with vertical agreements between undertakings 'which operate at different levels of the production and supply chain',[302] such as selective distribution agreements[303] or single branding agreements.[304] Similarly, not all conduct of an undertaking holding

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296 ECtHR, *OOO Neste St. Petersburg and Others v. Russia* (Dec.), 3 June 2004, at 9 sub 2, emphasis added.

297 ECtHR, *OOO Neste St. Petersburg and Others v. Russia* (Dec.), 3 June 2004, at 10 sub (b).

298 ECtHR, *OOO Neste St. Petersburg and Others v. Russia* (Dec.), 3 June 2004, at 10 sub (b).

299 ECtHR, *OOO Neste St. Petersburg and Others v. Russia* (Dec.), 3 June 2004, at 10 sub (c).

300 ECtHR, *OOO Neste St. Petersburg and Others v. Russia* (Dec.), 3 June 2004, at 10 sub (b), emphasis added.

301 On the increased economic approach of the European Commisison and its implications for evidence gathering and judicial review, see F. Castillo de la Torre and E.G. Fournier, *Evidence, Proof and Judicial Review in EU Competition Law*, Cheltenham, Edward Elgar Publishing, 2017, at 416.

302 A. Jones and B. Sufrin, *EU Competition Law. Text, Cases, and Materials*, Oxford, Oxford University Press, 2011 (4th ed.), at 629.

303 A. Jones and B. Sufrin, *EU Competition Law. Text, Cases, and Materials*, Oxford, Oxford University Press, 2011 (4th ed.), at 667–669.

304 A. Jones and B. Sufrin, *EU Competition Law. Text, Cases, and Materials*, Oxford, Oxford University Press, 2011 (4th ed.), at 663–666.

a dominant position in a certain market constitutes an abuse in the meaning of Article 102 of the TFEU.[305]

In sum, in the light of the above case law (even if it applies only to *national* competition law), one may conclude that fines imposed to punish hard core cartels under EU law, which rules are largely mirrored by national law or practice,[306] can indeed be considered punitive and thus criminal in the meaning of Articles 6 and 7 of the ECHR. The same, however, cannot be said for other parts of competition law that are mainly aimed at the regulation of competition and the prevention of anti-competitive behaviour.

3. Other Sanctions and Measures

The criminal nature of the other sanctions and measures imposed by the Commission is less certain. The prohibition order simply aims to put an end to the harmful behaviour; the periodic penalty payment simply adds pressure to that order and can therefore be considered a simple enforcement measure (*cf.* EU banking law; *infra*, Part III, B.3.). By contrast, as indicated before, the Commission's publication strategy with respect to cartels clearly pursues a punitive and deterring objective.

That being said, if the proceedings leading to the imposition of a fine, which can be combined with other sanctions or measures, concern the determination of a 'criminal charge' in the meaning of Article 6(1) of the ECHR, the criminal safeguards will apply to the entire proceedings. Considering the affirmative case law of the ECtHR on the criminal nature of cartel fines, there is no need to inquire further: the entire investigation and sanctioning phase will have to meet the requirements of the ECHR applicable in criminal cases.

4. Conclusion

One may conclude that the fines imposed by the European Commission in cartel cases are clearly of a criminal nature, despite the wording of Article 23(5) of Regulation No 1/2003. This has been confirmed by the ECtHR with regard to national competition law which, as we know, highly resembles the EU rules, and this also transpires from the EU Courts' case law. The nature of the other sanctions and measures is not necessarily criminal, but since they can be imposed together with a

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[305] For an extensive overview of the many types of agreements which can be an abuse of dominant position, see A. Jones and B. Sufrin, *EU Competition Law. Text, Cases, and Materials*, Oxford, Oxford University Press, 2011 (4th ed.), at 357–557.

[306] Indeed, while the enforcement of competition law has been strongly decentralized since Regulation No 1/2003, domestic sanctioning powers are governed by EU law principles. As a result, 'domestic sanctioning powers have been subject to a process of convergence'. M.J. Frese, *Sanctions in EU Competition Law: Principles and Practices*, Oxford, Hart Publishing, 2014, at 243.

(criminal) fine, they have to meet the same level of protection, at least as far as procedural safeguards are concerned.[307]

C. EU Banking Law

1. Introduction

As explained above, the ECB and the SRB are given significant sanctioning powers when it comes to supervising the banking system. Both authorities are entitled to impose administrative sanctions on credit institutions and other supervised entities. However, are those sanctions of a criminal nature in the meaning of Articles 6 and 7 of the ECHR? To answer this question, we will successively review the different sanctions analysed in Part II.

2. Administrative Pecuniary Penalties and Fines

Pursuant to Article 18(1) and (7) of the SSM Regulation, the ECB may impose administrative pecuniary penalties or fines upon credit institutions and other supervised entities which committed, intentionally or negligently, a breach of relevant directly applicable acts of EU law or of ECB regulations or decisions. These penalties are qualified as 'administrative' pursuant to Article 120 of the SSM Framework Regulation, and thus the first *Engel* criterion is, once more, of little use. Therefore, we need to move on to the other two criteria: the nature of the offence and the type and degree of severity of the penalty.

Considering the above case law of the ECtHR, one could argue that the administrative penalties under Article 18(1) and (7) of the SSM Regulation are 'criminal' in nature for the following reasons:

– the legal rule to be observed has a generally binding character—at least in the hypothesis of Article 18(1) of the SSM Regulation;

– the penalties are adopted by a public authority with statutory powers of enforcement, namely the ECB—admittedly, this subcriterion is probably not preponderant;

– the penalties can only be imposed if the infringement was committed intentionally or negligently, in other words, they require the finding of guilt;

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[307] The substantive requirements (*e.g.* principle of legality) might be somewhat less high: Article 7 of the ECHR, for instance, only applies to (criminal) penalties, not to measures, even if those measures are imposed in the context of a criminal proceeding.

– as to their goal, the penalties aim at effectively punishing and dissuading, or even deterring, the supervised entities in case of an infringement of prudential requirements,[308] they are thus administered for past behaviour and to prevent future wrongdoing;

– furthermore, the maximum penalty the supervised entity risks is substantial: up to ten per cent of the entity's total annual turnover of the preceding business year—this is the same maximum as under EU competition law (*supra*, Part II, B.2.)—or twice the amount of the profits gained or losses avoided thanks to the infringement. This maximum indicates the objective is not merely to disgorge the profits made by the entity. Admittedly, the fines and pecuniary penalties imposed so far by the ECB still appear (relatively) modest and are probably[309] quite far from the ceiling of ten per cent, but following the case law of the ECtHR in other areas, the actual penalty 'cannot diminish the importance of what was initially at stake'.[310]

Next to that, the SRB too may impose fines on credit institutions if it finds that such entity has committed one of the infringements listed in Article 38 of the SRM Regulation, which basically constitute forms of 'obstruction of justice' (*supra*, Part II, C.3.). These fines are explicitly qualified as 'administrative' pursuant to Article 41(2) of the SRM Regulation. Yet, as to the nature of the infringement, the underlying legal rule (cooperation with the SRB's investigative measures and compliance with its decisions) is generally applicable to all supervised entities, a fine can only be imposed if the infringement was committed intentionally or negligently, it is applied by a public authority with statutory powers of enforcement, and it seems to have a punitive and dissuading purpose. Moreover, the rule that, in case an act or omission constitutes more than one infringement, only the higher fine will apply, definitely reminds us of sentencing rules on the concurrence of offences under criminal law. Considering all these elements, one may conclude that the fine is of a 'criminal' nature in the meaning of Articles 6 and 7 of the ECHR. That being said, with regard to the third *Engel* criterion, the maximum amount of the fine is substantially lower (one per cent of the entity's total annual turnover, and at least equal to the financial benefit obtained from the infringement) than the pecuniary penalties that

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[308] S. Allegrezza and I. Rodopoulos, 'Enforcing Prudential Banking Regulations in the Eurozone: A Reading from the Viewpoint of Criminal Law', in: K. Ligeti and V. Franssen (eds.), *Challenges in the Field of Economic and Financial Crime in Europe and the US*, Oxford/Portland, Hart, at 250–251; L. Wissink, T. Duijkersloot, and R. Widdershoven, 'Shifts in Competences between Member States and the EU in the New Supervisory System for Credit Institutions and their Consequences for Judicial Protection', 10 *Utrecht Law Review* 92 (2014), at 112.

[309] As indicated before, the ECB provides very limited information about the calculation of the fine. Therefore, to know how much the maximum fine was in each case, one would have to consult the annual accounting reports of the financial institutions that have been sanctioned.

[310] ECtHR (Grand Chamber), *Ezeh and Connors v. United Kingdom*, 9 October 2003, para. 120. See *e.g.* also ECtHR, *Tomasovic v. Croatia*, 18 October 2011, para. 23.

can be imposed by the ECB (*supra*, Part II, C.2.); therefore, the punishment is clearly less severe, which might raise some doubts about the criminal nature of the fine. Nevertheless, the ECtHR has ruled in several cases that the lack of severity of the penalty at stake does *not* deprive an offence of its criminal nature. In other words, when other elements suggest the offence is criminal in nature, a penalty of a relatively low degree of severity will not be able to change this.[311]

In conclusion, the administrative pecuniary penalties and fines imposed by the ECB and the SRB could be considered to be of a criminal nature,[312] even if the assessment is slightly more affirmative for the ECB sanctions than for the SRB fines. This implies that when imposing sanctions under the SSM and the SRM regulations, both authorities (but definitely the ECB) will have to respect criminal law safeguards guaranteed under the ECHR and the EU Charter (*infra*, Part IV).

3. Periodic Penalty Payments

Pursuant to Article 18(7) of the SSM Regulation, the ECB may also impose periodic penalty payments in accordance with Regulation No 2532/98[313] in case of a breach of ECB regulations or decisions. Similarly, the SRB is empowered to impose periodic penalty payments upon credit institutions in order to compel them to comply with resolution rules pursuant to Article 39 of the SRM Regulation.

The criminal nature of these penalties is less straightforward than for administrative pecuniary penalties and fines described above. This is eventually due to the fact that they are periodic and aim at compelling the supervised entity to stop the infringement. In this respect, it is interesting to refer to the ECB's Supervisory Manual published in March 2018:

> Among the powers granted to the ECB by the SSM Regulation, the imposition of periodic penalty payments can be considered as an enforcement measure. Periodic penalty payments are *not intended to punish or deter* the entity/person concerned. They are applied

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311 See *e.g.* ECtHR (Plenary), *Öztürk v. Germany*, 21 February 1984, para. 54 ('The relative lack of seriousness of the penalty at stake (…) cannot divest an offence of its inherently criminal character'.); ECtHR, *Lauko v. Slovakia*, 2 September 1998, para. 58; ECtHR (Grand Chamber), *Jussila v. Finland*, 23 November 2006, para. 35, emphasis added ('No established or authoritative basis has therefore emerged in the case-law for holding that the minor nature of the penalty, *in taxation proceedings or otherwise*, may be decisive in removing an offence, otherwise criminal by nature, from the scope of Article 6'.) and para. 38. *Contra*: ECtHR, *Morel v. France* (Dec.), 3 June 2003, at 3–4.

312 B. van Bockel, 'The Single Supervisory Mechanism Regulation: Questions of ne bis in idem and implications for the further integration of the system of fundamental rights protection in the EU', 24 *Maastricht Journal of European and Comparative Law* 194 (2017), at 212.

313 Council Regulation (EC) No 2532/98 of 23 November 1998 concerning the powers of the European Central Bank to impose sanctions.

when the infringement is still ongoing, with a view to compelling the entity/person concerned to comply with the obligation which is being breached.[314]

Whether periodic penalty payments can be considered punitive and thus 'criminal' in the meaning of Articles 6 and 7 of the ECHR remains disputed. While some scholars hold that periodic penalty payments do not aim at deterring or punishing but rather at putting an end to a prohibited conduct[315] and, as a consequence, cannot be considered 'criminal', others argue that the mere fact that a penalty aims at compelling entities to comply with legal rules does not necessarily exclude its punitive character.[316] In addition, in support of the punitive nature of such penalties, attention should be paid to Regulation No 2015/159 of 27 January 2015,[317] which amended Regulation No 2532/98 and defined a periodic penalty payment as an amount of money that a supervised entity is obliged to pay '*as a punishment* or with a view to forcing the persons concerned to comply with the ECB supervisory regulations and decisions'.[318] Was this only a slip of the pen, or did the EU legislator indeed want to confirm the punitive nature of the periodic penalty payment, at least when imposed by the ECB?[319]

In the end, though, there is perhaps no need to answer the difficult question on the true nature of periodic penalty payments as they too can be combined with fines (*cf.* EU competition law; *supra*, Part III, B.3.)—fines that are without any doubt of a criminal nature—meaning that the procedure will in any event have to meet the minimum standards of the criminal limb of Article 6 of the ECHR.

4. Publication of ECB and SRB Sanctioning Decisions

Pursuant to Article 18(6) of the SSM Regulation, Article 132(1) of the SSM Framework Regulation and Article 41 of the SRM Regulation, the ECB and the SRB

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[314] ECB, *SSM Supervisory Manual. European banking supervision: functioning of the SSM and supervisory approach*, March 2018, at 100, emphasis added, available at: https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.supervisorymanual201803.en.pdf?1584b27046baf1e68f92f82caadb3a63 (last accessed 17 April 2019).

[315] L. Wissink, T. Duijkersloot, and R. Widdershoven, 'Shifts in Competences between Member States and the EU in the New Supervisory System for Credit Institutions and their Consequences for Judicial Protection', 10 *Utrecht Law Review* 92 (2014), at 113.

[316] S. Allegrezza and I. Rodopoulos, 'Enforcing Prudential Banking Regulations in the Eurozone: A Reading from the Viewpoint of Criminal Law', in: K. Ligeti and V. Franssen (eds.), *Challenges in the Field of Economic and Financial Crime in Europe and the US*, Oxford/Portland, Hart, at 252.

[317] Council Regulation (EU) No 2015/159 of 27 January 2015 amending Regulation (EC) No 2532/98 concerning the powers of the European Central Bank to impose sanctions, *OJ L* 27, 3 February 2015, at 1.

[318] Article 1(6) of Regulation No 2532/98, emphasis added.

[319] Indeed, to recall, the EU legislator did not make such amendment with respect to the periodic penalty payments that can be imposed by the SRB (*supra*, Part II, C.3.).

must publish their decisions regarding the administrative penalties they impose on their respective websites.

As mentioned above, this publication measure could be considered as having a punitive character because it may be used as a 'naming and shaming' enforcement tool to deter supervised entities from committing infringements.[320] In this respect, it is useful to refer to *Dubus S.A. v. France*, in which the ECtHR ruled that even a blaming sanction like the official warning issued by the French *Commission bancaire* against a credit institution which was not complying with the minimum capital and liquidity requirements has a criminal 'colour', especially when other, more severe sanctions could be imposed too (such as the withdrawal of the banking licence or a pecuniary sanction) and considering that the warning had had a financial impact on the credit institution.[321]

Still, considering the extremely minimalistic style of the ECB's publications so far, it is probably premature to conclude that the publication is criminal in nature. The nature of the publication of the decision is also disputed among scholars as some argue that it is not a separate penalty but rather a means of informing the financial markets and the public in general.[322] This objective clearly transpires in some publications of the ECB, particularly when the liquidity of the supervised entity might be at stake, as one can tell from the ECB decision regarding Permanent tsb Group Holdings plc (*supra*, Part II, C.2.). In addition, other scholars raise the question as to whether the possibility to anonymize the publication[323] could potentially exclude the punitive character of such publication.[324]

5. Conclusion

In sum, in the light of the above observations, we may come to the conclusion that administrative pecuniary penalties and fines imposed by the ECB and the SRB to punish and deter banks in case of an infringement can be considered punitive and thus 'criminal' in the meaning of Articles 6 and 7 of the ECHR.

By contrast, the same conclusion cannot be reached as easily for periodic penalty payments which are not intended to punish or deter the supervised entity concerned

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320 S. Allegrezza and O. Voordeckers, 'Investigative and Sanctioning Powers of the ECB in the Framework of the Single Monetary Mechanism, Mapping the Complexity of a New Enforcement Model', 4 *eucrim* 151 (2015), at 157–158.

321 ECtHR, *Dubus S.A. v. France*, 11 June 2009, paras. 37–38.

322 L. Wissink, T. Duijkersloot, and R. Widdershoven, 'Shifts in Competences between Member States and the EU in the New Supervisory System for Credit Institutions and their Consequences for Judicial Protection', 10 *Utrecht Law Review* 92 (2014), at 112.

323 Article 132(1)(a) of the SSM Framework Regulation, Article 1a(3) of Regulation No 2532/98, and Article 41 of the SRM Regulation.

324 P. Bloch, 'Les sanctions bancaires et financières au sein de l'Union européenne', 4 *Revue internationale des services financiers* 92 (2015), at 98.

but rather to compel that person to comply with the obligation which is being breached. Still, to the extent that those periodic penalty payments can be combined with a fine, the proceedings leading to such sanctions will in any event have to meet the criminal standards of Articles 6 and 7 of the ECHR.

Similarly, the conclusion for the publication of the decision tends to be negative: this measure is probably most aimed at informing the financial markets and the general public. But considering that it accompanies a criminal pecuniary sanction, it is nonetheless likely to have a criminal colour too.

D. EU Market Abuse

1. Introduction

As analysed in Part II, the EU legal framework on market abuse contains both administrative and criminal sanctions. These sanctions are imposed by national competent (administrative or judicial) authorities and are, contrary to the other two fields of EU administrative law, applicable to both natural and legal persons. Our focus in this part will be on the administrative sanctions, as there is no doubt whatsoever about the criminal nature of the sanctions under the 2014 MAD, which are labelled 'criminal' by the EU legislator (*cf.* the first *Engel* criterion).

2. Administrative Sanctions and Measures

The administrative sanctions set forth by the MAR are quite diverse, ranging from a simple warning to a temporary or permanent professional ban and withdrawal of the legal person's authorization, to maximum pecuniary sanctions of at least €5 million for the most severe infringements committed by natural persons and at least €15 million or 15 per cent of the total turnover of the legal person. In order to assess the potential criminal nature of these sanctions, we need to consider, on the one hand, the nature of the infringement and, on the other, the type and degree of severity of the penalty the person concerned risks incurring. Rather than starting from scratch, we can rely on some existing case law from the ECtHR and the CJEU. In recent years, the Courts have indeed had the possibility to rule on national market abuse legislation, even if these rules under scrutiny predated the new EU legal framework.

In particular, the Court has done so in *Grande Stevens v. Italy*.[325] In this case, three natural persons and two companies had been punished by the CONSOB, the Italian authority which has the task of protecting investors and ensuring the transparency and development of the stock markets, for market manipulation, as they had been disseminating false or misleading information by not communicating publicly about

[325] ECtHR, *Grande Stevens v. Italy*, 4 March 2014.

the ongoing negotiations to amend an equity swap contract. The fines imposed ranged from €500,000 to €3 million, and in addition to an administrative fine, the natural persons were also banned from administering, managing or supervising listed companies for a period of two to four months.

With respect to the nature of the offence, the Court first of all held that the provisions the applicants had breached 'were intended to guarantee the integrity of the financial markets and to maintain public confidence in the security of transactions' and that these are 'general interests of society, usually protected by criminal law'. Interestingly, the Court made a reference to its case law on national competition law in this respect, mentioned earlier in the contribution.[326]

Second, the Court considered the purpose of the sanctions, ruling that:

> the fines imposed were essentially intended to punish, in order to prevent repeat offending. They had therefore been based on rules whose purpose was both *deterrent, namely to dissuade* the applicants from resuming the activity in question, *and punitive*, since they punished unlawful conduct (…) Thus, they were *not solely intended*, as the Government claimed (see paragraph 91 above), *to repair damage* of a financial nature. In this respect, it should be noted that the penalties were imposed by the CONSOB on the basis of the *gravity of the impugned conduct*, and not of the harm caused to investors.[327]

In respect of the nature and severity of the penalty, the Court started by giving an overview of the maximum penalties the CONSOB could have imposed. While it noted that 'the fines in question could not be replaced by a custodial sentence in the event of non-payment', it stressed that the maximum fine was €5 million and that 'this ordinary maximum amount could, in certain circumstances, be tripled or fixed at ten times the proceeds or profit obtained through the unlawful conduct'.[328] Furthermore, the Court observed that:

> [i]mposition of the above-mentioned pecuniary administrative sanctions entails the *temporary loss of their honour* for the representatives of the companies involved, and, if the latter are listed on the stock exchange, their representatives are *temporarily forbidden from administering, managing or supervising listed companies* for periods ranging from two months to three years. The CONSOB may also *prohibit listed companies, management companies and auditing companies from engaging the services* of the offender, for a maximum period of three years, and *request professional associations to suspend, on a temporary basis, the individual's right to carry out his or her professional activity* (…). Lastly, the imposition of financial administrative sanctions entails *confiscation of the proceeds or profits* of the unlawful conduct and of the assets which made it possible (…).[329]

One will recognize in the above quote quite a few of the administrative sanctions that are laid down in the MAR and thus the comparison is easy to make. Admittedly,

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[326] In particular: ECtHR, *Société Stenuit v. France*, 30 May 1991, and ECtHR, *A. Menarini Diagnostics S.r.l. v. Italy*, 27 September 2011.

[327] ECtHR, *Grande Stevens v. Italy*, 4 March 2014, para. 96, emphasis added.

[328] ECtHR, *Grande Stevens v. Italy*, 4 March 2014, para. 97.

[329] ECtHR, *Grande Stevens v. Italy*, 4 March 2014, para. 97, emphasis added.

in the case at hand, the eventually imposed sanctions were (well) below the maximum and some sanctions were not imposed at all. But the actual fines were still of 'undeniable severity and had significant financial implications for the applicants'.[330] As for the professional bans imposed on the natural persons, ranging from two to four months, they were 'such as to compromise the integrity of the persons concerned'.[331]

Compared to the administrative sanctions the Italian authority could impose in 2005 and that were considered criminal in nature by the ECtHR,[332] the ones put in place by the MAR are even more severe: for instance, the fines for legal persons can increase up to €15 million or 15 per cent of the legal person's turnover, and the professional bans can even be permanent. Therefore, one can only conclude that they are criminal in nature too.

More recently, the CJEU has also ruled on the criminal nature of administrative sanctions in the field of market abuse, but still with respect to national legislation predating the MAR and the 2014 MAD. In *Garlsson Real Estate SA*, the Court held that the administrative sanctions under Italian market abuse legislation are of a criminal nature considering the punitive purpose of the administrative penalty and its 'high degree of severity'.[333] To support this assessment, the Court pointed in particular to the fact that 'that penalty may, in certain circumstances, (…) be increased by up to 3 times its amount or up to an amount 10 times greater than the proceeds or profit obtained from the offence'. which confirms that 'that penalty is not only intended to repair the harm caused by the offence'.[334]

Admittedly, the MAR also provides for much 'lighter' sanctions than the aforementioned severe fines (such as a public warning and the disgorgement of profits or avoided losses) and measures (namely a cease and desist order), but as the ECtHR reiterated in *Grande Stevens*, 'the criminal connotation of proceedings depends on the degree of severity of the penalty to which the person concerned is a priori liable (…), and not the severity of the penalty ultimately imposed'.[335] What is more, with respect to the possibility of issuing a public warning, the ECtHR ruled in another case—dealing with banking law—that it has a criminal colour especially when other, more severe sanctions could be imposed too (such as the withdrawal of the banking

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330 ECtHR, *Grande Stevens v. Italy*, 4 March 2014, para. 97.

331 ECtHR, *Grande Stevens v. Italy*, 4 March 2014, para. 97.

332 ECtHR, *Grande Stevens v. Italy*, 4 March 2014, para. 98.

333 Case C-537-16 (Grand Chamber), *Garlsson Real Estate SA and Other*, 20 March 2018, ECLI:EU:C:2018:193, paras. 34–35.

334 Case C-537-16 (Grand Chamber), *Garlsson Real Estate SA and Other*, 20 March 2018, ECLI:EU:C:2018:193, para. 34.

335 ECtHR, *Grande Stevens v. Italy*, 4 March 2014, para. 97.

licence or a pecuniary sanction) and considering that the warning had had a financial impact on the credit institution (*supra*, Part III, C.4.).[336]

On a final note, it is also worthwhile pointing out that the circumstances NCAs should consider when determining the type and level of the sanctions (Article 32(1) of the MAR) remind us of usual sentencing principles and criteria under criminal law, such as the gravity and duration of the infringement, the importance of the illegal profits, the degree of responsibility of the person concerned, and the previous infringements committed by that person.

3. Publication of Decisions

As far as the publication of decisions imposing an administrative sanction or measure is concerned, one might be tempted to refer to the earlier analysis on EU banking law (*supra*, Part III, C.4.). Still, in our view, there are some important differences which plead more in favour of a criminal sanction or at least a hybrid measure.

There is not only the possibility to anonymize the decision for publication and to defer the publication if it 'would be disproportionate (…) or where such publication would jeopardise an ongoing investigation or the stability of the financial markets',[337] but it is also possible to refrain from publication if a deferral or anonymization of the publication is deemed 'insufficient to ensure (i) that the stability of financial markets is not jeopardized; or (ii) the *proportionality of the publication of such decisions with regard to measures which are deemed to be of a minor nature*'.[338] The discretion to refrain from publishing when the measure or sanction is minor and the publication of such decision would not be proportionate suggests that the publication is not simply an informative measure but a sanction that could have considerable impact on the person concerned (and on the market, although the latter is less relevant to assess the nature of the publication).

Based on the limited information available today about the NCAs enforcement practices under the new MAR (*supra*, Part II, D.3.), it is difficult to tell whether the publication of sanctioning decisions actually pursues a punitive and/or deterring effect or whether it is rather of an informative (and thus administrative) nature. Still, what we can assess so far is that, in some cases, national authorities indeed decide not to publish or not to anonymize the publication. These modalities, which are aimed at avoiding a disproportionate effect on the offender (or spill-over effects on the market), seem to strengthen in our view the impression that the publication under the MAR can, potentially, be used as a 'naming and shaming' type of sanction.

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336 ECtHR, *Dubus S.A. v. France*, 11 June 2009, paras. 37–38.

337 Article 34(1), para. 3 of the MAR.

338 Article 34(1), para. 3(c) of the MAR, emphasis added.

4. Conclusion

In sum, considering the existing case law of the ECtHR and the CJEU, the true nature of the administrative sanctions set forth under the MAR appears to be criminal, with some reservations for the publication of the sanctioning decisions. This is mainly due to the fact that the MAR provides for very substantial maximum fines, far-reaching and long-lasting disqualification orders, and a withdrawal of the authorization of investment firms—all sanctions that are likely to have severe financial and/or reputational impact on the offender. Considering the importance of what is at stake for the offender, it seems very likely that the Courts will, in the future, rule in this way on the sanctions under the MAR.

To support this assessment, one may also refer to Recital 23 of the Preamble of the 2014 MAD, whereby the EU legislator indirectly confirms the criminal nature of the administrative sanctions under the MAR:

> In the application of national law transposing this Directive, Member States should ensure that the imposition of criminal sanctions for offences in accordance with this Directive and of administrative sanctions in accordance with the Regulation (EU) No 596/2014 does not lead to a breach of the principle of ne bis in idem.

Indeed, if the administrative sanctions under the MAR were not of a criminal nature in the meaning of Articles 6 and 7 of the ECHR, there would be no need to alert the Member States to a violation of the *ne bis in idem* principle.[339] Still, as recent case law of the CJEU shows, this does not necessarily mean that this principle will apply with the same stringency as in the field of 'hard core criminal law'.[340] Admittedly, this case law relates to national legislation based on the 2003 MAD; so it remains to be seen how the Court will rule on post-MAR legislation in the future.

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[339] For a further analysis of the application of the *ne bis in idem* principle in the context of the 2014 market abuse rules, see *e.g.* R. Kert, 'The relationship between administrative and criminal sanctions in the new market abuse provisions', in: F. Galli and A. Weyembergh (eds.), *Do labels still matter? Blurring boundaries between administrative and criminal law, The Influence of the EU*, Brussels, Editions de l'Université de Bruxelles, 2014, at 103–107.

[340] Case C-537-16 (Grand Chamber), *Garlsson Real Estate SA and Other*, 20 March 2018, ECLI:EU:C:2018:193, para. 63: 'Article 50 of the Charter must be interpreted as precluding national legislation which permits the possibility of bringing administrative proceedings against a person in respect of unlawful conduct consisting in market manipulation for which the same person has already been finally convicted, in so far as that conviction is, given the harm caused to the company by the offence committed, such as to punish that offence in an effective, proportionate and dissuasive manner'. For a first analysis of this case law, see G. Lo Schiavo, 'The principle of *ne bis in idem* and the application of criminal sanctions: of scope and restrictions', 14 *EuConst* 644 (2018), at 647; 650–651 and 658–663. See also A. Błachnio-Parzych, 'Solution to the accumulation of different penal responsibilities for the same act and their assessment from the perspective of the *ne bis in idem* principle', 9 *NJECL* 366 (2018), at 381; K. Ligeti, 'Fundamental Rights Protection Beyond Strasbourg and Luxembourg. Extending Transnational *ne bis in idem* Across Administrative and

E. Moving Beyond Formal Labels: Criminal Law in Disguise

At the end of Part III, we can affirm that most of the sanctions provided in the three selected areas of EU administrative law are of a criminal nature, despite the fact that they all carry, formally speaking, an administrative label. Even if there are a few remaining uncertainties with respect to some sanctions or measures (*e.g.* the publication of decisions in the field of EU banking law and EU market abuse), the fact that the perpetrators potentially face other 'criminal' sanctions is in principle enough to trigger the application of the criminal safeguards enshrined in the ECHR and the EU Charter.

IV. Some Reflections on Substantive and Procedural Safeguards in EU Administrative Criminal Law

A. Introduction

After having established the criminal nature of the sanctions applicable in the three policy areas analysed in the previous parts, we will now turn to the *implications of that assessment* for the applicable substantive and procedural safeguards. As indicated above, it is one thing to assess the criminal nature of sanctions, it is yet another challenge to translate that assessment into concrete applicable safeguards.

In that respect, it is worthwhile recalling the distinction the ECtHR drew between 'the hard core of criminal law' and other types of criminal law that are less stigmatizing. As explained above, the purpose of this distinction is crystal clear: limiting the scope of application of the ECHR safeguards, in particular the procedural safeguards of Article 6 of the ECHR.[341] To the first subcategory, the so-called 'hard core of criminal law', the procedural rights under the criminal head of Article 6 of the ECHR apply without any restriction. In contrast, 'the criminal-head guarantees will not necessarily apply with their full stringency' to the criminal charges of the second subcategory.[342] Whether they do depends on the 'overarching principle of fairness embodied in Article 6'.[343] This fairness argument is drawn from the Court's existing case law regarding proceedings falling under the civil head of Article 6(1) of the

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Criminal Procedures', in: European Law Institute, K. Ligeti and G. Robinson (eds.), *Preventing and Resolving Conflicts of Jurisdiction in EU Criminal Law*, Oxford, Oxford University Press, 2018, at 165–166.

[341] Indeed, most of the relevant post-*Jusilla* ECtHR case law focuses on procedural safeguards. The scope of application of substantive safeguards seems to raise less problems. But to confirm this impression, further analysis would be required.

[342] ECtHR (Grand Chamber), *Jussila v. Finland*, 23 November 2006, para. 43.

[343] ECtHR (Grand Chamber), *Jussila v. Finland*, 23 November 2006, para. 42.

ECHR.[344] In this case law, the Court held that the obligation of an oral hearing is not absolute. The Court, however, acknowledges that the fairness requirement in the criminal sphere is stricter.[345]

The key question is therefore *to what extent* the criminal procedural safeguards of Article 6 of the ECHR apply to 'those other criminal charges' falling outside the scope of the hard core of criminal law. While the right to a fair trial applies 'to all criminal proceedings, irrespective of the type of offence in issue', it may take the form of different degrees of procedural protection as long as the proceedings as a whole are considered fair.[346] So far, it seems that the ECtHR only allows limitations to or 'deviations from' the procedural rights under the criminal head of Article 6(1) of the ECHR under 'exceptional circumstances'.[347]

In order to avoid overlap with other contributions in this volume, which will give a more detailed and in-depth account of the applicable safeguards under EU administrative criminal law or some specific sectors,[348] we will confine ourselves to some general reflections in this Part. To recall, our prime objective is to get a better *overall* understanding of the protection offered, *de lege lata*, under EU administrative criminal law and to point out some problems.

B. A Fairly Limited Legal Framework

Considering the potential far-reaching impact of the sanctions provided for under EU punitive administrative law, it is somewhat surprising to see how few substantive and procedural safeguards are spelt out by the applicable EU Regulations in the three selected areas.

As regards *substantive safeguards*, the legal provisions remain strikingly minimal or are, at best, implicit. Apart from the principle of proportionality, which applies in

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344 ECtHR (Grand Chamber), *Jussila v. Finland*, 23 November 2006, paras. 41–42.

345 ECtHR (Grand Chamber), *Jussila v. Finland*, 23 November 2006, para. 43.

346 ECtHR (Grand Chamber), *Jalloh v. Germany*, 11 July 2006, para. 97 (in which the Court balances the right to remain silent against 'the public interest in the investigation and punishment of a particular offence').

347 A. Bailleux, 'The Fiftieth Shade of Grey. Competition Law, "Criministrative Law" and "Fairly Fair Trials"', in: F. Galli and A. Weyembergh (eds.), *Do labels still matter? Blurring boundaries between administrative and criminal law, The Influence of the EU*, Brussels, Editions de l'Université de Bruxelles, 2014, at 147.

348 In particular, we respectfully defer to the contributions made by Silvia Allegrezza (safeguards in EU banking law), Christopher Harding (safeguards in EU competition law), Mehmet Arslan (safeguards for criminal and administrative criminal sanctions), Lorena Bachmaier Winter (safeguards for non-criminal sanctions), Paulo Pinto de Albuquerque (applicability human rights to legal persons), and Michiel Luchtman (*ne bis in idem* principle), at the conference on Section III of the XXth AIDP International Congress of Penal Law in Freiburg (18-20 June 2018).

all three areas, particularly with regard to the sanctions (*supra*, Part II), very little is said about substantive safeguards in the respective regulations.

When it comes to *procedural safeguards*, the applicable EU regulations contain some specific provisions, but there are important differences between the three areas. On the one hand, Regulation No 1/2003 and the Regulations in the field of EU banking law contain a number of procedural safeguards, such as the burden of proof (which is closely linked with the presumption of innocence),[349] and the rights of defence,[350] including the right to be heard[351] and the right to access to the file.[352] One may note that the safeguards under EU banking law largely mirror the ones affirmed by Regulation No 1/2003, even if the former provisions tend to be more elaborated. By contrast, as to the right to an effective remedy, it is noteworthy that the SSM Regulation, unlike Regulation No 1/2003, does not grant a full review (on facts and on law) to the CJEU;[353] indeed, the CJEU's review is limited to the legality of the decisions of the ECB.[354] It is questionable whether such review meets the ECtHR requirements.

On the other hand, the MAR remains remarkably silent on the applicable procedural safeguards in the area of market abuse. Despite the fact that the latter Regulation contains quite precise minimum rules on the investigatory and sanctioning powers of NCAs, some of which are quite intrusive and have far-reaching effects on the persons concerned, it essentially defers to national law when it comes to procedural safeguards. Recital 66 of the Preamble of the MAR is most telling in this respect:

> While this Regulation specifies a minimum set of powers competent authorities should have, *those powers are to be exercised within a complete system of national law which guarantees the respect for fundamental rights*, including the right to privacy. For the exercise of those powers, which may amount to serious interferences with the right to respect for private and family life, home and communications, *Member States should have in place adequate and effective safeguards against any abuse*, for instance, where appropriate a requirement to obtain prior authorisation from the judicial authorities of a Member State concerned. Member States should allow the possibility for competent authorities to

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[349] Article 2 of Regulation No 1/2003.

[350] Somewhat surprisingly, Article 22 of the SSM Regulation is entitled '*due process* for adopting supervisory decisions', *i.e.* the American equivalent of the European right to a fair trial.

[351] Article 27(1) of Regulation No 1/2003; Article 22(1) of the SSM Regulation; Article 31 of the SRM Framework Regulation; Article 40(1) of the SRM Regulation.

[352] Article 27(2) of Regulation No 1/2003; Article 22(2) of the SSM Regulation; Article 40(2) of the SRM Regulation; Article 32 of the SRM Framework Regulation.

[353] Article 31 of Regulation No 1/2003 (confirming the Court of Justice's 'unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment'); Recital 63 of the Preamble of the SSM Regulation; Recital 121 of the Preamble of the SRM Regulation.

[354] Recital 60 of the Preamble of the SSM Regulation (*cf.* Article 13(2) of the SSM Regulation, on the review of the legality of on-site inspections).

> exercise such intrusive powers to the extent necessary for the proper investigation of serious cases where there are no equivalent means for effectively achieving the same result.[355]

This gap in the EU legal framework on market abuse is to be regretted and has been criticized by other authors.[356] As a result, EU law only harmonizes the powers of NCAs in order to ensure effective enforcement, but leaves it up to Member States to define the applicable safeguards and to ensure that those powers do not lead to a violation of fundamental safeguards. Of course, national law cannot go below the threshold of the ECHR (and the EU Charter),[357] but this instrument only contains general minimum requirements.

C. Role of the Courts and Need for Legislative Clarification

The above lack of detailed provisions on the applicable safeguards has *two major implications*. It means, one the one hand, that to the extent safeguards are not or hardly specified, one has to rely on existing principles and fundamental safeguards laid down in the EU Charter and the ECHR. On the other hand, a substantial role is given to the Courts to define the applicable safeguards and their precise scope.

Obviously, there is nothing exceptional about falling back on principles and fundamental safeguards. Nevertheless, the peculiarity about EU administrative criminal law is that, apart from the general principles of EU law and the principles of good administration,[358] it is not entirely clear which principles and rights apply: the ones applicable to administrative proceedings or the ones guaranteed for criminal proceedings? While some may argue that there is hardly any difference between an administrative fair trial and a criminal fair trial,[359] we beg to differ. Even if similar terms are used (right to a fair trial, right to an effective remedy, rights of defence, right to be tried by an independent and impartial tribunal, right to be tried within a reasonable time, etc.), those terms do not necessarily cover exactly the same rights. Furthermore, other safeguards, such as the presumption of innocence, the privilege

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355 Emphasis added.

356 See M. Luchtman and J. Vervaele, 'Enforcing the Market Abuse Regime: Towards an Integrated Model of Criminal and Administrative Law Enforcement in the European Union?', 5 *NJECL* 193 (2014), at 217.

357 To the extent, of course, that one can argue that the situation is governed by EU law. While the powers of NCAs are clearly governed by EU law, it is less certain that the safeguards are too, especially considering the lack of provisions in that respect at EU level. See Case C-617/10, *Åklagaren v. Åkerberg Fransson*, 26 February 2013, ECLI:EU:C:2013:105, para. 19.

358 See *e.g.* H.C.H. Hofmann, G.C. Rowe, and A.H. Türk, *Administrative Law and Policy of the European Union*, Oxford, Oxford University Press, 2011, at 143–221.

359 See *e.g.* F. Castillo de la Torre and E.G. Fournier, *Evidence, Proof and Judicial Review in EU Competition Law*, Cheltenham, Edward Elgar, 2017, at 294–295, paras. 6.059 and 6.061.

against self-incrimination, and the *ne bis in idem* principle, apply only to criminal proceedings.

The choice of the EU legislator to leave it up to the Courts to further define and ensure the protection of substantive and procedural safeguards inevitably creates a high degree of uncertainty. As already explained with respect to the ECtHR case law applying the *Engel* criteria and the procedural implications of the criminal nature of a charge or sanction (*supra*, Part III, A.1.), it remains quite unpredictable which safeguards an applicant is entitled to and to what extent. The same holds true for the case law of the CJEU on EU punitive administrative law, which some describe as 'erratic'.[360]

In this respect, one can refer to some examples in EU competition law, where the EU Courts have developed extensive case law on the applicable substantive and procedural safeguards—the fruit of many years of tough litigation by (usually wealthy) corporate defendants that push for the application of criminal law safeguards, though with mixed success. The essence of what emerges from this case law is that the criminal safeguards laid down in the EU Charter and the ECtHR in principle do apply, but *not necessarily to the same extent*.

For instance, the EU Courts have confirmed the application of the *presumption of innocence*,[361] but at the same time they also accept the nearly irrebuttable presumption regarding parent liability.[362] As we have argued elsewhere, a presumption that is merely based on ownership and *de facto* almost impossible to rebut is not compatible with Article 6(2) of the ECHR, especially considering the substantial fines the parent company risks.[363]

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[360] A. Weyembergh and N. Joncheray, 'Punitive Administrative Sanctions and Procedural Safeguards. A Blurred Picture that Needs to be Addressed', 7 *NJECL* 189 (2016), at 197.

[361] Case C-199/92 P, *Hüls* v *Commission*, 8 July 1999, ECR I-4287, para. 150. Reiterated in *e.g.* Case T-110/07, *Siemens AG v. Commission*, 3 March 2011, ECLI:EU:T:2011:68, para. 45; Case T-348/08, *Aragonesas Industrias y Energía, SAU v. Commission*, 25 October 2011, ECLI:EU:T:2011:621, para. 94 (in which case the unreliability of the evidence led to the annulment of part of the fining decision). See also M.J. Melícias, '*Did They Do It?'* The Interplay between the Standard of Proof and the Presumption of Innocence in EU Cartel Investigations, 35 *World Competition* 471 (2012), 479 (noting that Article 48(1) EU Charter does not even distinguish between 'criminal charges and other types of punitive proceedings'.).

[362] For a further analysis, see V. Franssen, 'Corporate Criminal Liability and Groups of Corporations. Need for a More Economic Approach?', in: K. Ligeti and S. Tosza (eds.), White Collar Crime: A Comparative Perspective, Oxford/Portland, Hart, 2018, at 299–303 and the references mentioned there.

[363] V. Franssen, 'Corporate Criminal Liability and Groups of Corporations. Need for a More Economic Approach?', in: K. Ligeti and S. Tosza (eds.), White Collar Crime: A Comparative Perspective, Oxford/Portland, Hart, 2018, at 303.

Furthermore, the EU Courts also acknowledge the applicability of the *legality principle*[364] and the *prohibition against retroactive criminal law* enshrined in Article 7 of the ECHR,[365] but they nevertheless grant the European Commission a very wide margin of discretion when it comes to setting the cartel fines and the liberty to drastically change its fining policy as long as it respects the absolute maximum fine set forth by Regulation No 1/2003.[366] Considering the breadth of the Commission's discretion, one may express some doubts as to whether this EU case law, which 'essentially reduces' this safeguard 'to the requirement of statutory certainty',[367] is really in conformity with the ECtHR requirement of foreseeability, especially in the early years of the Commission's tougher fining practice.[368] Admittedly, by adopting Guidelines on Fines as well as a Leniency Notice, the Commission has limited the exercise of its fining discretion and made an effort to enhance transparency concerning its fining practice[369]—yet, the same cannot be said, for instance, about the fining discretion exercised by the ECB.

A final illustration of the hybrid application of criminal law standards in EU competition relates to the *privilege against self-incrimination*. Surely, the EU courts many years ago already acknowledged that this privilege must be respected under EU competition law. Nevertheless, the protection offered by this privilege, which is

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364 With respect to the legal definition of the offence, see Case T-299/08, *Elf Aquitaine SA v. Commission*, 17 May 2011, ECLI:EU:T:2011:217, para. 187. Regarding the legality of the penalty, see Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri A/S and Others v. Commission*, 28 June 2005, ECLI:EU:C:2005:408, para. 202.

365 This principle requires that 'the penalties imposed correspond with those fixed at the time when the infringement was committed'. Case T-138/07, *Schindler Holding and Others v. Commission*, 13 July 2011, ECLI:EU:T:2011:362, para. 118, and the case law references mentioned there.

366 With regard to the fact that the Commission's fining practice has become much tougher over the past two decades, the General Court ruled that 'undertakings involved in an administrative procedure in which fines may be imposed *cannot acquire a legitimate expectation that the Commission will not exceed the level of fines previously imposed* or in a method of calculating the fines'. Case T-138/07, *Schindler Holding and Others v. Commission*, 13 July 2011, ECLI:EU:T:2011:362, para. 126, with reference to Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri and Others* v *Commission*, emphasis added. This ruling was confirmed on appeal by the Court of Justice: Case C-501/11 P, *Schindler Holding and Others v. Commission*, 18 July 2013, ECLI:EU:C:2013:522, para. 75.

367 M. Frese, *Sanctions in EU Competition Law: Principles and Practices*, Oxford, Hart Publishing, 2014, at 75.

368 See *e.g.* ECtHR, *Camilleri v. Malta*, 22 January 2013, paras. 39–43. For an analysis of earlier EU case law, see V. Franssen, *European Sentencing Principles for Corporations*, doctoral dissertation, Leuven, KU Leuven, 2013, at 345–348.

369 Case C-413/08 P, *Lafarge SA v. Commission*, 17 June 2010, ECLI:EU:C:2010:346, para. 95.

strongly linked to the right to remain silent[370] and which seeks to guarantee the presumption of innocence, seems to be more restricted than in the case law of the ECtHR.[371] The EU Courts indeed limit the privilege against self-incrimination to 'leading questions'.[372] which means that 'the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which is incumbent upon the Commission to prove'.[373] The obligation for corporations to answer any other kind of factual questions and the obligation to produce documents at the request of the European Commission do not violate the privilege against self-incrimination, and by extension the corporation's rights of defence and the right to a fair trial.[374] This case law is reflected in Recital 23 of the Preamble of Regulation No 1/2003.

If the case law in the field of EU competition law raises some questions and results according to some in a 'fairly fair trial'.[375] the situation is far more uncertain and unsatisfactory in the two other areas of EU administrative criminal law. In the field of EU banking law, the CJEU case law on safeguards has yet to see the light – the appeal proceedings against the first sanctioning decisions adopted by the ECB are still pending. As far as market abuse is concerned, the future development of case law at the EU level will strongly depend on the initiative of national courts, since the administrative sanctions provided by the MAR are imposed by NCAs, not by EU institutions or authorities. What is more, due to the lack of specific safeguards under the MAR, the CJEU will inevitably adopt a case-by-case approach too, assessing the

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370 Both are implicitly enshrined in Article 6(1) of the ECHR.

371 Roughly sketched, the ECtHR has ruled that the privilege against self-incrimination is not an absolute right. It does in principle not extend to the use of in criminal proceedings of material which exists independently of the will of the suspect, such as documents or blood and urine samples. See *e.g.* ECtHR (Grand Chamber), *O'Halloran and Francis v. United Kingdom*, 29 June 2007, paras. 45–52. For a good overview of the ECtHR case law, see S. Lamberigts, 'The Privilege against Self-incrimination. A Chameleon of Criminal Procedure', 7 *NJECL* 418 (2016), at 430–434.

372 Leading questions can be defined as questions which directly ask a corporation about its involvement in a cartel or other prohibited agreement and which would force the corporation to admit that it has committed an infringement. *Cf.* A. Andreangeli, *EU Competition Enforcement and Human Rights*, Cheltenham/Northampton, Edward Elgar, 2008, at 133.

373 Case 374/87, *Orkem v. Commission*, 18 October 1989, ECLI:EU:C:1989:387, para. 35; Case T-112/98, *Mannesmannröhren-Werke AG v. Commission*, 20 February 2001, ECLI:EU:T:2001:61, para. 67. See also K. Lenaerts, 'Some Thoughts on Evidence and Procedure in European Community Competition Law', 30 *Fordham Int'l L.J.* 1463 (2007), 1489.

374 Case T-112/98, *Mannesmannröhren-Werke AG v. Commission*, 20 February 2001, ECLI:EU:T:2001:61, para. 78. See also Case C-301/04 P, *Commission v. SGL Carbon AG*, 29 June 2006, ECLI:EU:C:2006:432, paras. 44–49.

375 A. Bailleux, 'The Fiftieth Shade of Grey. Competition Law, "criministrative law" and "fairly fair trials"', in: F. Galli and A. Weyembergh (eds.), *Do labels still matter? Blurring boundaries between administrative and criminal law, The Influence of the EU*, Brussels, Editions de l'Université de Bruxelles, 2014, at 144–150.

adequacy of national safeguards in light of the EU Charter.[376] This is hardly a reassuring position for future defendants.

Therefore, in our view, there is a real need to clarify the applicable safeguards *and* their precise scope in the field of EU punitive administrative law, despite the reluctance of the European Commission to engage in a codification of EU administrative law as a whole (*supra*, Part I). This need has already been adequately voiced by others:

> Instead of leaving to the judge the responsibility to clarify on a case-by-case basis which standard to apply, it should be for the legislator to clearly take position when adopting a measure liable to be qualified as sanction. It is the legislator's responsibility to strike a balance between the flexibility offered by individual measures deprived of repressive aspects and the efficiency of punitive administrative sanctions to ensure enforcement of Union law, although the latter will imply a high standard of protection for the addressee, be it during the measure's adoption or at the stage of judicial review. It is clear that this task will be particularly arduous for the legislator if one takes into account both the multiplicity of legal bases likely to lead to the adoption of punitive administrative sanctions and the diversity of national approaches.[377]

Such legislative exercise would not only address the existing uncertainties, but would also create a *unique opportunity to reflect on the desirability of certain safeguards*. Considering that EU punitive administrative law does not belong to the 'hard core of criminal law' but is nonetheless of a criminal nature, and taking into account the need for effective enforcement and the high level of specialization of the enforcing authorities, what safeguards should be respected in order to guarantee a *fair* trial in criminal matters?

V. Concluding Remarks: Some Distinctive Features of EU Administrative Criminal Law and Future Needs

The above cross-section of three areas of EU administrative law has revealed a significant number of common features, despite some undeniable differences. The similarities are obvious with respect to the applicable sanctions (*supra*, Part II, E.)

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[376] For an overview of the existing CJEU case law dealing with the pre-2014 EU legal framework on market abuse and thus focusing on substantive law requirements, see J. Lau Hansen, 'Market Abuse Case Law – Where Do We Stand With MAR?', 2 *E.C.F.R.* 367 (2017), at 373 *et seq.*

[377] A. Weyembergh and N. Joncheray, 'Punitive Administrative Sanctions and Procedural Safeguards. A Blurred Picture that Needs to be Addressed', 7 *NJECL* 189 (2016), at 208, with reference to J.A.E. Vervaele (2014).

and their criminal nature (*supra*, Part III, E.). Furthermore, the three areas are characterised by a lacunary legal framework on substantive and, more importantly, procedural safeguards (*supra*, Part IV, B.). While these gaps in the legal framework have, to some extent, been filled and compensated by a substantial body of case law of the EU Courts in the field of EU competition law, such case law still has to develop in the other two areas.

In each of the selected sectors, the competent authorities—whether European or national—have far-reaching sanctioning powers whose consequences on the natural or legal persons concerned are not to be underestimated. These consequences are predominantly of a pecuniary nature, but this does not mean they should not be taken seriously and equipped with appropriate safeguards. While the choice of administrative tools by the EU legislator is understandable considering the constitutional constraints imposed by the EU Treaties, as well as the need for (highly) specialized authorities and a more flexible approach, it is striking to observe that the same legislator has shied away from elaborating adequate procedural safeguards to counterbalance the powers and sanctions provided for by the EU legal framework, thereby deferring this hugely important and daunting task to the judiciary.

In a period of increased scepticism about the EU's added value and of criticism on so-called 'judicial activism', we would argue that there is a window of opportunity for the EU legislator to step up and reflect seriously on adequate safeguards for punitive administrative proceedings. In recent years, the EU legislator has adopted several legal instruments clarifying common safeguards in the realm of (formal) criminal law. While this work is definitely not yet finished, the time has come to take a more comprehensive approach and to encompass the peripheral fields of administrative criminal law, which are playing an increasingly important role in the protection and enforcement of 'general interests of society'.[378] This is not to say that the same safeguards should apply across the board—in this respect, the ECtHR's *Jussila* case law might perhaps be a (largely unexploited) stepping stone—, but more clarity about the extent of the guaranteed protection against government interference is desperately needed.

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[378] On this topic, see also: V. Franssen and C. Harding (eds.), *Criminal and Quasi-criminal Enforcement Mechanisms in Europe: Origins, Concepts, Future*, Oxford/Portland, Hart, forthcoming 2020.