

European Court of Human Rights case law on administrative sanctions

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- **Article 6(1) (Right to a fair trial)** of the ECHR provides:
- *"In the determination of his civil rights and obligations or of **any criminal charge** against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law»*
- By virtue of Article 47 of the Charter of Fundamental Rights of the European Union, now formally part of the Treaty on European Union, the guarantees offered by Article 6(1) ECHR are explicitly recognised and **incorporated into EU law.**

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- Article 6(2 and 3) (**Right to a fair trial**) of the ECHR introduces a series of more specific guarantees in the field of criminal trial:
- «2. Everyone charged with a criminal offence shall be **presumed innocent** until proved guilty according to law.
- 3. Everyone charged with a criminal offence has the following minimum rights:
- (a) to be **informed promptly**, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have **adequate time and facilities** for the preparation of his defence;
- (c) **to defend himself in person or through legal assistance** of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) **to examine or have examined witnesses against him** and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an **interpreter** if he cannot understand or speak the language used in court.»

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- The notion of a “*criminal charge*” in Article 6, like the concept of “*civil rights and obligations*”, is regarded by the Court as possessing an **autonomous meaning**. This mainly with the purpose of **preventing elusion** of the ECHR obligations by the contracting states.
- Since 1971 (*Engel case*) « *The Court’s established case-law sets out three criteria, commonly known as the “Engel criteria”...to be considered in determining whether or not there was a “criminal charge”. The first criterion is the **legal classification of the offence under national law**, the second is the **very nature of the offence** and the third is the **degree of severity** of the penalty that the person concerned risks incurring. The second and third criteria are alternative and not necessarily cumulative...*» (case *Tomasovic*, 2011, § 20).

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- More in details, in practical terms, any administrative sanction, either of financial or different nature, which is **general** (i.e., in principle applicable to the generality of citizens, and not only to a specific organized group as the disciplinary sanctions imposed by professional organizations), that has a **deterrent and punitive nature** and therefore is not mainly intended to afford pecuniary reparation for damage (i.e. is not compensatory), is to be classified as criminal, for the purpose of art. 6.
- In other terms, « *the general character of the rule and the purpose of the penalty, being both deterrent and punitive, is sufficient to show that the offence in question was, in terms of Article 6 of the Convention, criminal in nature* » (Öztürk, 1984).
- **The gravity of the sanction does not play a real role:** also minor offences may be criminal in nature. Just consider that the leading case Öztürk case was in relation to a small financial fine for a driving regulation infringement and recently a 3 euros sanction was considered sufficiently serious (*Ziliberberg, 2005*).

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- For example, as made it clear in *Menarini* (2011), Italian **antitrust fines** (fully in line with the EU model) are criminal, notwithstanding the fact that they are applied by an Administrative Authority and, according the Italian (and EU) law, are administrative.
- Similarly, the **prohibition on practicing certain professions** (political or legal) for a long period of time” imposed on someone who has been found to have submitted a false declaration is to be classified as a criminal sanction, although administrative according to Polish law (*Matyjec*, 2006).

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- **Certain main implications of art. 6 ECHR:**
- the administrative proceedings should in principle already provide the guarantees codified by art. 6, and therefore an **adversarial procedure** (as opposed to an inquisitorial one), in which the **equality of arms** is guaranteed, should be afforded;
- In other terms, the administrative phase should be **semi-judicial**;
- In a 2012 case before Rome Administrative Court in which we assisted a client against a fine by the Italian Antitrust Authority for an alleged unfair commercial practice and in which we made reference to the ECHR jurisprudence as a reason of appeal, the judges recognized that *“there is a large room to reinforce the compliance of the proceedings before the Authority with the principles descending from art. 6 ECHR»*.

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- **Certain main implications of art. 6 of ECHR (2 part:**
- An element of **flexibility**: where the administrative proceedings has not satisfied art. 6 requirements, a **full jurisdiction** judicial review is to be afforded, in order to ex post **compensate** the absence of semi-judicial administrative phase: «*proceedings might still satisfy requirements of Article 6 § 1 of the Convention if the court deciding on the matter considered all applicant's submissions on their **merits, point by point**, without ever having to decline jurisdiction in replying to them or ascertaining facts...*» (Druzstevni, 2008).
- in principle, in absence of an administrative proceedings fully satisfying art. 6 requirements, the Court should be put in condition to **re-exercise** the same power exercised by the Administrative Authority, without limitations descending from the existence of a discretionary power assigned by the law to the Administrative Authority. **A final decision on the merits before a Tribunal**. In other terms, a power to *substitute its decision* for that of the administration has to be conferred to the Court, for the purpose of ex post **curing** the absence of proper guarantees in the administrative phase.

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- Reactions by ECJ jurisprudence. Recently, Case Kone and Others v Commission, C-510/11 P, 24 October 2013 (2 part):

*“24. As regards the review of legality, the Court has pointed out that the European Union judicature must carry it out on the basis of the evidence adduced by the applicant in support of the pleas in law put forward and that **it cannot use the Commission’s margin of discretion** – either as regards the choice of factors taken into account in the application of the 2002 Leniency Notice or as regards the assessment of those factors – **as a basis for dispensing with the conduct of an in-depth review of the law and of the facts.**”*

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Debate on the relevance of Menarini case:

- The Italian system that is based on a traditional continental approach to administrative proceedings and judicial review of administrative action (i.e., in which the limitation of the so called administrative merit is well recognized and applied) is really in line with ECHR and therefore all the traditional European system of administrative justice are ECHR compliant?
- In my view, **Menarini judgment cannot be generalized**, as in the specific case the appellant did not claimed the absence of sufficient guarantees during the administrative phase and the Court actually exercised a full jurisdiction in respect to the application lodged. In fact, no complex economic assessment were at stake, but just the assessment of the concrete cooperation of Menarini in the implementation of a cartel. Such simple factual assessment is not in any way discretionary according to the Italian law, and so it is totally subject to a full judicial review.
- We can't exclude an opposite outcome, in case a complex or discretionary assessment by the Italian Antitrust Authority was at stake, since Italian Administrative Courts show a clear deference in relation to this type of assessment;
- A certain reinforcement of the procedural guarantees in the administrative phase and a significant reinforcement of the traditional powers that administrative Courts may exercise in relation to discretionary administrative powers seem required.

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- Article 7(1) of the ECHR (No punishment without law) provides:
- *"No one shall be held guilty of any criminal offence on account of any act or omission **which did not constitute a criminal offence under national or international law at the time when it was committed.** Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.»*

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- Article 7(1) of the ECHR (No punishment without law)
- In few words: ***nullum crimen, nulla poena sine lege certa, stricta et previa*** (no crime, no criminal sanction, without a clear, to be narrowly construed and prior law).
- for example, recently, *Martirosyan*, 2013, §56: «Article 7 is not confined to prohibiting the retroactive application of criminal law to the disadvantage of an accused. It also embodies, more generally, the principle that **only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege)** and the principle that **criminal law must not be extensively construed to the detriment of an accused, for instance by analogy**. From these principles it follows that an offence must be clearly defined in law».

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- Article 7(1) of the ECHR (No punishment without law)
- Since 2009, art. 7 has been interpreted by the Court of Strasbourg so to, additionally, «*guarantee the retrospective application of the more lenient criminal law*» (Scoppola, 2009, § 109) : «*Article 7 § 1 of the Convention guarantees not only the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of **retrospectiveness of the more lenient criminal law**. That principle is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant.*».

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- In many national legal systems, the principle of legality as to administrative sanctions is **less demanding and protective** than in relation to criminal sanctions.
- For instance in Italy, the *nullum crimen, nulla poena sine lege certa, stricta et previa* principle is codified by the Constitution only as to formal criminal sanctions with the result that the legislator may well exclude the relevance of the principle in relation to given administrative sanctions and in any case such a principle is applicable to a limited extent to administrative sanctions (for example, no retroactive application of the more lenient sanction is provided for);
- In Italy, based on the ECHR jurisprudence, Mr. Berlusconi has recently claimed that a law enacted in 2012 and providing for the exclusion from the political life of whoever has been condemned for certain criminal offences cannot be applied to him, since the conduct for which he has been declared guilty dates back to 2006.

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