# European Court of Human Rights case law on administrative sanctions

*Dr. FRANCESCO GOISIS, Full Professor in Administrative Law, State University of Milan*

*Dr. MIRIAM ALLENA, Assistant Professor in Administrative Law, Bocconi University of Milan*

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# Art. 6 ECHR

- 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»*
- Article 47 of the Charter of Fundamental Rights of the European Union

# Art. 6 ECHR

- Article 6(parr. 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 defense;*
- *(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.»*

# An autonomous meaning

- The drafters of the ECHR probably intended to exclude administrative matters from the sphere of application of the «*fair trial*» rule

- 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**.

- *Deweer* (1980): «*the prominent place held in a democratic society by the right to a fair trial … prompts the Court to prefer a "substantive", rather than a "formal", conception of the "charge" contemplated by Article 6, par. 1 (art. 6-1). The Court is compelled to look behind the appearances and investigate the realities of the procedure in question*»

# Engel criteria: a one way autonomy

– 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).

# Examples of Administrative orders to be classified as criminal

- For example, are criminal:
- *Deweer* (1980), a compulsory closure of a shop, for violation of the legislation on prices;
- *Hamer (2007):* a demolition measure of a building unlawfully constructed;
- *Malige* (1998)*:* the deduction of points from the driving licence;
- *Vassilios Stavropoulos* (2004): the revocation of a social housing benefit, as a result of a false declaration*;*
- *Menarini* (2011): Italian antitrust fines.
- *Matyjec* (2006): the prohibition on practicing certain professions (political or legal) for a long period of time;
- *Balsytė-Lideikienė* (2008)*:* an administrative warning and the confiscation of a publication.

# No need for a punitive purpose

- The fact in itself that an administrative measure is intended (more than to punish) to pursue a specific public interest does not preclude the classification as a criminal sanction.
- For example, the measure may still be criminal, just due to its seriousness (revocation of the driving license).
- However, especially in this respect, the ECtHR jurisprudence is not always consistent: in a way, all the negative measures which are triggered by an unlawful conduct might be classified as criminal, insofar as not compensatory

# The meaning of Tribunal

- The term «*tribunal*» shall be interpreted in a substantive matter, having exclusive regard to the functional profile, i.e. to the powers *de facto* exercised by a public body, rather than to its organizational profiles

- *Olujc (2009)* § 37 «The Court reiterates that for the purposes of Article 6 § 1 of the Convention a tribunal need not to be a court of law integrated with the standard judicial machinery […] since a tribunal, within the meaning of Article 6, § 1, is characterised in the substantive sense of the term by its judicial function, that is to say, the determining of matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner (see Philis, cited above, § 50)».

# Preliminary Conclusions

The “independent” meaning of «*tribunal*» and «*criminal charge*» led the Strasbourg Court to extend the scope of application of Art. 6 ECHR well beyond the formal scope of criminal and civil law, as well as of criminal and civil procedural law

# An Adversarial Administrative Procedure?

- the administrative proceedings  should in principle already provide the guarantees codified by art. 6, and therefore be an adversarial procedure (as opposed to an inquisitorial one), in which the equality of arms is guaranteed

- ***Dubus S.A.***, 2009

- ***Grande Stevens***, 2014

# Full Jurisdiction as an *ex post* therapy for the deficiencies of a lower body

- **Sedlák**, 2016: An element of flexibility: «The Court recalls in this respect that in determining issues of fairness for the purposes of Article 6 of the Convention, the Court must consider the proceedings as a whole, including the decision of the appellate court…It is well established in the Court's case law that a defect at first instance may be remedied on appeal, so long as the appeal body has full jurisdiction. More specifically, where a complaint is made of a lack of impartiality on the part of the decision-making body, the concept of "full jurisdiction" involves that the reviewing court not only considers the complaint but has the ability to quash the impugned decision and either to take the decision itself, or to remit the case for a new decision by an impartial body».

- A power for the Court to *substitute its decision* for that of the administration (lower body) needs to be conferred to the Court, for the purpose of ex post **curing** the deficiencies of proper guarantees in the administrative phase.

# Criminal matters v. Civil ones

– ***Steininger**,* 2012: «In the present case, however, the criminal head of Article 6, § 1 applies to the proceedings at issue and in its case-law the Court followed a different approach as regards the scope of review of criminal sanctions imposed by administrative authorities»

– The jurisdiction (to be therapeutic) needs to be much more full in the criminal matters than in the civil ones.

# Full Jurisdiction should not be assessed in abstracto

- ***Biagioli***, 2016: “The Court notes that it is not its task to decide in abstracto that the administrative courts would not have examined those issues if raised or that they would have declined jurisdiction to deal with them”.

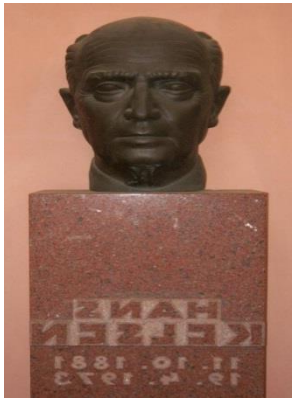
# The Menarini Case and the Meaning of Full Jurisdiction

Menarini judgment (in which a a review of legitimacy has been held to be a full jurisdiction scrutiny) cannot be generalized:

- 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, since no complex economic assessment were at stake.

# A Kelsenian approach?



*General Theory of Law and State*, Harvard, 1945, 278: «… there is nothing to prevent us from giving the public administration, insofar as it exercises a judicial function, the same organization and procedure as have the courts. Sanctions are coercive acts, and sanction inflicted upon individuals by administrative organs are certainly encroachments upon the property, freedom, and even life of the citizens. If the constitution prescribes that no interference with the property, freedom or life of the individual may take place except by "due process of law" this does not necessarily entail a monopoly of the courts on the judicial function. The administrative procedure in which a judicial function is exercised can be formed in such a way that it corresponds to the ideal of "due process of law" ».

# Or just  an evolution of the very original idea of Administrative Law?

– **Otto Mayer, *Le Droit Administratif Allemand,* 1903**, 81: «*Rendre l'administration conforme à la justice, c'est donner à l'autorité administrative le rôle du juge et non pas celui de la partie*»

## To what extent can the curative effects of full jurisdiction operate?

- *Major offences v. minor offences*
- *The presumption of innocence* (*nulla poena sine judicio*)

- *The Jussila Case (2006) and the ambiguous notion of hard core of criminal law*

- *Suhadolc (2011) stated, in relation to the Jussila case, that «the Court has also had regard to the minor sum at stake or the minor character of the offence».*

- *Not all the administrative sanctions are minor in quantitative terms.*

# Conclusive remarks

The need for:

- *a more consistent approach*
- *criminal guarantees not proving to be just illusory*