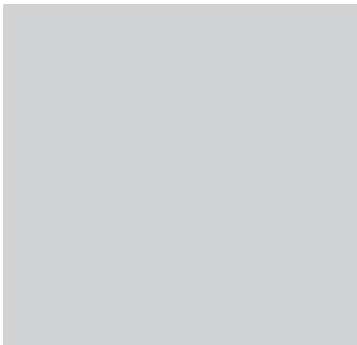


Mehmet Arslan

Procedural Guarantees for Criminal and Administrative Criminal Sanctions

A Study of the European Convention on Human Rights

BEITRÄGE ZUM SICHERHEITSRECHT



Procedural Guarantees for Criminal and Administrative Criminal Sanctions

A Study of the European Convention on Human Rights

Mehmet Arslan

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Introduction

As early as 1981, the Council of Europe expressed its concern over the growing rate of economic crime in the Member States resulting from increased economic activities within and between States. For an effective control of economic crime, the Council recommended Member States to prefer preventive and flexible strategies to customary criminal law, notably measures of administrative law consisting in regulating, inspecting, and supervising respective economic areas.¹ The Council of Europe triggered a similar shift in crime control to the administrative bodies in the course of the so-called acceleration and simplification of criminal justice in minor and mass offenses, in particular traffic offenses.²

The growing trend to use administrative sanctioning mechanisms in areas such as those mentioned above brings up the issue of whether and, if so, to what extent, this practice leads to a failure on the part of national legislatures to provide defendants with procedural safeguards under criminal law. In fact, regardless of the corresponding assessments by the national legislatures, questions on what constitutes a “criminal charge” and what procedural guarantees must be made available during proceedings and in sanctioning are, *inter alia*, subject to the European Human Rights standards, in particular the European Convention on Human Rights (ECHR) as specified by the European Court of Human Rights in Strasbourg (ECtHR).

In the following, I will first define the scope of the sanctioning regimes that must be considered criminal within the meaning of the ECHR, regardless of how they are characterized under national law. Second, I will discuss the procedural guarantees that administrative criminal sanctioning regimes also need to comply with. This includes not only fair trial requirements regarding the institutions and actors involved in investigating, prosecuting, and adjudicating criminal administrative sanctions but also the status of the defendant as well as the general procedural principles and other defense rights.

¹ Recommendation no. R (81) 12 of the Committee of Ministers to Member States on Economic Crime (Adopted by the Committee of Ministers on 25 June 1981 at the 335th meeting of the Ministers’ Deputies) [<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804cae97>].

² Recommendation no. R (87) 18 of the Committee of Ministers to Member States Concerning the Simplification of Criminal Justice (Adopted by the Committee of Ministers on 17 September 1987 at the 410th meeting of the Ministers’ Deputies) [<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804e19f8>].

I. Sanctioning regimes subject to procedural guarantees under the criminal limb of Art. 6 ECHR

According to Art. 6 (1) ECHR, *everyone* has the right to a fair trial *provided* the proceedings in question involve “the determination... of any *criminal* charge against him.”[Emphasis added] Thus, the application of the right to a fair trial requires that the proceedings of a sanctioning regime fulfill the *ratione materiae*, *personae*, and *temporis* requirements of this provision. If one requirement is not met, the sanctioning regime in question does not have to comply with Art. 6 under the criminal limb.³

A. Ratione materiae: criminal and administrative criminal sanctions within the meaning of Art. 6 ECHR

1. General concept

It should be noted that the ECtHR does not address this question in the many cases where the offense at issue comes under the so-called “core criminal law” and where there is no dispute about the applicability of the right to a fair trial in the proceedings under the criminal limb of Art. 6 ECHR. In controversial cases, including administrative sanctioning regimes in several areas of the law, the following three *Engel*-criteria provide the basis for a decision on whether to settle the dispute: the classification of the offense in question under national law, the nature of the offense, and the nature and severity of the sanction imposed or the measure taken. Although the criteria are alternative, the Court may decide by considering them cumulatively.⁴

2. Engel-criteria in the area of administrative sanctioning regimes

The Court determines the scope of what is criminal by looking at the formal and substantive requirements of the sanctioning regime in question. The formal requirement is to determine the positive law of the contracting states. The substantive requirement for purposes of the Convention may be examined by looking at the two constituents of a criminal norm, specifically the act(s) prohibited and the sanction(s) threatened.⁵

³ See for instance ECtHR *Ooo Neste St. Petersburg and others v. Russia* (dec.), no. 69042/01, 3 June 2004.

⁴ Among many others see ECtHR *Öztürk v. Germany*, no. 8544/79, § 50, 21 February 1984; ECtHR *Grande Stevens and Others v. Italy*, no. 18640/10, § 94, 4 March 2014; see also Arslan, *Die Aussagefreiheit des Beschuldigten*, p. 74; Zrvandyan, p. 20; Lorenzmeier, ZIS 1 (2008), 23; Brodowski, FS Vogel, 154; critical on the application of *Engel*-criteria by the Court Meyer, ZDAR 3 (2014), 100.

⁵ See also Bock, pp. 269 et seqq.

a) *Classification of administrative offenses by national law*

If the national law, including the jurisprudence of the domestic courts, positively determines that the offense in question is to be subsumed under criminal law, the Court is exempt from applying the two other (*Engel*) criteria.⁶

In *Messier v. France*, the Court referred to the jurisprudence of the French Conseil d'Etat stating that the procedural guarantees of Art. 6 ECHR must also be complied with in proceedings before the Financial Markets Authority (AMF) and assumed the applicability of Art. 6 (1) under the criminal limb. In the instant case, the defendant in the proceedings before the AMF was the Chairman and Chief Executive Officer of a company, who was sanctioned with a fine of EUR 1,000,000 on grounds of insider misconduct.⁷

The government cannot withdraw the assessment of the domestic courts later in Court.⁸ Alternatively, the Court can move to apply the second and third criteria in order to erase any doubts.⁹

In addition to the domestic courts, the constitution or a parliamentary law may also entail an assessment of the question whether a particular sanctioning regime is or is not criminal for purposes of domestic law. For instance, many Council of Europe Member States have sanctioning regimes not considered to fall within the national criminal law, notably in respect to some petty or minor offenses as well as offenses or irregularities committed in the area of economic and business activities.¹⁰ As these offenses are prosecuted and the sanctions are imposed by a non-judicial body, namely the administration, they are formally regarded as administrative, not criminal, sanctions for purposes of Art. 6 (1) ECHR. Even so, the Court points out that the national administrative sanctioning mechanisms are in many cases still quite close to national criminal law, even if in different ways. This is true not only for the aims of the regimes, the types of conduct they regulate, the substantive requirements for commission, and the liability of the offender, but also in terms of the structure of the proceedings and the applicable safeguards and rights of the defendant.¹¹ Moreover, a closer look at the jurisprudence of the Court reveals that what counts in terms of applicability of Art. 6 (1) ECHR are not some subdivisions of wrongdoings based on dogmatic considerations of national criminal law,

⁶ ECtHR *Vernes v. France*, no. 30183/06, § 25, 20 January 2011; by contrast ECtHR *Ooo Neste St. Petersburg and others v. Russia* (dec.), no. 69042/01, 3 June 2004.

⁷ ECtHR *Messier v. France* (dec.), no. 25041/07, 19 May 2009; compare with ECionHR *Société Sténuit v. France* (rep.), no. 11598/85, § 72 ff., 30 May 1991.

⁸ ECtHR *Messier v. France*, no. 25041/07, § 35, 30 June 2011.

⁹ ECtHR *Dubus S.A. v. France*, no. 5242/04, §§ 35–38, 11 June 2009.

¹⁰ For Austria see *Schick*, p. 576; for Germany see *Schmitz*, p. 129; for Great Britain see *Picinali*, p. 683.

¹¹ ECionHR *Société Sténuit v. France* (rep.), no. 11598/85, § 62, 30 May 1991; ECtHR *Ziliberg v. Moldova*, no. 61821/00, § 34, 1 February 2005; compare however with ECtHR *Ooo Neste St. Petersburg and others v. Russia* (dec.), no. 69042/01, 3 June 2004; see also *Zrvandyan*, p. 22.

especially with regard to the degree of their ethical blameworthiness.¹² Rather, the Court looks “behind the appearances and investigate[s] the realities of the procedure in question.”¹³

Already in 1980, in *Deweere v. Belgium*, the Court highlighted the closeness of the administrative proceedings in question to the national criminal law as follows: The same administrative offense was also regulated as a criminal act, and the competent administrative body was empowered to transfer the case to judicial authorities.¹⁴ Moreover, the Court did not overlook the fact that the competent administrative body was in fact involved in the determination of the criminal charge as it imposed the closure of the defendant’s shop for violating the price order and offered him a settlement. For the Court, the latter sanctions were “in effect a substitute for at least certain” types of penalties the defendant would have faced in a criminal trial, in particular a fine, the forfeiture, and the closure of his premises.¹⁵

These features of the national administrative sanction regime indicate that the corresponding proceedings take place in the broad context of criminal law, although national law does not consider the issue as criminal in *sensu stricto*.¹⁶ As the Court emphasizes in its established jurisprudence, the classification by national law is of limited importance. However, the contracting state may accept the criminal nature of the offense or the sanction in question for purposes of Art. 6 (1) ECHR before the Court in spite of a contrary assessment by national law.

In *Lilly France S.A. v. France*, the French government admitted that the sanctions imposed by the French Competition Commission, in the instant case a fine of 30 million francs and the publication of the decision against the applicant company in two newspapers, were criminal in nature despite the fact that domestic law does not acknowledge that.¹⁷

If national law classifies the offense as non-criminal and the contracting state objects to the application of Art. 6 (1) ECHR under the criminal limb before the Court, the Court goes on to deliberate the issue in light of the nature of the offense and the nature and severity of the sanction imposed or measure taken.

b) Nature of the administrative offense

For purposes of Art. 6 (1) ECHR, the Court attaches more importance to the criterion of the nature of the offense in question although this is closely related with

¹² ECtHR *Öztürk v. Germany*, no. 8544/79, §§ 46 et seqq., 21 February 1984; see also *Brodowski*, FS Vogel, 163; for German Criminal Law in this regard see *Brodowski*, ZStW 128 (2016), 372 et seqq.; for Austrian Criminal Law *Schick*, ZÖR 4 (2010), 576 et seqq.

¹³ ECtHR *Deweere v. Belgium*, no. 6903/75, § 43, 27 February 1980.

¹⁴ ECtHR *Deweere v. Belgium*, no. 6903/75, § 39, 27 February 1980; see also ECtHR *Borisova v. Bulgaria*, no. 56891/00, § 40, 21 December 2006; compare however with ECtHR *Ooo Neste St. Petersburg and others v. Russia* (dec.), no. 69042/01, 3 June 2004.

¹⁵ ECtHR *Deweere v. Belgium*, no. 6903/75, § 45, 27 February 1980.

¹⁶ See also ECtHR *Öztürk v. Germany*, no. 8544/79, §§ 51 et seqq.; 21 February 1984; ECionHR *Société Sténuît v. France* (rep.), no. 11598/85, § 61, 30 May 1991; ECtHR *Mikhaylova v. Russia*, no. 46998/08, § 64, 19 November 2015.

¹⁷ ECtHR *Lilly France S.A. v. France* (dec.), no. 53892/00, 3 December 2002.

the third criterion, namely the nature and severity of the sanction. With regard to the former criterion, the offense in question contains a criminal connotation if its regulation aims to protect “values and interests normally falling within the sphere... of criminal law.”¹⁸ In particular, sanctioning regimes implemented by the so-called independent administrative authorities may pursue such aims.¹⁹ In general, an administrative sanctioning regime must be considered criminal if, for instance, it seeks to

- maintain an effective competition on the market by imposing sanctions against price fixing;²⁰
- “guarantee the integrity of the financial markets and to maintain public confidence in the security of transactions”;²¹
- “monitor competition restrictive agreements and abuses of dominant position”;²²
- maintain public confidence in proper administration of stock companies and protection of shareholders.²³

However, national criminal law need not necessarily protect the corresponding values, particularly by imposing criminal sanctions. The Court accepts that administrative authorities may operate merely preventively (regulatory) or seek compensation for damage caused. This is especially the case if the measures of the administrative regime in question do not pursue punishment or deterrence (more on this criterion below).²⁴ The ECtHR recognized the criminal nature of the administrative sanctioning regimes below *inter alia* by considering their objective in general:

- Italian Competition and Market Authority (AGCM);²⁵
- Italian Companies and Exchange Commission (CONSOB);²⁶
- French Financial Markets Board (CMF);²⁷
- French Financial Market Authority (AMF);²⁸

¹⁸ ECtHR *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, § 57, 10 February 2009.

¹⁹ For an exception see ECtHR *Ooo Neste St. Petersburg and others v. Russia* (dec.), no. 69042/01, 3 June 2004.

²⁰ ECtHR *Société Sténuît v. France* (rep.), no. 11598/85, 30 May 1991 § 61; compare however with ECtHR *Ooo Neste St. Petersburg and others v. Russia* (dec.), no. 69042/01, 3 June 2004.

²¹ ECtHR *Grande Stevens and Others v. Italy*, no. 18640/10, § 96, 4 March 2014.

²² ECtHR *A. Menarini Diagnostics S.r.l. v. Italy*, no. 43509/08, § 40, 27 September 2011; see for more *Foffani*, 374.

²³ ECtHR *Messier v. France* (dec.), no. 25041/07, 19 May 2009.

²⁴ See for instance ECtHR *Ooo Neste St. Petersburg and others v. Russia* (dec.), no. 69042/01, 3 June 2004.

²⁵ ECtHR *A. Menarini Diagnostics S.r.l. v. Italy*, no. 43509/08, §§ 39 et seq., 27 September 2011.

²⁶ ECtHR *Grande Stevens and Others v. Italy*, no. 18640/10, § 96, 4 March 2014.

²⁷ ECtHR *Didier v. France* (dec.), no. 58188/00, 27 August 2002.

- French Security and Exchange Commission (COB);²⁹
- French Banking Commission.³⁰

Aside from the aims pursued by a certain sanctioning regime, the Court clearly considers the regulation of certain conduct by means of sanctions a customary feature of criminal law. Thus, regulations of criminal law are “directed towards all citizens and not towards a given group possessing a special status.”³¹ However, the application of this test with regard to administrative offenses is somewhat problematic.

First, the definition seems to exclude corporations or other legal entities, as they are not “citizens” in the strict sense. One might therefore contest the applicability of the right to a fair trial under Art. 6 (1) ECHR if the national law regulates criminal or administrative offenses and stipulates such sanctions for legal persons. As early as 1991, the Court clarified in *Société Sténuît v. France* that the notion of “criminal” within the meaning of Art. 6 (1) ECHR also includes offenses committed by legal entities.³² Therefore, the term “citizen” for purposes of Art. 6 (1) must be understood as denoting natural or legal persons.

In the recent case of *Özmurat İnşaat Elektrik Nakliyat Temizlik San. ve Tic. Ltd. Şti. v. Turkey*, the Court accepted the general nature of the norm without any reference to its addressee as follows:

As for the second criterion, the Court notes that the measure imposed on the applicant [a company] resulted from Article 19 of [...] Regulation [Concerning Mines], which applies a general obligation to a specific circumstance, that is, the imposition of fines on those *carrying out mining activities outside of their licenced areas*.³³

Second, the criterion of whether a certain sanctioning regime is directed towards a given group possessing a special status does not only lead to a reasonable exclusion of some military and disciplinary proceedings from the scope of application of

²⁸ ECtHR *X and Y v. France*, no. 48158/11, §§ 39 et seqq., 1 September 2016.

²⁹ ECtHR *Messier v. France* (dec.), no. 25041/07, 19 May 2009 (insider misconduct of the Chairman and Chief Executive Officer); ECtHR *Vernes v. France*, no. 30183/06, § 11, 30 January 2011.

³⁰ ECtHR *Dubus S.A. v. France*, no. 5242/04, 11 June 2009.

³¹ ECtHR *Igor Pascari v. The Republic of Moldova*, no. 25555/10, § 21, 30 August 2016; compare with ECtHR *Ooo Neste St. Petersburg and others v. Russia* (dec.), no. 69042/01, 3 June 2004; see also Zrvandyan, p. 20; Morsch, p. 606.

³² ECtHR *Société Sténuît v. France* (rep.), no. 11598/85, § 66, 30 May 1991; for administrative offenses committed by legal persons see ECtHR *Het Financieriele Dagblad B.V. v. The Netherlands* (dec.), no. 577/11, 28 June 2011; compare however with ECtHR *Ooo Neste St. Petersburg and others v. Russia* (dec.), no. 69042/01, 3 June 2004; see also van Kempen, 14; Brodowski, Minimum Procedural Rights, 213.

³³ ECtHR *Özmurat İnşaat Elektrik Nakliyat Temizlik San. ve Tic. Ltd. Şti. v. Turkey*, no. 48657/06, § 35, 28 November 2017. Emphasis added.

Art. 6 (1) ECHR³⁴ but also to non-transparent results in some areas of administrative regulations. For instance:

In *Inocencio v. Portugal*, the Court denied the criminal nature of the administrative offense in question, because the non-compliance with the requirement to “obtain a permit before carrying out construction work” on one’s house and the sanctioning a respective contravention by imposition of an administrative fine are not “of general application to all citizens.”³⁵

In *Ooo Neste St. Petersburg and others v. Russia*, the Court also contested a “universal” application of Russian competition law, which “applies only to relations which influence competition in commodity markets.”³⁶

These judgments demonstrate that the requirement of general application is not only quite unspecific compared with “possessing a special status” but also threatens the applicability of Art. 6 (1) ECHR in case of administrative sanctioning regimes, which, in the final analysis, regulate the activities of a limited group of persons. In fact, in subsequent case law, the Court discontinued using the restricted general application requirement with regard to administrative offenses:

In *Steininger v. Austria*, the Court on the one hand pointed out that surcharges by the Regulatory Authority Agrarmark on the defendant company “were not imposed by a general legal provision applying to taxpayers generally but to a more restricted group of persons – both physical and legal – who pursue a specific economic activity.” On the other hand the Court specified the meaning of a group of special status as follows: The regulation in question was not “aimed at singling out a specific group of the population and subjecting them to a particular regime, but rather at adapting a general obligation, that of the payment of taxes and other contributions as a result of economic activities, to specific circumstances in order to make that obligation foreseeable.”³⁷

The subsequent case law of the Court with regard to administrative offenses in the area of customs law also confirmed the general nature of a “criminal” regulation within the meaning of Art. 6 (1) if the regulation, without singling out a specific group, is only directed at persons engaged in a certain activity, namely, in the case at issue, persons “who cross the border.”³⁸

Finally, the notion of what is “criminal” under Art. 6 (1) is not only reflected in the aims of a sanctioning regime and by prohibiting certain conduct directed at all natural and legal persons but also in the substance of the very offense itself. In this regard, the Court highlighted in *Kuzmickaja v. Lithuania* that the nature of the administrative offense in question, namely defrauding a customer, “clearly had crimi-

³⁴ Among many others see for instance ECtHR *Helmut Blum v. Austria*, no. 33060/10, § 59, 5 April 2016 (disciplinary proceedings against a lawyer).

³⁵ ECtHR *Inocencio v. Portugal* (dec.), no. 43862/98, 11 January 2001.

³⁶ ECtHR *Ooo Neste St. Petersburg and others v. Russia* (dec.), no. 69042/01, 3 June 2004.

³⁷ ECtHR *Steininger v. Austria*, no. 21539/07, § 36, 17 April 2012.

³⁸ ECtHR *Nadtochiy v. Ukraine*, no. 7460/03, § 21, 15 May 2008.

nal connotations.”³⁹ At the same time, a criminal offense within the meaning of Art. 6 (1) ECHR does not require a degree of seriousness such that a conviction thereof harms the reputation of the offender.⁴⁰ The Court recognizes administrative offenses in the following regulatory areas as having the criminal connotation within the meaning of Art. 6 (1):

- traffic offenses;⁴¹
- offenses against the demonstration law;⁴²
- offenses against the public order (minor hooliganism);⁴³
- customs offenses;⁴⁴
- offenses against social security regulations;⁴⁵
- offenses against labor law restrictions with regard to foreigners.⁴⁶

c) Nature and severity of the administrative sanction

The last criterion the Court considers is the nature and severity of the measure imposed on the perpetrator of an administrative offense. With regard to the first aspect of this criterion, the Court stresses that criminal sanctions are generally understood as punitive and deterrent in nature. In other words, sanctions punish the offense because it is unlawful conduct and seek to prevent the offender from reoffending and others from offending.⁴⁷ Besides the focus on conduct and its unlawful nature, a punitive pecuniary sanction within the meaning of Art. 6 (1) ECHR

³⁹ ECtHR *Kuzmickaja v. Lithuania* (dec.), no. 27968/03, 10 June 2008; compare with the jurisprudence of ECtHR *Ooo Neste St. Petersburg and others v. Russia* (dec.), no. 69042/01, 3 June 2004, according to which “freedom of market competition is a relative, situational value and encroachments on it are *not inherently wrong in themselves*.” Emphasis added.

⁴⁰ ECtHR *Öztürk v. Germany*, no. 8544/79, § 18, 21 February 1984; ECtHR *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, § 57, 10 February 2009; Zrvandyan, p. 22; Schmitz, wistra 4 (2016), 131.

⁴¹ ECtHR *Igor Pascari v. The Republic of Moldova*, no. 25555/10, § 27, 30 August 2016; for more see appendix.

⁴² ECtHR *Mikheylova v. Russia*, no. 46998/08, § 64, 19 November 2005; for more see appendix.

⁴³ ECtHR *Fomin v. Moldova*, no. 36755/06, § 35, 11 October 2011; for more see appendix.

⁴⁴ ECtHR *Zaja v. Croatia*, no. 37462/09, § 87, 4 October 2016; for more see appendix.

⁴⁵ ECtHR *Hüseyin Turan v. Turkey*, no. 11529/02, § 18, 4 March 2008.

⁴⁶ ECtHR *Het Finnancieele Dagblad B.V. v. The Netherlands* (dec.), no. 577/11, 28 June 2011; for more see appendix.

⁴⁷ ECtHR *Balyste-Lideikiene v. Lithuania*, no. 72596/01, § 58, 4 November 2008; ECtHR *Mikheylova v. Russia*, no. 46998/08, § 64, 19 November 2015; see also Brodowski, Minimum Procedural Rights, 217.

does not intend to cover damage caused by the offender⁴⁸ or pay a duty.⁴⁹ As accepted in the criminal law systems of some contracting states, a punitive sanction is imposed on the perpetrator not due to the financial damage caused but because the unlawful act itself interfered with or endangered the interest protected under criminal law.⁵⁰

Moreover, the ECtHR maintains that there is no tension between the two aims of criminal sanctions, namely prevention and punitiveness, as long as punitiveness is considered the “distinguishing feature” and deterrence is sought by punitive punishment.⁵¹ Thus, non-punitive measures of a preventive nature do not fall under the criminal limb of Art. 6 (1) ECtHR regardless of whether the measure is imposed in connection with a crime⁵² and whether its severity meets that of a punitive and preventive measure.⁵³

Furthermore, the administrative sanction the defendant may potentially incur generally reaches the severity threshold of a criminal sanction within the meaning of Art. 6 (1) ECHR if the sanction constitutes “a serious detriment” to the offender.⁵⁴ That said, however, the Court attaches importance to the fact that a lack of severity of the administrative sanction is not decisive if the nature of the offense in question is inherently criminal within the meaning of the above-described jurisprudence.⁵⁵ This indicates that the nature and severity of the sanction in question are, as a criterion, of secondary importance.

Against the background that personal liberty is of great importance in a democratic society governed by rule of law, the presumption exists that any offense-related loss of liberty constitutes, by its nature, a criminal sanction within the meaning of Art. 6 (1) ECHR. However, the Court is ready to “exceptionally” accept that the sanction of deprivation of liberty is not “appreciably detrimental” and thus

⁴⁸ ECtHR *Igor Pascari v. The Republic of Moldova*, no. 25555/10, § 21, 30 August 2016; *Zrvandyan*, p. 20.

⁴⁹ ECtHR *Zaja v. Croatia*, no. 37462/09, § 87, 4 October 2016 (importing a car without paying relevant taxes).

⁵⁰ ECtHR *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, § 57, 10 February 2009; see also *Brodowski*, FS Vogel, p. 156.

⁵¹ ECtHR *Kadubec v. Slovakia*, no. 5/1998/908/1120, § 56, 2 September 1998; see also *Bock*, p. 271.

⁵² See for instance ECtHR *Berland v. France*, no. 42875/10, 3 September 2015 (no application of Art. 7 ECHR).

⁵³ ECtHR *Mikheylova v. Russia*, no. 46998/08, § 64, 19 November 2015.

⁵⁴ ECtHR *Nadtochiy v. Ukraine*, no. 7460/03, § 21, 15 May 2008; ECtHR *A. Menarini Diagnostics S.r.l. v. Italy*, no. 43509/08, §§ 40–41, 27 September 2011; see also *Brodowski*, FS Vogel, p. 158.

⁵⁵ ECtHR *Ziliberberg v. Moldova*, no. 61821/00, § 34, 1 February 2005.

non-criminal given its nature, duration, or manner of execution.⁵⁶ The criminal nature of administrative offenses for which the defendant may face detention of up to five days is not in doubt.⁵⁷ Nor is it in doubt in case of a fine that can be converted to deprivation of liberty.⁵⁸ However, it would be premature to conclude that deprivation of liberty and convertible fines are the main sanction categories of Art. 6 (1) ECHR.

As said, the criminal nature of a measure is neither determined by the severity of a measure itself nor does the nature of the measure per se include or lack a serious detriment that the criminal sanction within the meaning of Art. 6 (1) ECHR should exhibit.⁵⁹ This is particularly evident in case of a temporary withdrawal of a driving licence: It is not possible to determine its nature in general.

In *Nilsson v. Sweden*, the Court found that the suspension of a driving licence for 18 months will always be criminal for purposes of Art. 6 (1) ECHR as it is “in itself so significant, regardless of the context of... criminal conviction” of the defendant. Moreover, the Court referred to the fact that, aside from the severity, the suspension of the driving licence was a criminal sanction because the national law stipulated its imposition in the instant case based on the criminal conviction of the defendant due to aggravated drunk driving and unlawful driving.⁶⁰

By contrast, in *Becker v. Austria* the Court concluded that the withdrawal of the driving licence for four months was not criminal, because the person in question refused to take a breathalyser test and thereby demonstrated a certain dangerous attitude. Therefore, given the circumstances of the case, the withdrawal was not a measure of “primarily a punitive character but rather constituted a preventive measure for the safety of road users.”⁶¹

The fact that some administrative sanctions or measures cannot be categorically regarded as preventive or repressive also applies to some cases involving offenses or irregularities related to corporations.

In the above-mentioned case of *Ooo Neste St. Petersburg and others v. Russia* the Court not only contested the repressive nature of the Russian competition law but also highlighted that the potential measures imposed on the applicant companies were not of a criminal nature. They were “a simple warning to stop monopolistic activity... compulsory division of the company [and] the confiscation of unlawfully gained profit.” Especially the confiscation order, so the Court, was clearly aimed at the compensation for damage rather than the punishment of the companies.⁶²

⁵⁶ ECtHR *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, § 57, 10 February 2009; see also ECtHR *Mikhaylova v. Russia*, no. 46998/08, §§ 66 et seqq., 19 November 2015.

⁵⁷ ECtHR *Menesheva v. Russia*, no. 59261/00, § 97, 9 March 2006; see also ECtHR *Karelin v. Russia*, no. 926/08, § 42, 20 September 2016 (up to fifteen days’ detention).

⁵⁸ ECtHR *Karelin v. Russia*, no. 926/08, § 59, 20 September 2016.

⁵⁹ See also *Bock*, p. 271.

⁶⁰ ECtHR *Nilsson v. Sweden* (dec.), no. 73661/01, 13 December 2005; see also ECtHR *Malige v. France*, no. 27812/95, §§ 37 ff., 23 September 1998.

⁶¹ ECtHR *Becker v. Austria*, no. 19844/08, § 34, 11 June 2015.

⁶² ECtHR *Ooo Neste St. Petersburg and others v. Russia* (dec.), no. 69042/01, 3 June 2004.

In its subsequent case law, the ECtHR seems to have abandoned its sanctions-oriented approach in favor of an approach focused on the severity of the sanction. With regard to administrative offenses committed by corporations or their representatives, the Court is ready to accept a broad spectrum of sanctions as criminal within the meaning of Art. 6 (1). This is not only true for fines, which in case of a corporation cannot be converted into deprivation of liberty, but also for other, in a broad sense economically detrimental, sanctions.

In the above-mentioned case of *Lilly France S.A. v. France*, the French government recognized that the sanctions imposed by the French Competition Commission, in the instant case a fine of 30 million francs and the publication of the decision against the applicant company in two newspapers, were criminal in nature. Both the considerable amount of the fine the Commission imposed in the instant case and the maximum sanction provided for as well as the intent behind it, namely to penalise a competition irregularity (the abuse of the dominant market position), implied not only the punitive character of the sanctions but also their preventive nature as they aim to prevent reoffending.⁶³

In *Steininger v. Austria*, the regulatory authority, Agrarmarkt Austria, not only compelled the defendant company to pay outstanding charges in the amount of EUR 11,730 but added a surcharge of 60 percent of the unpaid charges. Given the fact that the authority could have imposed amounts up to double the amount of unpaid charges, the criminal nature of the sanction was clear to the Court, as the surcharge was not imposed merely to compensate for the additional work necessary for recalculating the original charges, but exceeded this.⁶⁴

In *A. Menarini Diagnostics S.r.l. v. Italy*, the Court pointed out that the amount of EUR 6,000,000 imposed on the applicant company by the Italian Competition and Mark Authority could only be punitive, as the authority aimed to sanction an irregularity (anti-competitive practices), and preventive, as the second objective was to dissuade others from committing the same offense. Under these circumstances, the fact that the fine could not be converted into deprivation of liberty is immaterial.⁶⁵

In *Dubus S.A. v. France*, the Court regarded the “warning” issued against the defendant company by the French Banking Commission as criminal, despite the fact that the French law described it as a disciplinary administrative sanction. Without considering the nature of irregularities the company had committed, the Court emphasized the power of the Commission to impose, in addition or instead of a warning, a fine up to a maximum amount equal to the sanctioned company’s minimum capital. Thus, “disciplinary” sanctions of the Commission entailed not only “significant financial” detrimental effects but the “blame” incurred by issuing the sanction against the company was likely to undermine its creditworthiness and had undeniable consequences for its assets.⁶⁶

Finally, in *Grande Stevens and others v. Italy*, the ECtHR clearly recognized the severity of sanctions related to corporate activity as criminal sanctions within the meaning of Art. 6 (1) ECHR. In this case, the Italian Companies and Exchange

⁶³ ECtHR *Lilly France S.A. v. France* (dec.), no. 53892/00, 3 December 2002.

⁶⁴ ECtHR *Steininger v. Austria*, no. 21539/07, §§ 36–37, 17 April 2012.

⁶⁵ ECtHR *A. Menarini Diagnostics S.r.l. v. Italy*, no. 43509/08, §§ 40–41, 27 September 2011.

⁶⁶ ECtHR *Dubus S.A. v. France*, no. 5242/04, § 37, 11 June 2009.

Commission (CONSOB) imposed on the two companies and their joint chairperson, the representative of one company, and a lawyer, on grounds of insider trading:

- fines ranging from EUR 500,000 to EUR 3,000,000;
- prohibition from administering, managing, or supervising the companies for periods ranging from two to four months.

The prohibition to conduct certain business activities had a particularly serious detrimental effect on the natural persons in that it caused harm to their integrity and reputation. Moreover, the severity was reflected in the amount of the fines and caused the defendants significant financial harm. Given their severity, the nature of the sanctions was criminal within the meaning of Art. 6 (1).⁶⁷

In view of the Court's case law partly described above, the following sanctions are criminal within the meaning of Art. 6 (1):

- suspension of driving licence;⁶⁸
- inconvertible fine;⁶⁹
- inconvertible fine and publication of judgment;⁷⁰
- warning;⁷¹
- warning and fine;⁷²
- permanent prohibition from engaging in certain economic activities;⁷³
- suspension of trading licence for six months;⁷⁴
- confiscation;⁷⁵
- warning and confiscation;⁷⁶
- demolition of a house for illegal construction.⁷⁷

⁶⁷ ECtHR *Grande Stevens and Others v. Italy*, no. 18640/10, §§ 98–99, 4 March 2014.

⁶⁸ ECtHR *Igor Pascari v. The Republic of Moldova*, no. 25555/10, § 27, 30 August 2016 (for between six and twelve months).

⁶⁹ ECtHR *Zilibierberg v. Moldova*, no. 61821/00, § 34, 1 February 2005.

⁷⁰ ECtHR *Lilly France S.A. v. France* (dec.), no. 53892/00, 3 December 2002.

⁷¹ ECtHR *Dubus S.A. v. France*, no. 5242/04, §§ 35–38, 11 June 2009; compare with ECtHR *Ooo Neste St. Petersburg and others v. Russia* (dec.), no. 69042/01, 3 June 2004.

⁷² ECtHR *X and Y v. France*, no. 48158/11, § 22, 1 September 2016.

⁷³ ECtHR *Vernes v. France*, no. 30183/06, § 42, 20 January 2011.

⁷⁴ ECtHR *Didier v. France* (dec.), no. 58188/00, 27 August 2002.

⁷⁵ ECtHR *Nadtochiy v. Ukraine*, no. 7460/03, § 21, 15 May 2008.

⁷⁶ ECtHR *Balyste-Lideikiene v. Lithuania*, no. 72596/01, §§ 57 et seqq., 4 November 2008; compare with ECtHR *Ooo Neste St. Petersburg and others v. Russia* (dec.), no. 69042/01, 3 June 2004.

⁷⁷ ECtHR *Depalle v. France* (dec.), no. 34044/02, 29 April 2008; ECtHR *Brosset-Triboulet and other v. France* (dec.), no. 34078/02, 9 April 2008.

B. *Ratione personae*

If the Court is to decide on a criminal charge in line with the above-described jurisprudence, of all the participants in the proceedings in question, the accused is the only person entitled to the right of a fair trial as a matter of principle.⁷⁸ As indicated above, natural or legal persons may be accused of a criminal charge within the meaning of Art. 6 (1) ECHR.⁷⁹ Other persons, notably witnesses or victims, may not invoke a violation of Art. 6 (1) ECHR.⁸⁰ However, the decision by national authorities on whether a person should be considered an accused or a witness is not binding on the Court. The Court is autonomous in determining the status of the person concerned for purposes of Art. 6 (1).⁸¹

C. *Ratione temporis*

According to Art. 6 (1) ECHR, the defendant in criminal proceedings is entitled to enjoy the right to a fair trial as soon as he or she is “charged.” Typically, a person is charged if he or she is officially notified about being charged with the commission of a criminal offense. If such notification fails to materialize, a state authority’s charge can be seen implicitly in other measures that significantly affect the legal position of the person concerned.⁸² Especially the latter alternative makes it necessary to specifically address the *ratione temporis* question by considering the scope of the specific rights under Art. 6 ECHR in terms of whether or to what extent the measure at issue affected the position of the person in question. A discussion of this issue in conjunction with individual rights will follow below.

In general, however, the jurisprudence of the Court has long held that “being charged” also covers pre-trial proceedings, in particular preliminary investigations by the police or other criminal prosecution bodies. In this regard, the Court emphasized the importance of the investigation stage for the preparation of the court trial, “as the evidence obtained during this stage determines the framework in which the offense charged will be considered at the trial.”⁸³ At the same time, the Court pointed out that the guarantees of the right to a fair trial under Art. 6 (1) ECHR should not necessarily be the same in the investigation stage as in the criminal proceedings before the trial court. Rather, they unfold their protection subject to the

⁷⁸ For more see *Trechsel*, p. 36 et seqq.

⁷⁹ For instance ECtHR *Özmutur İnşaat Elektrik Nakliyat Temizlik San. ve Tic. Ltd. Şti. v. Turkey*, no. 48657/06, § 35, 28 November 2017; see also *Arslan*, Die Aussagefreiheit des Beschuldigten, p. 72.

⁸⁰ ECtHR *Serves v. France*, no. 82/1996/671/893, §§ 40 ff., 20 October 1997.

⁸¹ *Ibid.*

⁸² ECtHR *Malkov v. Estonia*, no. 31407/07, § 56, 4 February 2010; see also *Arslan*, Die Aussagefreiheit des Beschuldigten, pp. 79.

⁸³ ECtHR *Saldüz v. Turkey*, no. 36391/02, § 54, 27 October 2008.

particularities of each specific measure of the preliminary investigation and the circumstances of the case.⁸⁴

Having said that, the application of Art. 6 (1) ECHR is not limited to the pre-trial investigations by the police and criminal prosecution authorities. In fact, Art. 6 (1) ECHR is silent about the institutional affinity of the investigating or prosecuting authorities to the executive or the judiciary.⁸⁵

As early as in the 1980 case of *Deweere v. Belgium*, the Court accepted that non-criminal/judicial administrative bodies may also be involved in inspection activities that have a dual purpose. In the instant case, the inspecting body, on the one hand, was acting outside “the context of the repression of crime.” The Court highlighted that under the circumstances of the case, the inspection carried out at the applicant’s shop was “part of the continuing process of controlling observance of the statutes and regulations on the country’s economic life.”⁸⁶ On the other hand, the subsequent proceedings conducted by the same administrative body based on the evidence gathered in the course of a non-repressive inspection may become “the determination of a criminal charge” within the meaning of Art. 6 (1) if the wrongdoing in question and the imposed sanction are of a criminal nature. In *Deweere v. Belgium* the Court affirmed that it was not convinced by the government’s argument that the imposed measure, namely the closure of the business, was merely “a control and safety measure.”⁸⁷ Moreover, the Court pointed out that the competent administrative body in the case was involved in the determination of the criminal charge and “the offer of settlement” was “in effect a substitute for at least certain” types of penalties the defendant would have faced in a criminal trial, specifically fine, forfeiture, and closure of the premises.⁸⁸

Finally, the subsequent case law of the ECtHR shows that various measures by administrative bodies can trigger the application of Art. 6 (1) ECHR, such as a so-called test purchase⁸⁹ in investigations of minor administrative offenses or a search and seizure at corporate facilities by regulatory and supervisory administrative bodies.⁹⁰

⁸⁴ ECtHR *John Murray v. The United Kingdom*, no. 18731/91, § 62, 8 February 1996.

⁸⁵ ECionHR *Société Sténuît v. France* (rep.), no. 11598/85, § 58, 30 May 1991.

⁸⁶ ECtHR *Deweere v. Belgium*, no. 6903/75, § 43, 27 February 1980.

⁸⁷ ECtHR *Deweere v. Belgium*, no. 6903/75, § 39, 27 February 1980.

⁸⁸ ECtHR *Deweere v. Belgium*, no. 6903/75, § 45, 27 February 1980; see also ECtHR *Saunders v. The United Kingdom*, no. 19187/91, § 67, 17 December 1996; ECionHR *Société Sténuît v. France* (rep.), no. 11598/85, § 65, 30 May 1991; for the settlements by the German Anti-Trust Authority see *Schmitz*, wistra 4 (2016), 132.

⁸⁹ ECtHR *Kuzmickaja v. Lithuania* (dec.), no. 27968/03, 10 June 2008 (defrauding a customer).

⁹⁰ See for these investigation powers of the French Competition, Consumer Affairs, and Fraud Prevention Office, ECtHR *Vinci Construction and GMT génie civil et services v. France*, no. 63629/10 and 60567/10, §§ 45 et seqq., 2 April 2015; ECtHR *Société Metal-lurgique Liotard Freres v. France*, no. 29598/08, §§ 19 et seqq., 5 May 2011; ECtHR *Société Canal Plus et Autres v. France*, no. 29408/08, 21 December 2010; for the investigation powers of the German Anti-Trust Authority see *Schmitz*, wistra 4 (2016), 132; for supervisory authorities in Germany in general *Böse*, ZStW 119 (2007), 849 ff.; for Switzerland *Gleß*, pp. 724 ff.

II. Procedural Guarantees

A. Institutions and actors

There are several differences between the administrative criminal sanctioning regimes and the customary structure of criminal proceedings. This is particularly so in terms of the actors and institutions involved in the following stages of sanctioning regimes: investigation, prosecution, decision-making process, and review. Whether and to what extent these structural deviations influence the right of the defendant to a fair trial will be discussed below. It should be noted in advance that the wording of Art. 6 (1) ECHR provides only few requirements regarding the structure of criminal proceedings, namely that “an independent and impartial tribunal established by law” must determine the criminal charge against the defendant. Thus, the contracting states seem to have some leeway to structure an administrative criminal sanctioning regime and to grant the defendant the right of access to a tribunal within the meaning of Art. 6 (1). States’ practice in fact indicates that they use various models in this regard. In the following, I will focus on the models that found their way into the Court’s case law.

1. Investigation, prosecution, and sanctioning of criminal offenses by the administrative authority

a) General concept

The Court’s case law shows that there are cases where the contracting states charge an administrative authority with the prosecution and sanctioning of certain offenses, because they consider these offenses “too trivial” to be governed by ordinary substantive and procedural criminal law.⁹¹

As early as in the 1984 case of *Öztürk v. Germany* the Court clarified that the national legislature may refer the prosecution and punishment of such minor administrative offenses to an administrative body as long as the defendant’s right to have the criminal charge against him determined by an impartial and independent tribunal within the meaning of Art. 6 (1) ECHR remains untouched. It also accepted that this right is guaranteed if the defendant is entitled to appeal the criminal sanction determined by the administration to a tribunal.⁹²

This jurisprudence illustrates that minor administrative criminal offenses do not necessarily require an impartial and independent tribunal to determine first-hand the criminal charge against the defendant. This begs the question of the Court’s notion of a tribunal and its difference from other public authorities.

⁹¹ ECtHR *Mikhaylova v. Russia*, no. 46998/08, § 64, 19 November 2015.

⁹² ECtHR *Öztürk v. Germany*, no. 8544/79, 21 February 1984.

b) Tribunal within the meaning of Article 6 (1) ECHR

According to the Court's jurisprudence, the term must be interpreted in a "substantive" way, in other words, regardless of how the sanctioning body of the national law characterizes it. "Tribunal" within the meaning of Art. 6 (1) ECHR must meet certain requirements, especially "independence, in particular of the executive, impartiality... [and] guarantees afforded by [the tribunal's] procedure" as specified by Art. 6 (1) itself. Moreover, the tribunal is a public body, which has a "*judicial function* that is to say [it determines] matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner."⁹³

With regard to the independence of a public entity with a judicial function, the Court particularly examines "the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence."⁹⁴

aa) Mere administrative or governmental bodies

Based on these criteria, the scope of Art. 6 (1) ECHR obviously excludes administrative bodies variously involved in public affairs and government organs.⁹⁵

In *Schmautzer v. Austria*, the Court established that neither the Austrian federal police nor the regional government could be considered a "judicial body."⁹⁶

In *Kadubec v. Slovakia*, the Court denied the independence of the local and district sanctioning and reviewing office, *inter alia*, because they were "carrying out local State administration under the control of the government."⁹⁷

In *Steininger v. Austria*, the Court pointed out again that neither Agrarmarkt Austria, which had imposed the surcharges on the applicant company, nor the Federal Minister of Agriculture, Forestry, Environment, and Water as appeal authority meets the requirements of a tribunal within the meaning of Art. 6 (1). "While the former is a public law body in which some administrative powers are vested, the latter is an administrative and government authority."⁹⁸

In cases like those described above, a violation of Art. 6 (1) can be avoided if the defendant in administrative criminal sanctioning proceedings is given the chance to submit the administrative decision subsequently to a judicial body with "sufficient"

⁹³ ECtHR *Steininger v. Austria*, no. 21539/07, § 45, 17 April 2012. Emphasis added.

⁹⁴ ECtHR *Kadubec v. Slovakia*, no. 5/1998/908/1120, § 56, 2 September 1998; see also *Zrvandyan*, p. 31.

⁹⁵ For more see *Zrvandyan*, pp. 28 et seqq.

⁹⁶ ECtHR *Schmautzer v. Austria*, no. 155523/89, § 34, 23 October 1995.

⁹⁷ ECtHR *Kadubec v. Slovakia*, no. 5/1998/908/1120, § 57, 2 September 1998; see also ECtHR *Lauko v. Slovakia*, no. 4/1998/907/1119, 2 September 1998.

⁹⁸ ECtHR *Steininger v. Austria*, no. 21539/07, § 47, 17 April 2012; see also *Zrvandyan*, p. 39.

jurisdiction and one that provides the guarantees of Art. 6 (1).⁹⁹ In fact, if the national law does not provide, directly or indirectly, a tribunal within the meaning of Art. 6 (1) ECHR, the question of the right to a public and oral hearing will not arise as such hearing can be only meaningful if the decision or reviewing authority meets the requirements of a tribunal.¹⁰⁰ Therefore, the guarantee of a tribunal within the meaning of Art. 6 (1) is the precondition for fair sanctioning proceedings.

bb) Subsequent judicial review

It must be noted that the weight of any subsequent judicial proceeding in such cases is relative, because the administrative body prepares the charge against the defendant and predetermines the evidence to be presented to the judicial body. In fact, the Court accepts that “the prosecution and punishment of *minor offenses* [is] primarily a matter for the administrative authorities.”¹⁰¹ However, a close look at the Court’s jurisprudence reveals that the term “minor offenses,” which is the very basis of this important restriction with regard to the “determination... of any criminal charge” against a defendant by a fair trial within the meaning of Art. 6 (1) ECHR is not consistently used. The following cases may serve as an illustration.

In *Steininger v. Austria*, the regulatory authority Agrarmarkt Austria ordered the defendant company to pay a surcharge of about EUR 7,000. The Court found a violation of Art. 6 (1) because the law itself restricted the jurisdiction of the Austrian Administrative Court and the Constitutional Court and did not provide the power for “sufficient review.”¹⁰² However, the Court’s conclusion that the accusation against the defendant company, namely the failure to pay the agriculture charges and the fine, indicated a minor offense may be questionable. The same is true for the charge and the fine in *A. Menarini Diagnostics S.r.l. v. Italy*. The Italian Competition and Mark Authority (AGCM) imposed a fine of EUR 6,000,000 on the applicant company for anti-competitive practices.¹⁰³ Despite these high fines, the Court seems to accept that the administrative sanctioning authority may assume the decisive role in prosecuting and sanctioning. In addition, the Court has no principal objections to the fact that subsequent judicial reviews by administrative courts acting as a tribunal within the meaning of Art. 6 (1) ECHR are also limited because the nature of administrative court proceedings differ “in many respects from the

⁹⁹ ECtHR *Steininger v. Austria*, no. 21539/07, § 49, 17 April 2012.

¹⁰⁰ ECtHR *Schmautzer v. Austria*, no. 155523/89, §§ 38–39, 23 October 1995; ECtHR *Steininger v. Austria*, no. 21539/07, § 63, 17 April 2012.

¹⁰¹ ECtHR *Steininger v. Austria*, no. 21539/07, § 45, 17 April 2012, emphasis added; see also Zrvandyan, p. 28; Meyer, ZDAR 3 (2014), 99; critical on punishment by the administration in German law Brodowski, ZStW 128 (2016), 374.

¹⁰² ECtHR *Steininger v. Austria*, no. 21539/07, §§ 36–37, 17 April 2012.

¹⁰³ ECtHR *A. Menarini Diagnostics S.r.l. v. Italy*, no. 43509/08, §§ 40–41, 27 September 2011; for exorbitant fines in the German Anti-Trust Law Schmitz, wistra 4 (2016), 129.

nature of a criminal procedure in the strict sense of the term” and the manner and scope of their review are therefore not comprehensive.¹⁰⁴ The Court held that the subsequent review by the administrative courts in the instant case was sufficient because

- they sufficiently examined the factual and legal aspects of various allegations raised against the applicant company;
- as part of the examination it was verified that AGCM as the prosecuting and sanctioning body had made appropriate use of its powers;
- in the course of the verification, they examined the merits and proportionality of the AGCM's decisions; and finally
- the courts had full jurisdiction to verify the adequacy of the fine for the offense the defendant company had committed and, where necessary, to replace the sanction.¹⁰⁵

However, the Court did not see, for the requirement of “sufficient jurisdiction,” a shortcoming in the fact that, unlike a criminal court, the national administrative courts did not have the power to render judgment on the merits of the case independently of the decision of AGCM in their own responsibility, in other words to replace the AGCM decision. It is not convincing that the Court accepted this as inherent to administrative court proceedings based on the minor nature of the offense in question and furthermore emphasized that “the jurisdiction of the administrative courts was not limited to a mere review of legality.”¹⁰⁶ Most importantly, the finding of facts before the administrative authority, which is not only the prosecuting but also the deciding/sanctioning body and, as such, not impartial, does not take place in an adversarial manner and subject to the guarantee of equality of arms and the standards of proof in criminal cases. I will return to this in more detail below.

Admittedly, the major objective of the Court in first introducing the *Engel*-criteria and then developing them in its subsequent case law was to include minor administrative offenses in the protective system of Art. 6 (1). At the time, there was no trend to establish administrative sanctioning regimes with the possibility to impose exorbitant fines or other sanctions, in particular against corporations and their managers or representatives. The autonomous interpretation of the notion of “criminal charge” and, as a result, the correct application of the *Engel*-criteria also enabled the Court to cope with this development in the Member States. However, it is obvious that these administrative sanctioning regimes for corporate economic activities are considerably different from the category of minor administrative offenses, say, traffic regulations, in terms of the nature of the offenses in question and the

¹⁰⁴ ECtHR *A. Menarini Diagnostics S.r.l. v. Italy*, no. 43509/08, § 62, 27 September 2011.

¹⁰⁵ ECtHR *A. Menarini Diagnostics S.r.l. v. Italy*, no. 43509/08, §§ 63 et seq., 27 September 2011.

¹⁰⁶ ECtHR *A. Menarini Diagnostics S.r.l. v. Italy*, no. 43509/08, § 64, 27 September 2011.

nature and severity of the sanctions. Considering their minor nature, some inherent restrictions may be permissible. In this regard, the Court's judgments in *Penias and Ortmaier v. Austria* are justified in approving the district authority's assumption of the prosecutor's role in the administrative criminal proceedings before the Austrian Independent Administrative Panel ruling on a criminal charge of driving a motor vehicle under the influence of alcohol and in a position to impose a fine of up to EUR 4,300.¹⁰⁷ However, the national lawmaker's decision to refer the judicial review of the exorbitant corporate fines to the administrative jurisdiction should not absolve it of the obligation to respect all procedural guarantees of Art. 6 (1) ECHR in criminal cases. In fact, the Court voices this explicitly but fails to back up words with deeds.

In the second Italian case (*Grande Stevens v. Italy*), the Court continued to describe administrative criminal sanctions amounting to between EUR 500,000 and 3,000,000 and market manipulation as "similar minor offences."¹⁰⁸ Yet, remarkably, the Court did not repeat its above-mentioned jurisprudence that "the prosecution and punishment of minor offences [are] primarily a matter for the administrative authorities."¹⁰⁹ In other words, in cases like this the ensuing sanctioning proceedings need not guarantee the above-mentioned basic requirements of fair fact-finding proceedings. In addition, the Court referred to its long-held jurisprudence that a defendant must have the possibility to apply for a subsequent review by a tribunal within the meaning of Art. 6 (1) if the prosecution and sanctioning of this "similar minor offence" is entrusted to a so-called independent administrative authority, in the instant case the Italian Companies and Exchange Commission (CONSOB). It should be noted that CONSOB could hardly be compared with ordinary administrative authorities responsible for prosecuting and sanctioning minor offenses, such as traffic offenses.

The said jurisprudence that required a subsequent judicial review in such cases, formally introduced by the Court in 1984 in the case of *Öztürk v. Germany*, is simply misleading in this regard. As an independent administrative authority, CONSOB has not only comprehensive investigation powers but also prosecuting and deciding functions. In view of this, the Court's extensive review of the questions whether the defendant received a fair trial in the proceedings before CONSOB and whether the latter should be considered a tribunal within the meaning of Art. 6 (1) is principally correct. In the same way in which the Court performs the subsequent legal review in routine minor offenses, the Court verified in a third step whether the defendant was given access to a tribunal with Art. 6 (1) jurisdiction and guarantees in the proceedings before the Turin Court of Appeal and Court of

¹⁰⁷ ECtHR *Penias and Ortmaier v. Austria*, no. 35109/06 and 38112/06, § 62, 18 October 2011.

¹⁰⁸ ECtHR *Grande Stevens and Others v. Italy*, no. 18640/10, § 138, 4 March 2014.

¹⁰⁹ ECtHR *Steininger v. Austria*, no. 21539/07, § 45, 17 April 2012. Emphasis added.

Cassation. The Court concluded that the trial before the Appeals Court was not public and therefore not fair, because it met in private and the deliberations with the defendant were held in private.¹¹⁰

At this point it should be noted that several aspects of the Court's above-described ruling fail to convince: Clearly, the offense of market manipulation and fines amounting to several million euros do not fit the category of minor offenses as commonly understood, such as traffic offenses. Nor can one say that the prosecution and sanctioning before independent administrative authorities resemble the administrative proceedings in such minor offenses; in fact, the decision-making process takes place, to a considerable extent, without basic fair trial requirements. A more convincing and preferable approach is the one used in cases related to the French independent administrative authorities competent in economic and financial law with powers of criminal sanctioning.¹¹¹ In the following, I will look at the Court's jurisprudence on the question of what conditions are necessary to consider the independent administrative authorities a tribunal within the meaning of Art. 6 (1), more specifically, how their investigating, prosecuting, and deciding branches must be constituted. As the Court emphasizes, these authorities can be considered a tribunal, provided they meet certain structural guarantees, regardless of whether domestic law considers them a court or an administrative body.¹¹²

The advantage of this approach for the contracting states is twofold: First, they can provide the procedural guarantees of Art. 6 (1) already during the sanctioning proceedings before the independent administrative body, and the subsequent review by a court as appeal instance does not have to be comprehensive.¹¹³ Second, if the sanctioning proceedings by the independent administrative authority do not sufficiently meet the fair trial requirements, a subsequent review by a court may remedy the shortcomings of the first proceedings.¹¹⁴ The disadvantage for the contracting states in guaranteeing fair criminal proceedings by providing several levels of judicial review is the fact that some of the shortcomings of the appellate bodies can no longer be rectified or the fact that the subsequent judicial review by these courts is limited. As such, these appellate bodies do not provide relief and, in fact, can cause new violations.¹¹⁵

However, in the final analysis the defendant is better served by an adversarial decision-making process at the earliest possible time of fact-finding, where an

¹¹⁰ ECtHR *Grande Stevens and Others v. Italy*, no. 18640/10, §§ 153–154, 4 March 2014.

¹¹¹ ECtHR *Dubus S.A. v. France*, no. 5242/04, § 35, 11 June 2009; compare, however, with ECionHR *Société Sténuît v. France* (rep.), no. 11598/85, §§ 72 ff., 30 May 1991.

¹¹² ECtHR *Didier v. France* (dec.), no. 58188/00, 27 August 2002.

¹¹³ Compare ECtHR *Didier v. France* (dec.), no. 58188/00, 27 August 2002; ECtHR *Lilly v. France*, no. 53892/00, §§ 22 et seq., 14 October 2003.

¹¹⁴ ECtHR *Grande Stevens and Others v. Italy*, no. 18640/10, § 138, 4 March 2014.

¹¹⁵ ECtHR *Lilly v. France*, no. 53892/00, § 25, 14 October 2003.

impartial entity of the administrative body provides equality of arms, presumption of innocence, and other defense rights, than by a subsequent review by a court.¹¹⁶

2. Independent administrative bodies as tribunal within the meaning of Article 6 (1) ECHR

a) General concept

An independent administrative body may be considered a tribunal within the meaning of Art. 6 (1) if it meets the requirements mentioned above, namely independence and impartiality.¹¹⁷ Even though both requirements are closely linked, “independence” applies primarily to the relationship between the relevant authority and the other branches of power, the administration and the government. This requires a careful look at “the manner of the appointment of the members of the body in question, their term of office, the existence of safeguards against outside pressure and the question whether it presents an appearance of independence.”¹¹⁸ The impartiality requirement pertains directly to the tribunal as the decision-making body in a specific case. Here, the Court applies a subjective and an objective test. The subjective test asks whether members of the tribunal behaved in a way that may question their impartiality, the objective test whether the tribunal as a decision-making body offered sufficient safeguards to exclude any legitimate doubt about its impartiality.¹¹⁹

The concept of independent administrative authorities may fail the objective test to provide sufficient safeguards in a number of ways. As the Court also highlights, these authorities frequently perform as part of their regulatory and supervisory duties not just administrative and preventive functions but also repressive functions due to their sanctioning powers.¹²⁰ In terms of the repressive functions, the investigating, prosecuting, and deciding branches must be separate, as a combination is not compatible with Art. 6 (1), which guarantees a fair trial by an impartial decision-making tribunal.¹²¹ More specifically, the separation must be such that not the same person charges and tries. In other words, the defendant in administrative criminal proceedings before the decision-making body should reasonably have the

¹¹⁶ Compare with *Zrvandyan*, p. 37.

¹¹⁷ ECtHR *X and Y v. France*, no. 48158/11, §§ 39 et seqq., 1 September 2016.

¹¹⁸ ECtHR *Grande Stevens and Others v. Italy*, no. 18640/10, § 132, 4 March 2014.

¹¹⁹ ECtHR *Dubus S.A. v. France*, no. 5242/04, §§ 53–54, 11 June 2009.

¹²⁰ See for instance ECtHR *Dubus S.A. v. France*, no. 5242/04, §§ 5 et seqq., 11 June 2009 (Banking Commission); ECtHR *Vernes v. France*, no. 30183/06, § 11, 20 January 2011 (Former Security and Exchange Commission [COB]).

¹²¹ ECtHR *Grande Stevens and Others v. Italy*, no. 18640/10, § 137, 4 March 2014; for the European Commission on this see *Lorenzmeier*, ZIS 1 (2008), 22; for the German Anti-Trust Authority see *Schmitz*, wistra 4 (2016), 132.

impression that his guilt was not already established at the very beginning of the trial.¹²²

b) Examples

aa) Merger of investigating and deciding body

In *Grande Stevens and others v. Italy*, the Court negated the objective impartiality of the Italian Companies and Exchange Commission (CONSOB), because the independent administrative authority did not provide sufficient safeguards required by Art. 6 (1). Although the corresponding law did provide a basic division between investigating, prosecuting, and sanctioning entities, it did not provide a strict separation of the branches, as the chairman was not only involved in supervising the investigating entity but also in chairing the Commission as the sanctioning entity.¹²³

bb) Lack of distinction between prosecuting and deciding body

In *Dubus S.A. v. France*, the Court concluded that the former French Banking Commission did not provide sufficient structural guarantees to be considered independent and impartial. In its decision, the Court considered the following shortcomings of the CMF's sanctioning regime:

- Vagueness in the corresponding provisions of the French law stipulating the functions, composition, and decision powers of the Banking Commission and its branches.
- Lack of procedural rules drawing a clear distinction in the Banking Commission's exercise of its judicial function, specifically with regard to the investigating, prosecuting, and sanctioning organs. However, the role of the rapporteur, who, after filing the case, was not only involved in some of the investigative actions on behalf of the Commission as the sanctioning body but also participated in its deliberations on the decision, was not incompatible with the impartiality requirement as he had no powers of prosecution, namely the power to bring the indictment against the defendant.
- With regard to the prosecuting organ, the Court referred to the lack of any provision specifying a body or person tasked with bringing the charge.

In the instant case, the Secretary General and the Commission itself not only initiated and pursued the decision-making process against the defendant, but the Secretary General, acting as President, and five Commission members also decided on the sanction after a public hearing and deliberations, and the Secretary General

¹²² ECtHR *Dubus S.A. v. France*, no. 5242/04, § 60, 11 June 2009.

¹²³ ECtHR *Grande Stevens and Others v. Italy*, no. 18640/10, §§ 136–137, 4 March 2014.

notified the defendant of the sanction. Therefore, there was also no distinction between the prosecuting and the deciding body.¹²⁴

cc) Clear and strict separation of powers

In the case of *X and Y v. France*, the Court concluded the opposite with regard to the impartiality of the French Financial Market Authority (AMF). Here, the Court established that

- the French law on organization and sanctioning proceedings within the AMF distinguishes clearly and strictly between preventive and repressive functions on the one hand, and between investigating, prosecuting, and sanctioning organs on the other hand;
- the law designates the Board of the AMF as the prosecuting body. The Board decides on initiating sanctioning proceedings before the Sanctioning Committee, which is responsible for the assessment of evidence and the imposition of sanctions;
- membership in one of the prosecuting or sanctioning branches excludes involvement in the others;
- although the Committee may ask the President of the AMF in his capacity as chairman of the investigating branch for further investigations, that in itself does not undermine the impartiality of the Committee, as the sanctioning proceedings are conducted in an adversarial manner and the defendant has the right to be heard;
- the fact that the rapporteur of the Committee is assisted by the AMF’s administration does not cast doubt on his or her impartiality as the AMF’s assistant acts upon the rapporteur’s instructions.¹²⁵

3. Simplification of criminal proceedings

The question whether “the determination of ... charge against” a defendant was conducted by an independent and impartial tribunal within the meaning of Art. 6 (1) ECHR may also arise if the criminal proceedings involve structural simplifications. In the following, I will discuss, *inter alia*, case law of the Court on penal order proceedings and on the trial without prosecutor. Other ways of simplifying criminal proceedings, such as the speedy trial, here also referred to as „expeditious

¹²⁴ ECtHR *Dubus S.A. v. France*, no. 5242/04, §§ 56–61, 11 June 2009.

¹²⁵ ECtHR *X and Y v. France*, no. 48158/11, §§ 39 et seq., 1 September 2016; see also ECtHR *Messier v. France* (dec.), no. 25041/07, 19 May 2009; for more on the proceedings at AMF see http://www.amf-france.org/en_US/L-AMF/Missions-et-competences/Sanctions?#title_paragraph_1.

proceedings, will also be discussed below as they are related to specific rights of the defendant, notably the right to be heard and adduce evidence.¹²⁶

The standards underlying this issue need to include the objective impartiality of the tribunal within the meaning of Art. 6 (1) ECHR, which states that the same person is not allowed to both charge and try a case and that there should not reasonably be an impression that the defendant's guilt was already established at the beginning of the trial.¹²⁷ Moreover, in view of the equality of arms principle and the principle of the right to an adversarial trial, the legality of the roles of the prosecutor and the trial court will be questioned if the absence of the prosecutor in the hearings leads to a situation where the judge takes up the prosecution's case, examines the merits, determines the defendant's guilt, and imposes the sanction on his or her own motion.¹²⁸ Furthermore, such proceedings cast doubt on the trial court's compliance with the presumption of innocence principle.¹²⁹

These requirements demonstrate that the safeguards of an impartial tribunal and the rights of the defendant are closely linked and that the structural modalities of proceedings chosen by a criminal justice system affect the right to a fair trial within the meaning of Art. 6 (1).¹³⁰

a) Penal order proceedings

With regard to the penal order proceedings in Germany, the Court accepts that the prosecutor decides on the guilt and the sentence even in the absence of the defendant. However, the precondition for such proceedings is that he or she can still gain access to a tribunal within the meaning of Art. 6 (1) that will hear him or her and will conduct "a *fresh* determination of the merits of the charge, in respect of both law and fact."¹³¹ Moreover, the Court finds penal order proceedings compatible with the right to have access to a court if the national law stipulates restrictions on this right, notably a limit on the time to seek the subsequent review by a court, for the sake of legal certainty.¹³²

¹²⁶ See below 3.c).

¹²⁷ ECtHR *Dubus S.A. v. France*, no. 5242/04, § 60, 11 June 2009.

¹²⁸ ECtHR *Karelin v. Russia*, no. 926/08, § 56, 20 September 2016.

¹²⁹ ECtHR *Karelin v. Russia*, no. 926/08, § 72, 20 September 2016.

¹³⁰ ECtHR *Karelin v. Russia*, no. 926/08, § 59, 20 September 2016.

¹³¹ ECtHR *Johansen v. Germany*, no. 17914/10, § 43, 15 September 2016; emphasis added. ECtHR *Maass v. Germany*, no. 71598/01, 15 September 2005; critical on the prosecutor – who, in the final analysis, belongs to the administration – as the person who determines the sentence in German law, *Brodowski*, ZStW 128 (2016), 374.

¹³² ECtHR *Johansen v. Germany*, no. 17914/10, §§ 44 – 45, 15 September 2016.

b) Trial without prosecutor

aa) Lack of a prosecution party

According to the Court, the judge of an independent and impartial tribunal within the meaning of Art. 6 (1) ECHR is the ultimate guardian of the proceedings and must provide an adversarial hearing as well as the equality of arms between defendant and prosecution. In view of this concept of fairness in criminal proceedings under Art. 6 (1) ECHR, the lack of a prosecuting party in proceedings involving certain criminal offenses contradicts the very concept of a fair trial by a criminal court. In such cases, the court has no choice but to conduct the trial without a prosecuting party, which means that the court also has to perform the functions of a prosecuting authority just to guarantee the impartiality of the court, the adversarial hearing, and the presumption of innocence. It is the responsibility of a public authority, not of the court, to prosecute a crime. Moreover, the lack of a prosecuting party questions the objective impartiality of the trial court, as the defendant will get the impression, and justifiably so, that the prosecuting and adjudicating body are the same. Furthermore, it would be not possible for the court to ensure the presumption of innocence, especially because, in the absence of a prosecuting party, the burden of proof is shifted to the defendant. Finally, the ECtHR emphasises that one cannot depart from these fundamental fair trial guarantees by referring to the minor nature of the offenses at issue.¹³³

bb) Absence of the prosecutor

The risk of the above-mentioned shortcomings remains even if national law assigns a prosecuting party to the criminal proceedings. The absence of the prosecutor in a court trial may still cause substantial impairments. His or her absence in some hearings is compatible with Art. 6 (1) ECHR if the trial court is not called to “conduct any investigation into the merits of the criminal case and ... [does] not assume any function” of the prosecutor. Having said that, a limited active role of the court is not excluded, for instance, asking the defendant about the charge against him.¹³⁴ However, the absence of the prosecutor may lead to a combination of the roles of prosecutor and impartial court if the latter proceeds and performs prosecutorial functions. The Court affirmed this in *Ozerov v. Russia*, in which the judge, on his own motion, had called and examined new witnesses who made incriminating statements. Moreover, the judge, on his own motion, had to change the

¹³³ ECtHR *Karelin v. Russia*, no. 926/08, § 72, 20 September 2016.

¹³⁴ ECtHR *Thorgeir Thorgeirson v. Iceland*, no. 13778/88, §§ 52–53, 25 June 1992.

indictment against the defendant, as some inculpatory evidence had to be removed from the prosecution's case.¹³⁵

B. Status of the defendant in criminal proceedings

1. Right against self-incrimination

Although the Convention contains no explicit right against self-incrimination, the Court derives it from Art. 6 (1). This right intends, *inter alia*, to protect the accused against improper compulsion by the state, to avoid a miscarriage of justice, and to safeguard the aims of Art. 6 ECHR.¹³⁶

For the Court, the right against self-incrimination is at the heart of Art. 6 ECHR and contributes to the fulfillment of the aims of Art. 6, notably the equality of arms between the accused and the prosecution. Moreover, being an important defense right, the right against self-incrimination is closely related to the presumption of innocence within the meaning of Art. 6 (2) ECHR.¹³⁷ Even if the Court does not directly derive the former from the latter,¹³⁸ this points to the significant closeness of both rights. With regard to the limits of the prosecution particularly when it comes to the defendant as a source of evidence, the Court emphasizes that the right not to incriminate oneself presupposes that the prosecution in a criminal case seeks to prove its case against the accused without resorting to evidence obtained by methods of coercion or oppression in defiance of the will of the accused.¹³⁹ In addition, both rights jointly protect the defendant's use of his right to silence by prohibiting extensive adverse inferences from his silence while deciding on the question of guilt or on the sentence.¹⁴⁰

Besides the presumption of innocence under Art. 6 (2) ECHR, the former Commission highlighted the defensive component of the right against self-incrimination. According to the Commission, the very basis of a fair trial presupposes that the accused is given the opportunity of defending himself against the charges brought against him. This position of the defense would be undermined if the accused were obligated or compelled to incriminate himself.¹⁴¹ Considering

¹³⁵ ECtHR *Ozerov v. Russia*, no. 64962/01, § 53, 18 May 2010; see also ECtHR *Krisvoshapkin v. Russia*, no. 42224/02, §§ 45–45, 27 January 2011.

¹³⁶ ECtHR *John Murray v. The United Kingdom*, no. 18731/91, § 45, 8 February 1996.

¹³⁷ ECtHR *John Murray v. The United Kingdom*, no. 18731/91, §§ 51 et seq., 8 February 1996.

¹³⁸ ECtHR *Rieg v. Austria*, no. 63207/00, § 29, 24 March 2005; for more see Arslan, *Die Aussagefreiheit des Beschuldigten*, pp. 51 et seq.

¹³⁹ ECtHR *Baran Hun v. Turkey*, no. 30685/05, § 68, 20 May 2010.

¹⁴⁰ ECtHR *Krumpholz v. Austria*, no. 13201/05, § 42, 18 March 2010.

¹⁴¹ ECionHR *Saunders v. The United Kingdom* (rep.), no. 19187/91, § 72, 10 May 1994.

this, one can even argue that a right against self-incrimination must be guaranteed as the negative correlate to the right to defense. However, the case law of the ECtHR does not lend itself to such a direct derivation either. Nevertheless, as indicated above, the Court acknowledges the right against self-incrimination as an important right of defense for the defendant and a right closely linked to other defense rights. In this regard, the Court recognizes that an effective use of the privilege against self-incrimination in case of questioning by the authorities may require not only access to a lawyer or a translator; it is also necessary to inform the defendant about the charges against him and about his right to consult a lawyer or to remain silent.¹⁴² In fact, the very use of the right against self-incrimination requires confidentiality between the defendant and his or her lawyer, whose assistance is necessary to provide everyone with a fair trial.¹⁴³

2. The scope of application

The “right not to incriminate oneself” can literally be misunderstood to mean that an accused person may unilaterally decide not to be used as evidence against himself “at all,” and that his preference must be respected and not impaired by any infringement on the part of the authorities.¹⁴⁴ In order to show that it is not willing to follow such a broad interpretation of this right, the Court has striven since the *Saunders* judgment in 1996 to shed light on the scope of the right generally. The Court clarified that this right finds its primary application during the questioning of the defendant by the authorities and requires respect for the defendant’s choice to remain silent.¹⁴⁵ In addition, covert questioning that reaches a certain level of deception and compulsion must not foil the defendant’s choice to remain silent.¹⁴⁶

Besides cases where the authorities seek to obtain testimonial evidence from the accused person through questioning, the scope of the privilege against self-incrimination must also apply to physical evidence that might be obtained from the accused. In this regard, the Court makes an important distinction.

According to the *Saunders* test, this right does *not apply* to physical evidence that has “an existence independent of the will of the suspect” and to the use of

¹⁴² ECtHR *Salduz v. Turkey*, no. 36391/02, § 55, 27 November 2008; ECtHR *Şaman v. Turkey*, no. 35292/05, § 34, 5 April 2011; ECtHR *Erdem and others v. Turkey* (dec.), no. 35980/97, 14 December 2000; ECtHR *Panovits v. Cyprus*, no. 4268/04, §§ 67 et seqq., 11 December 2008; ECtHR *Aleksandr Zaichenko v. Russia*, no. 39660/02, §§ 41 et seqq., 18 February 2010.

¹⁴³ ECtHR *Michaud v. France*, no. 12323/11, § 118, 6 December 2012.

¹⁴⁴ Dissenting opinion of Judge Valticos, joined by Judge Gölcüklü ECtHR *Saunders v. The United Kingdom* no. 43/1994/490/572, 17 October 1996.

¹⁴⁵ ECtHR *Allan v. The United Kingdom*, no. 48539/99, § 50, 5 November 2002; ECtHR *Heaney und McGuinness v. Ireland*, no. 34720/97, § 51, 21 December 2000.

¹⁴⁶ Ibid; ECtHR *Bykov v. Russia*, no. 4378/02, 102, 10 March 2009.

compulsion against the accused who resists obtaining such evidence by the authorities.¹⁴⁷ As far as *bodily* physical evidence, particularly blood, hair samples, or other bodily tissues are concerned, these are in fact available to the competent authorities and their existence is therefore independent of the will of the accused person. In these cases, there is no need for compulsion to make said evidence available. “To obtain such material, a defendant is requested to endure passively a minor interference with his physical integrity.”¹⁴⁸

The independent existence of evidence is also affirmed for the Court even in cases where, strictly speaking, a certain degree of active participation by the defendant is required in order to provide the authorities with specific bodily physical evidence, particularly breath, urine, or voice samples. Their availability is not guaranteed by their very existence, and their production depends to some extent on the will of the defendant. Rather, the reasons for excluding such bodily physical evidence from the scope of the right against self-incrimination are practical: As the Court highlights, this physical evidence is produced “by the normal functioning of the body” of the defendant. If the accused wants to maintain the normal functioning of his body in criminal proceedings, for which he has no realistic alternative as he cannot consistently prefer not to breathe, to empty his bladder, or to talk, the availability of this bodily physical evidence is, strictly speaking, not at his disposal. Most importantly, his or her potential resistance can be overcome by alternative methods.¹⁴⁹

However, in terms of non-bodily physical evidence such as documents or a *corpus delicti*, the right against self-incrimination under Art. 6 (1) ECHR applies because their existence in terms of their availability for investigation bodies depends on the will of the accused.¹⁵⁰ Although this right does not preclude obtaining this evidence as such, and the investigation authorities may seek such evidence for instance by a court warrant and seize it, taking recourse to the defendant for this purpose is not permitted under Art. 6 (1) ECHR. As the Court emphasizes: “being unable or unwilling to procure” documentary evidence “by some other means,” compelling the defendant to “provide the evidence of offences he had allegedly committed” violates the right against self-incrimination under Art. 6 (1) ECHR.¹⁵¹

¹⁴⁷ ECtHR *Saunders v. The United Kingdom*, no. 19187/91, § 67, 17 December 1996.

¹⁴⁸ ECtHR *Jalloh v. Germany*, no. 54810/00, § 114, 11 July 2006.

¹⁴⁹ For an alcohol test, a blood sample may be taken instead of a breath test; on this see ECtHR *Becker v. Austria*, no. 19844/08, §§ 6 et seqq, 11 June 2015.

¹⁵⁰ ECtHR *Funke v. France*, no. 10828/83, 25 February 1993; ECtHR *J.B. v. Switzerland*, no. 31827/96, 3 May 2001; ECtHR *Jalloh v. Germany*, no. 54810/00, § 114, 11 July 2006; in this regard, see also *Lamberigts*, 432 et seqq.; *van Kempen*, 15; *Weber*, 46; differentiating *Dannecker*, ZStW 127 (2015), 1000 et seqq.; *Gleß*, p. 730.

¹⁵¹ ECtHR *Heaney und McGuinness v. Ireland*, no. 34720/97, § 48, 21 December 2000; compare however with ECtHR *Bogumil v. Portugal*, no. 35228/03, §§ 68 et seqq., 7 October 2008.

Finally, the right against self-incrimination applies when the evidence obtained by breach of Art. 6 (1) ECHR is used against the defendant.¹⁵² Considering the above-mentioned application cases, the right against self-incrimination is applied in two major areas: first, as a substantive evidence-gathering rule when it comes to obtaining evidence from the defendant and, second, as a procedural rule on the use of evidence in criminal proceedings against the defendant.

3. The scope of protection

Even within the scope of application as generally defined, the right against self-incrimination is not an absolute right and may be subject to some limitations. Particularly the mode of infringement, namely the nature and degree of compulsion used, the existence of appropriate safeguards, and the use of evidence obtained by compulsion must be considered in determining the scope of protection under Art. 6 (1) ECHR.¹⁵³

In order to illustrate the influence of the first factor, the nature of compulsion, on the scope of protection of the right against self-incrimination, it is necessary to distinguish between various types and degrees of compulsion. A closer look at the Court's case law reveals that the types of compulsion are distinguished by whether they are of a legal or a physical nature, whether their intensity is direct or indirect, and whether they subject the person to physical or psychological pressure.¹⁵⁴ Based on these distinctions, the Court also takes into account the public interest in using evidence obtained under compulsion against the accused in criminal proceedings. Specifically, the Court finds that the legal obligation of a vehicle owner to notify the competent authorities about the identity of the driver in case of traffic offenses is justified, even if the legal compulsion used here is severe and direct.¹⁵⁵ However, in other cases of direct compulsion, whether legal or physical, used to obtain testimonial or physical evidence from the accused, the Court takes an entirely different approach. It emphasizes in its established jurisprudence that no purpose can justify using such compulsion as it destroys the very essence of the right against self-incrimination, regardless of whether the evidence obtained in breach of this right has subsequently been used against the defendant as the basis of his or her conviction.

¹⁵² ECtHR *Jalloh v. Germany*, no. 54810/00, § 110, 11 July 2006; ECtHR *Weh v. Austria*, no. 38544/97, § 42, 8 April 2004.

¹⁵³ ECtHR *Corbet and others v. France*, no. 7494/11 7493/11 7989/11, §§ 33 et seq., 19 March 2015.

¹⁵⁴ See for more *Arslan*, Die Aussagefreiheit des Beschuldigten, p. 85.

¹⁵⁵ ECtHR *Lückhof and Spanner v. Austria*, no. 58452/00 and 61920/00, § 47, 10 January 2008; compare with *Picinali*, *Crim. L. & Phil.* 11 (2017), 688 and 693; *Dannecker*, *ZStW* 127 (2015), 994.

tion, or not.¹⁵⁶ However, the same cannot be said for indirect legal compulsion where the accused is informed about the potential adverse consequences of his silence or where, in some circumstances, such inferences drawn from his silence lead to a conviction.¹⁵⁷ Further restrictions on the right against self-incrimination under Art. 6 (1) ECHR may arise due to the so-called overall approach of the Court in deciding on the fairness of the trial against a defendant. According to the long-standing jurisprudence of the Court, even where the applicant invokes a violation of his right against self-incrimination, the Court always considers the whole trial and decides on its fairness as the aforementioned right is a specific feature of the general right to a fair trial.¹⁵⁸ The scope of protection against self-incrimination under the ECHR is further restricted by the applicability criteria of Art. 6 (1).

4. The applicability of Article 6 (1) ECHR

a) In general

In consequence of the above-stated applicability requirements of the right to a fair trial under Art. 6 (1) ECHR for the right against self-incrimination, the Article applies, as a matter of principle, only to the defendant in criminal proceedings.¹⁵⁹ This raises the question about the point in time at which a person must be considered the “accused” within the meaning of Art. 6 (1) ECHR. Indeed, the Court is increasingly involved in developing criteria to answer this question, notably in cases of police interrogation, as the requirement to inform the person about his or her right to remain silent presupposes that he or she is already “accused” within the meaning of Art. 6 (1) ECHR.¹⁶⁰ Closely connected with this is the question of whether the person is interviewed by the authorities as a witness, as the witness cannot invoke the right to a fair trial and, therefore, cannot claim the right to remain silent in criminal proceedings under Art. 6 (1) ECHR.¹⁶¹ However, corresponding ECtHR case law reveals that the Court is aware of the issue that national authorities may easily switch the roles of defendant and witness and thereby unduly withdraw the right to remain silent of a person who, despite being given the role of

¹⁵⁶ ECtHR *Martinen v. Finland*, no. 19235/03, § 64, 21 April 2009; see also *Dannecker*, ZStW 127 (2015), 993.

¹⁵⁷ ECtHR *John Murray v. The United Kingdom*, no. 18731/91, §§ 48 et seq., 8 February 1996.

¹⁵⁸ ECtHR *Moiseyev v. Russia*, no. 62936/00, §§ 201 et seq., 9 October 2008.

¹⁵⁹ ECtHR *Allen v. The United Kingdom*, no. 25424/09, 10 September 2002.

¹⁶⁰ See for more *Arslan*, Die Aussagefreiheit des Beschuldigten, pp. 138 et seqq.

¹⁶¹ The former Commission derived a right to refuse self-incriminating statements for the witnesses from the freedom of expression under Art. 10 ECHR, on this see ECionHR *K. v. Austria* (rep.), no. 16002/90, § 45, 13 October 1992.

a witness, must be regarded as an accused within the meaning of Art. 6 (1) ECHR.¹⁶²

As this jurisprudence of the Court shows, the right against self-incrimination under Art. 6 (1) ECHR does not apply outside of criminal proceedings. Thus, parties in civil proceedings before the ECtHR cannot invoke a violation of the right against self-incrimination under Art. 6 (1) of the ECHR. However, this does not mean that the right against self-incrimination under Art. 6 (1) is not applied in non-criminal proceedings. Particularly in cases where self-incrimination is obtained by compulsion in a non-criminal procedure and may be used in later criminal proceedings against the defendant, one needs to look closely into the circumstances of the original proceedings.¹⁶³

b) In non-criminal administrative proceedings

Except in the context of a criminal charge, an official request for information, which may possibly lead to self-incrimination, can usually not be considered an inadmissible compulsion.¹⁶⁴ Likewise, the privilege against self-incrimination under Art. 6 (1) ECHR does not typically prohibit the imposition of legal obligations to cooperate, notably

- the punishable duty of a person to provide information to the competent authorities on their financial or corporate affairs,¹⁶⁵
- the criminal liability of a debtor to truthfully disclose all of his/its assets in the indemnity process for the protection of creditors. In such cases, the affected persons are often not charged with the commission of a crime within the meaning of Art. 6 (1) ECHR.¹⁶⁶ The privilege against self-incrimination under the Convention principally does not apply until the person concerned has been forced to cooperate in pending or anticipated criminal proceedings related to an offense that has already been committed.¹⁶⁷ Moreover, the above-mentioned cases usually in-

¹⁶² In this regard see ECtHR *Serves v. France*, no. 20225/92, §§ 40 ff., 20 October 1997; ECtHR *Macko and Kozubal Slovakia*, no. 64054/00 and 64071/00, 19 June 2007.

¹⁶³ See also ECtHR *Corbet and others v. France*, no. 7494/11 7493/11 7989/11, §§ 33 et seqq., 19 March 2015.

¹⁶⁴ ECtHR *Van Vondel v. The Netherlands* (dec.), no. 38258/03, 23 March 2006 § 1 Law; see also *Gaede*, p. 313; *Gleß*, p. 731; for general information on obligations in tax, competition, or financial market law in Spain see *Martin and Blumenberg*, 856.

¹⁶⁵ ECtHR *Allen v. The United Kingdom*, (dec.), no. 25424/09, 10 September 2002 § 1 Law; see also *Martin and Blumenberg*, 860 et seqq.

¹⁶⁶ ECtHR *Allen v. The United Kingdom*, (dec.), no. 25424/09, 10 September 2002 § 1 Law; ECtHR *Eklund v. Finland* (dec.), no. 56936/13, § 48, 8 December 2015.

¹⁶⁷ ECtHR *Allen v. The United Kingdom*, (dec.), no. 25424/09, 10 September 2002 § 1 Law; see also *Dannecker*, ZStW 127 (2015), 995.

volve a legitimate public interest that justifies the imposition of such cooperation obligations, notably the efficiency of an effective tax system,¹⁶⁸ or

- the satisfaction of creditors and the restitution of the financial situation of the debtor.¹⁶⁹

If, for these reasons, it is permissible to impose enforceable legal obligations, the privilege against self-incrimination under Art. 6 (1) ECHR certainly does not provide general immunity for new offenses motivated by the desire to avert criminal consequences against oneself,¹⁷⁰ such as the offense

- of making false statements,¹⁷¹ or
- of fraud.¹⁷²

However, the question arises whether a person obligated to cooperate may refuse to disclose information or to produce or hand over documents in the above-mentioned regular information-gathering procedures with reference to potential self-incrimination. In such cases, the Court seems to accept, to some extent, a person's exposure to the risk of self-incrimination by arguing that the privilege against self-incrimination does not even protect the defendant in criminal proceedings from every risk of self-incrimination, respectively from measures that may exert a certain degree of compulsion on him.¹⁷³

In *Staines v. The United Kingdom*, the Court found no breach of the privilege against self-incrimination, as the person concerned, in an administrative proceeding for violations of the national capital market law, spontaneously made statements in writing and orally to a financial inspector, and these statements were used in subsequent criminal proceedings without any objection by him, before he was asked for a formal interrogation where he was under the legal obligation to make them.¹⁷⁴

However, the Court held that it is necessary to examine in each case whether the administrative proceeding in question was misused, specifically whether the authority's actual intention was to gain incriminating material from the person concerned.¹⁷⁵

¹⁶⁸ ECtHR *Allen v. The United Kingdom*, (dec.), no. 25424/09, 10 September 2002 § 1 Law.

¹⁶⁹ ECtHR *Elomaa v. Finland* (dec.), no. 37670/04, 16 March 2010 § 1 Law.

¹⁷⁰ ECtHR *Allen v. The United Kingdom*, (dec.), no. 25424/09, 10 September 2002 § 1 Law.

¹⁷¹ Ibid.

¹⁷² ECtHR *Elomaa v. Finland* (dec.), no. 37670/04, 16 March 2010 § 1 Law.

¹⁷³ ECtHR *Allen v. The United Kingdom*, (dec.), no. 25424/09, 10 September 2002 § 1 Law; see also *Martin and Blumenberg*, 860.

¹⁷⁴ ECtHR *Staines v. The United Kingdom*, (dec.), no. 41552/98, 16 May 2000 § 1 Law.

¹⁷⁵ ECtHR *Van Vondel v. The Netherlands* (dec.), no. 38258/03, 23 March 2006 § 1 Law; see *Weber*, 44, who demands to know in terms of the application of the right against self-incrimination whether there is a certain possibility that a subsequent use of the evidence in question in criminal proceedings is to be expected; similar also *Gleß*, p. 732; on an unclear separation of administrative and repressive aims in the taxation process under German law see *Morsch*, p. 613; for the administrative investigations by the so-called su-

Compared to the above-mentioned regular information-gathering request by the administration, the risk of self-incrimination and the intention to explore the possibility of a criminal trial against a person are more obvious in some types of non-criminal proceedings: For instance, the procedure for determining violations against the national capital market law may also have investigative purposes. In other words, such proceedings may also seek to use the results of the investigations, *inter alia*, in criminal proceedings against the party concerned. The proper way of dealing with such administrative proceedings with dual purpose would be to prove whether the person concerned should be considered an “accused” within the meaning of the corresponding jurisprudence of the Court. In fact, one can reasonably expect this to be affirmed in the majority of cases. However, the Court takes another approach by arguing that the public interest in regulating complex financial and commercial matters would be unreasonably hampered if the rights and guarantees of Art. 6 ECHR were also applicable to such preparatory procedures. This means that the right against self-incrimination should not be applied as substantive protection against compulsory evidence-gathering. However, in order to compensate for the detrimental effects of the duty to cooperate on that person’s right against self-incrimination, the Court requires the exclusion of evidence obtained by compulsion in subsequent criminal proceedings against the person who is subsequently accused.¹⁷⁶

Moreover, if criminal investigations against the person under obligation to cooperate have already been initiated, his or her unrestricted right against self-incrimination under Art. 6 (1) ECHR also applies to parallel administrative proceedings. If the national authorities of the administrative proceeding are nevertheless interested in the cooperation of the accused for non-criminal aims, the Court allows the imposition of a duty to cooperate only if national law provides for an exclusion of evidence obtained in the criminal proceedings against the accused.¹⁷⁷ As long as this is not the case, the imposition of a fine for non-appearance at the interview and for the refusal to give evidence in the administrative proceedings violates that person’s right against self-incrimination under Art. 6 (1) ECHR. The Court maintains that such safeguard is not provided if the scope of the exclusionary rule is limited to situations where the defendant objects to the use of his statements

pervisory authorities, in which the threshold of reasonable suspicion could be circumvented see *Böse*, ZStW 119 (2007), 849 ff.

¹⁷⁶ ECtHR *Saunders v. The United Kingdom*, no. 19187/91, § 67, 17 December 1996; ECtHR *J.J.L. and others v. The United Kingdom*, no. 29522/95 and 30056/96 and 30574/96, §§ 79 ff., 19 September 2000; ECtHR *Kansal v. The United Kingdom*, no. 21413/02, §§ 27 ff., 27 April 2004; see also *Dannecker*, ZStW 127 (2015), 993.

¹⁷⁷ ECtHR *Shannon v. The United Kingdom*, no. 6563/03, §§ 33 ff., 4 October 2005; ECtHR *Martinen v. Finland*, no. 19235/03, §§ 76 ff., 21 April 2009; see also *Gaede*, p. 313.

obtained under compulsion in criminal proceedings. The exclusionary rule is also inadequate if it is not obligatory but at the discretion of the judge.¹⁷⁸

5. Corporations and other legal entities

Another important issue involving the right against self-incrimination is whether legal persons, in particular corporations, enjoy this right as well.¹⁷⁹ While the Court has not yet handled such a case,¹⁸⁰ the former Commission has.

a) *Former Commission*

In *Peterson Sarpsborg v. Norway*, the six defendants (three companies and their respective managing directors) claimed that their right against self-incrimination was not respected, because the statements of the three directors were obtained in administrative proceedings in which they were statutorily obligated to make statements and where a refusal incurred punishment.

In the instant case, the national price authority investigated rumors about unlawful collaboration over prices and questioned other company employees in addition to their directors. After the inspections had been completed, the price directorate reported the three companies to the police, upon which an investigation of the matter was initiated. Although the primary aim of inspections was not to collect evidence with regard to any criminal investigations, according to the jurisprudence of the domestic courts, the price directorate was nevertheless “entitled and obliged” to report suspicious acts to the police for the purpose of further criminal investigations. However, prior to this action, no one was either suspected or accused of any criminal act. Thus, the right against self-incrimination did not apply in administrative proceedings by the price directorate, and a contrary assumption was held to have “unpredictable” effects on national law. Therefore, the statements of the three directors were allowed to be introduced into trial though not as documentary evidence but only during questioning in trial for purposes of “confrontation” with previous statements given to the price authority. However, in the instant case the trial court did not make such a “confrontation.” All defendants were sentenced to fines in varying amounts, and, in addition, the three companies were ordered to pay back the proceeds of their illegal price collaborations.

The former Commission did not express any doubt, principally, on the applicability of the right against self-incrimination to the three companies. However, it did

¹⁷⁸ ECtHR *Shannon v. The United Kingdom*, no. 6563/03, § 40, 4 October 2005.

¹⁷⁹ See in general *van Kempen*, 16; for German law *Rogall*, pp. 980 et seqq.; *Böse*, ZStW 126 (2014), 162; *Dannecker*, ZStW 127 (2015), 374 et seqq.

¹⁸⁰ See also *Dannecker*, ZStW 127 (2015), 371; *Brodowski*, Minimum Procedural Rights, p. 222; *Basualto*, 506.

raise the question “whether or to what extent these companies can incriminate themselves through the statements of their employees.” It left the question open because it found no violation of this right, as the statements the price authority obtained from the directors were not used in criminal proceedings, not even for purposes of any “confrontation” of the directors with their previous statements during questioning in trial.¹⁸¹

In view of the above-mentioned question, which was left unanswered, one might gain the impression that the applicability of the right against self-incrimination for corporations under Art. 6 (1) ECHR is not guaranteed. The Commission is apparently not entirely convinced that the companies may incriminate themselves by statements of their employees insofar as the former can only act through their organs and representatives, and the latter give the statements in their name. Such a general conclusion from the Commission’s decision in the instant case would be premature. This can easily be seen not only in the fact that the Commission did not question the applicability in principle but also in that it referred to “*these companies*” and to the act of incriminating themselves “through the *statements* of their employees.” Indeed, the circumstances of the instant case were special because the investigations by the price directorate were apparently initiated against the companies, but, later, the managing directors themselves were accused of price collaboration. The Commission is therefore entitled to doubt the possibility of an incrimination of the companies through the directors, who, in criminal proceedings, are no longer merely company employees but stand to be accused for their own behavior.¹⁸² As no use was made of their previous statements, the Commission did not have to go that far. In terms of the above-described subsequent jurisprudence of the Court, the Commission should instead have explored the question whether the investigations by the price directorate were misused to compel the companies, i.e., the directors acting in their name, to make incriminating statements.

Further, it is remarkable that the Commission used the notion of the privilege against self-incrimination rather than the right against self-incrimination. In fact, the Commission emphasized that such a privilege is necessary for purposes of a fair trial because “the position of the defense is undermined if the accused is under compulsion, or has been compelled, to incriminate himself.” Later, the Commission established, from the perspective of a procedural notion of the privilege against self-incrimination, that this privilege was not violated in the instant case

¹⁸¹ ECionHR *Peterson Sarpsborg AS and others v. Norway* (dec.), no. 25944/94, 27 November 1996.

¹⁸² For similar problems with regard to national criminal procedure law, for Spain and Italy see *Basualto*, 511 et seq.; for Germany see *Fischer and Hoven*, ZIS 1 (2015), 32.

because “the statements obtained did not impair their ability to defend themselves against the criminal charges brought.”¹⁸³

b) The Court

A corresponding procedural notion of the right against self-incrimination can be seen in the jurisprudence of the Court in terms of the purposes the Court assigns to it.¹⁸⁴ This is particularly true for the protection of the defendant against undue compulsion by the state. One might think that the reason for such protection is the will of the defendant, which implies a natural person. In addition, the test the Court applies in case of physical evidence, namely whether the evidence in question exists independently of the will of the defendant, endorses this conclusion.¹⁸⁵ Against this background, one can even argue that, in the final analysis, the right against self-incrimination underlies the idea of human dignity or self-determination as the freedom of will is constitutive for both. However, such an interpretation would mean reading a lot into the notion of will used by the Court in this case and would overlook the fact that the Court actually does not depart from a certain inner will of the defendant whether he or she decides to incriminate him- or herself or not.¹⁸⁶

A closer look reveals that the Court does not engage in more substantive considerations, such as whether, in terms of bodily physical evidence, the defendant should enjoy a right to remain passive and not be obligated or compelled to actively participate in the taking, say, of a blood sample.¹⁸⁷ The Court simply excludes obtaining bodily physical evidence, in particular blood, hair samples, or other bodily tissues, from the scope of the right against self-incrimination. Based on a substantive understanding of the protection of everyone’s will, including that of the defendant in criminal proceedings, a substantive approach would point out that the accused must not be subjected to “cruel choices,” namely to participate in the taking of a blood sample and thereby to incriminate him- or herself or to accept a compulsory taking by alternative methods.¹⁸⁸ Such considerations, however, are entirely absent in the jurisprudence of the Court.

This approach by the Court is appropriate: First, the Court had derived that right from Art. 6, for which it has not yet delivered a substantive reasoning. Second, ex-

¹⁸³ ECionHR *Peterson Sarpsborg AS and others v. Norway* (dec.), no. 25944/94, 27 November 1996.

¹⁸⁴ *Lamberigts*, 419; *Böse*, ZStW 126 (2014), 163; see also *Basualto*, 507.

¹⁸⁵ See for more above 2.b).

¹⁸⁶ See also ECtHR *P.G. and J.H. v. The United Kingdom*, no. 44787/98, § 80, 25 September 2001.

¹⁸⁷ See for a corresponding discussion in German law, *Arslan*, Die Aussagefreiheit des Beschuldigten, pp. 261 et seqq.

¹⁸⁸ In this regard see also *Lamberigts*, 424.

cept in one decision of the former Commission,¹⁸⁹ the Court clearly rejects locating the foundation of the defendant's right against self-incrimination in criminal proceedings in other substantive human rights of the Convention, notably in the right to respect for private life pursuant to Art. 8 (1) or in the freedom of expression pursuant to Art. 10 (1).¹⁹⁰ The Court is explicit in pointing out that claims of violations of the right against self-incrimination cannot be asserted under these Articles but only under Art. 6 (1) ECHR.¹⁹¹

This illustrates that the protection against undue use of compulsion within the meaning of Art. 6 (1) ECHR describes a procedural position of the accused person and need not be embedded in a general protection of freedom of will natural to everyone including a defendant in criminal proceedings, as is the case in some contracting states.¹⁹² Under the ECHR, this applicability cannot be denied by arguing that, as the companies or other legal persons lack human dignity or any self-determination, there cannot be any protection from undue compulsion for them or their "will."

In sum, there should be no doubt that the right against self-incrimination is applicable to legal persons.¹⁹³ The Court's jurisprudence in *Bernh Lahrson Holding* and *others v. Norway* is an indication to that effect. In this case, the Court considered as justified the request by a tax authority to make a backup copy of the central server of the three applicant companies based on the general economic interests of a country. More importantly, in order to make clear that the request was made, in principle, within the scope of the application of the right against the self-incrimination, the Court emphasized that "the disputed measure was not equivalent to a seizure imposed in criminal proceedings" as the companies were legally obligated to enable access to the server. Meeting this obligation was in fact equivalent to the production of documentary evidence for the prosecution authorities, which clearly falls under the protection of Art. 6 (1) ECtHR. However, in the instant case, the request brought against the three companies occurred in the context of a non-criminal, namely tax assessment, proceeding and absent any indications that the authorities misused their power to collect incriminating evidence against the companies.¹⁹⁴

¹⁸⁹ ECionHR *K. v. Austria* (rep.), no. 16002/90, § 45, 13 October 1992.

¹⁹⁰ See in general *van Kempen*, 17 et seqq.

¹⁹¹ ECtHR *Van der Heijden v. The Netherlands*, no. 42857/05, § 64, 3 April 2012; see also *van Kempen*, 14.

¹⁹² *Ibid.*

¹⁹³ *Meyer*, ZDAR 3 (2014), 102; *Dannecker*, ZStW 127 (2015), 371; *Brodowski*, Policy Options, 939; *Lamberigts*, 434 et seqq.; *Weber*, 46; *Brodowski*, Minimum Procedural Rights, p. 222 (but not the same level of protection); for a dissenting position see *Rogall*, p. 985; for pros and cons see *Theophilopoulos*, S. Afr. Mercantile L. J. 16 (2004), 25.

¹⁹⁴ ECtHR *Bernh Larsen Holding and others v. Norway*, no. 24117/08, §§ 87 ff., 14 March 2013.

C. General procedural safeguards

1. Presumption of innocence

a) General concept

According to Art. 6 (2) ECHR “everyone charged with a criminal offense shall be presumed innocent until proved guilty according to law.” The provision consists of a general presumption of innocence and a rather specific requirement of proof of guilt in criminal proceedings. The first component applies even prior to or outside any criminal charge within the meaning of Art. 6 (1) ECHR as long as there is a substantive link between the affirmation or negation of the criminal responsibility of the person concerned and the decision in question.¹⁹⁵ In this broad application, the provision also covers proceedings not related to the determination of the criminal charge against a defendant and does not cease to apply even when the question of guilt has been settled by acquittal or suspension of trial for procedural reasons.¹⁹⁶

The presumption of innocence is particularly important in criminal proceedings. As a principle in criminal proceedings and as the subjective right of the accused, it applies in two ways: First, investigation authorities are required to treat the suspect by taking his presumed innocence into account. The second application relates to the law of evidence and proof in criminal proceedings. The Court subsumes the latter under the notion of “in dubio pro reo.”¹⁹⁷ In addition, the ECtHR has repeatedly pointed out in its case law the close link between the presumption of innocence and the right against self-incrimination.¹⁹⁸

b) Specific requirements

aa) Prosecution

The requirement to treat someone as innocent until proven guilty in accordance with the law does not establish a general prohibition to take investigation measures against the suspect that, to a certain degree, are based on the assumption that he might have committed the crime in question.¹⁹⁹ The systematic interpretation of the presumption of innocence in connection with Art. 5 (1) lit. c ECHR, which provides for the defendant's detention for purposes of interrogation on suspicion of

¹⁹⁵ ECtHR *Allen v. The United Kingdom*, no. 25424/09, §§ 103 ff., 12 July 2013.

¹⁹⁶ ECtHR *Minelli v. Switzerland*, no. 8660/79, §§ 20 ff., 25 March 1983; ECtHR *Allen v. The United Kingdom*, no. 25424/09, §§ 78 ff., 12 July 2013; *Trechsel*, pp. 155 f.

¹⁹⁷ *Ibid.*

¹⁹⁸ ECtHR *Allen v. The United Kingdom*, no. 25424/09, § 93, 12 July 2013; *Theophilopoulos*, S. Afr. Mercantile L. J. 16 (2004), 24.

¹⁹⁹ ECtHR *John Murray v. The United Kingdom*, no. 18731/91, § 58, 8 February 1996; *Gaede*, p. 231 Fn. 114; *Trechsel*, p. 154.

having committed an offense, leads to the same conclusion.²⁰⁰ As long as the investigation measures do not assume a suspect's guilt, reverse the burden of proof, or amount to an anticipated penalty, they do not raise specific presumption of innocence issues.²⁰¹ However, the more the consequences of such measures have a severe or conviction-like impact on the person, the more the presumption of innocence needs to be applied. In this context, the presumption of innocence does not question the legitimacy of pre-trial detention itself but is a strong argument for a strict verification that the conditions have been met, that effective legal remedies were provided, and that its duration is reasonable.²⁰² In the same vein, the ECtHR holds that the presumption of innocence is violated if the fingerprints of an accused person continue to be retained regardless of an acquittal or the discontinuation of proceedings.²⁰³

In the context of pre-trial investigations against a suspect, the ECtHR's focus is on the issue of "pre-trial publicity and premature expressions, by the trial court or by other public officials ... [in respect of] a defendant's guilt."²⁰⁴

With regard to economic crimes and corporate activities, the Court ruled as follows:

In *UBS AG v. France*, the bank UBS AG and its subsidiary UBS France were placed under investigation based on the suspicion that the bank illegally sold banking and financial products and committed aggravated laundering of the proceeds of tax fraud. For both charges, the bank was further placed under court supervision and subjected to pay a security deposit of several million euros in order to ensure the payment of any future compensation for damages and of a fine.²⁰⁵

The ECtHR assumed that the presumption of innocence under Art. 6 (2) ECHR also applies to criminal proceedings directed against a legal entity under French law. With regard to the subject matter of the application it first pointed out that pre-trial decisions or declarations by judicial bodies did not violate the presumption of innocence under Art. 6 (2) ECHR because they merely described and were based on a state of suspicion, not guilt.²⁰⁶

In *Messier v. France*, the defendant, Chairman and Chief Executive Officer of a stock company, claimed that the Secretary General of the French Financial Markets Authority (AMF) violated his right to presumption of innocence when he gave an interview to the

²⁰⁰ ECtHR *Ipek and others v. Turkey*, no. 17019/02 and 30070/02, §§ 28 et seq., 3 February 2009.

²⁰¹ ECionHR *G. and M. v. Italy*, (rep.), no. 12787/87, 27 February 1992, D&R 70, p. 59 (59–102); LR-StPO – Esser, Art. 6 margin no. 478; *Villiger*, p. 229 margin no. 363; *Harris/O'Boyle/Bates/Buckley*, p. 300.

²⁰² ECtHR *Dželili v. Germany*, no. 65745/01, § 69, 10 November 2005; see also *Gaede*, p. 231.

²⁰³ ECtHR *M.K. v. France*, no. 19522/09, § 42, 18 April 2013.

²⁰⁴ ECtHR *Allen v. The United Kingdom*, no. 25424/09, § 93, 12 July 2013.

²⁰⁵ ECtHR *UBS AG v. France* (dec.), no. 29778/15, §§ 3 et seq., 29 November 2016.

²⁰⁶ ECtHR *UBS AG v. France* (dec.), no. 29778/15, § 17, 29 November 2016.

newspaper La Tribune during the investigation stage. The Secretary General made the following statements on the situation of said company:

On this basis of circumstance, I observe at the moment, I like to call the group to fix the things, without dramatizing, (...). For several months, we have followed the financial media coverage of the company very attentively. During the summer, we reminded them that the communication of a listed group must be based on consolidated data and not only on a part of the activities, in this case the media. In addition, the group did not meet the regulator's requirements by using specific and often misleading aggregates. But we must recognize that at that time we could not measure the extent of these regrettable practices, which we now are able to analyze, very precisely, but a posteriori in the report of investigation of the COB (...)."

The Court found the claim unfounded as the defendant did not exhaust the remedies available against this alleged violation, in the instant case the appeal.²⁰⁷

bb) Trial court

In the jurisprudence of the ECtHR, the core requirements of the presumption of innocence are more explicitly addressed to the trial court or its members, who must rule on the proof of guilt of the accused. In its expression as the *in dubio pro reo* principle, Art. 6 (2) ECHR stipulates three requirements concerning the determination of guilt of the accused. First, the judges have to conduct an "open-ended" trial. Second, the burden of proof lies with the prosecution. Finally, any doubt as to the defendant's guilt must be interpreted in his favor,²⁰⁸ although the case law of the Court is unclear as to whether a certain standard of proof is required and, if so, what it involves.²⁰⁹

The principle of an "open-ended" trial requires the judge not to begin the trial with a preconceived notion of the truth of the accusations raised against the defendant, respectively of his guilt.²¹⁰ Thus, this principle relates to the judge's subjective attitude towards the defendant, which also closely relates to the question of the judge's impartiality. In that respect, the scope of the presumption of innocence is linked with the requirement of an impartial tribunal under Art. 6 (1).²¹¹ According to the Court, the judge's impartiality must be assumed until the contrary is proven.²¹² However, since it is difficult to prove a judge's bias,²¹³ the Court admits that judicial impartiality can be also proven by an objective test.²¹⁴

²⁰⁷ ECtHR *Messier v. France* (dec.), no. 25041/07, 19 May 2009; for the power of the German Anti-Trust Authority to release public statements see *Schmitz*, wistra 4 (2016), 134.

²⁰⁸ ECtHR *Melich v. Czech Republic*, no. 35450/04, § 49, 24 July 2008; *Gaede*, p. 230; see also *Zrvandyan*, p. 32.

²⁰⁹ ECtHR *Barberà, Messegue and Jabardo v. Spain*, no. 10590/83, § 77, 6 December 1988; see also *Trechsel*, p. 167; *Harris/O'Boyle/Bates/Buckley*, p. 302.

²¹⁰ ECtHR *Telfner v. Austria*, no. 33501/96, § 15, 20 March 2001; *Trechsel*, p. 165.

²¹¹ ECtHR *Harabin v. Slovakia*, no. 58688/11, § 131, 20 November 2012.

²¹² ECtHR *Piersack v. Belgium*, no. 8692/79, §§ 30 ff., 1 October 1982.

The requirement of impartiality typically does not prohibit the judge from suspecting and taking adverse measures against the accused person. This includes, in particular, the court's decision on the detention of the defendant during the main trial.²¹⁵ Moreover, while coping with other procedural issues, in particular with decisions on the defendant's request regarding evidence taking,²¹⁶ commenting on the defendant's statements,²¹⁷ or other introduced evidence,²¹⁸ judges are still compelled to observe the principle that the burden of proof lies with the prosecution and to refrain from any statements that would imply the guilt of the accused or undermine the chances of success of his defense until the end of the proceedings. Finally, a judge's bias can be seen in the reasoning of the judgment, such as where a judge bases his belief in the guilt of the accused on an undue and extensive assessment of the evidence. According to the Court, this is the case when the judge uses the silence of the accused to draw adverse conclusions that are incompatible with common sense. The drawing of such conclusions also shows, according to the ECtHR, the lack of the impartiality of the judge. At the same time, the judge would thereby reverse the burden of proof for the accused, because the accusations against him will be not sufficiently proven.²¹⁹ However, as long as the drawing of adverse inferences remains within certain limits and other conditions set out by the Court are met, such conduct on the part of the judge is not incompatible with the presumption of innocence under Art. 6 (1) ECHR.²²⁰

In the context of economic and business activities, namely regarding the imposition of administrative criminal sanctions, the Court ruled as follows:

In the case of *Messier v. France* already mentioned above, the defendant, the Chairman and Chief Executive Officer of a stock company, claimed that the President of the Sanctioning Committee of the French Financial Markets Authority (AMF) violated his right to presumption of innocence when he gave an interview to the newspaper *La Tribune*. The

²¹³ ECtHR *Albert und Le Compte v. Belgium*, nos. 7299/75 and 7496/76, § 32, 10 September 1983.

²¹⁴ ECtHR *De Cubber v. Belgium*, no. 9186/80, §§ 26 ff., 26 October 1984.

²¹⁵ ECtHR *Romenskiy v. Russia*, no. 22875/02, § 27, 13 June 2013.

²¹⁶ ECionHR *X v. The United Kingdom*, (rep.), no. 12787/87, 21 March 1975; D&R 3, p. 16 (10–24); *Villiger*, p. 265 margin no. 419.

²¹⁷ ECionHR *H. H. v. Austria* (dec.), no. 6181/73, 5 October 1974 § 2 Law.

²¹⁸ See ECionHR (dec.), no. 8375/78, Commission decision of 10 March 1981, unreported, Strasbourg Case-Law relating to The European Convention on Human Rights Volume 2 (Art. 5) pp. 736 f.

²¹⁹ ECtHR *Telfner v. Austria*, no. 33501/96, §§ 12 f., 20 March 2001; see for that *Trechsel*, p. 16; *Harris/O'Boyle/Bates/Buckley*, p. 300; LR-StPO-Esser, Art. 6 margin no. 464.

²²⁰ See for instance ECtHR *John Murray v. The United Kingdom*, no. 18731/91, §§ 48 et seqq., 8 February 1996.

Court considered the claim unfounded as the President gave the interview only after the verdict had been pronounced and because his statements were general in nature.²²¹

In *Peterson Sarpsborg v. Norway*, the six defendants, three companies and their respective managing directors, claimed that their right to presumption of innocence was not respected, because the proof of their guilt in criminal proceedings was not “according to law” as explicitly stipulated in Art. 6 (2) ECHR. In the instant case, the national price authority was investigating rumors about unlawful collaboration over prices, and in the course of these investigations, the directors were obligated to give statements. A refusal to give a statement was punishable. According to the defendants, the presumption of innocence principle was not respected, because the statements obtained during the administrative investigations were used to prove their guilt in the criminal trial. In doing so, the authorities and the courts applied a “law” not intended for conducting criminal proceedings. However, Art. 6 (2) requires guilt to be proven in accordance with the law that specifically regulates criminal proceedings. By applying a law other than the law on criminal proceedings to prove their guilt, Art. 6 (2) was violated.

Not commenting on this interpretation of Art. 6 (2) ECHR, the former Commission pointed out that there are no indications in the case that “the trial court in fulfilling its function started from the presumption that the applicants had committed the acts with which they were charged.”²²²

In the case of *Vernes v. France*, the defendant, chairperson of a financial company, claimed that his right to an impartial tribunal was violated because the names of the Sanctioning Committee of the former French Security and Exchange Commission (COB) were not disclosed to him. In fact, the respective provisions of French law did not require this. In view of the importance of the sanction imposed on the defendant, namely a permanent prohibition on performing certain economic activities, the Court held that he was justified in casting doubt on the impartiality of the persons who decided on the sanction against him.²²³

cc) Legislature

The presumption of innocence binds not only the trial judge but also the legislature. The law may not reserve the burden of proof to the detriment of the accused as a matter of principle. However, in this context the Court permits stipulating legal or factual presumptions if they are confined within reasonable limits, notably in view of the importance of what is at stake and the possibility of the defendant to defend himself.²²⁴ Above all, such presumptions allow the judge to assume certain elements of the offense in question as proven even though there is only proof of other elements that are not directly related and the defendant cannot convince the judge of the opposite. In particular, the Court accepts as a matter of principle that contracting states, for instance in their tax law, may penalize, under certain condi-

²²¹ ECtHR *Messier v. France* (dec.), no. 25041/07, 19 May 2009

²²² ECionHR *Peterson Sarpsborg AS and others v. Norway* (dec.), no. 25944/94, 27 November 1996.

²²³ ECtHR *Vernes v. France*, no. 30183/06, § 32, 20 January 2011.

²²⁴ ECtHR *Salabiaku v. France*, no. 10519/83, § 28 ff., 7 October 1988; *Harris/O'Boyle/Bates/Buckley*, pp. 301 ff.; *Treichsel*, p. 168.

tions, “a simple or objective fact as such” without any reference to the mental state of the defendant even though Art. 6 (2) ECHR requires proof of *guilt* in accordance with the law.²²⁵ Similarly, the Court found no violation of the presumption of innocence principle with regard to the Austrian administrative criminal law, which assumes at least the defendant’s negligence based on the mere fact that he contravened an offense.²²⁶ In case of minor traffic offenses, the former Commission went further and approved the compliance with the Swedish law that held the registered owner of a car responsible for some traffic offenses.²²⁷

By allowing legal and factual presumptions, not only is the burden of proof shifted from the prosecutor to the defendant but the defendant also does not benefit from doubts regarding his guilt, is forced to give inculpatory evidence, and waives his right to remain silent. It seems that the Court is ready to accept significant restrictions on the presumption of innocence and the right against self-incrimination as long as the prosecution proves *prima facie* the accusations raised against the defendant and the defendant can be expected to defend himself. These restrictions seem to be conceptual consequences of the right to a fair trial, which, for the Court, is mainly guaranteed by the principles of the equality of arms and the adversarial trial.

2. Right to prepare the defense

a) General concept

Art. 6 (3) lit. b ECHR guarantees the accused “to have adequate time and facilities for the preparation of his defense.” According to the Court, the accused must have the opportunity to organize his defense in such a way that he has the opportunity to bring all the relevant defense arguments before the court to influence the outcome of the proceedings. For the Court, the defense activities of the accused include everything “necessary” to prepare for trial. In this respect, Art. 6 (3) lit. b ECHR does not entail an exhaustive list but aims to establish the equality of arms between prosecution and defense. The “facilities” to be given to the accused are limited to those that assist or may assist the accused in the preparation of his defense.²²⁸

²²⁵ ECtHR *Västberga Taxi Aktiebolag and Vulic v. Sweden*, no. 36985/97, § 112, 23 July 2002.

²²⁶ ECtHR *Müller v. Austria*, no. 12555/03, 5 October 2006 (illegal employment of a foreigner); ECtHR *Hauser-Sporn v. Austria*, no. 37301/03, 7 December 2006 (failure to inform the next police station about the accident); ECtHR *Stempfer v. Austria*, no. 18294/03, 26 July 2007 (failure to stop after the traffic accident and to inform the next police station).

²²⁷ ECionHR *Duhs v. Sweden*, no. 12995/87, 7 December 1990.

²²⁸ ECtHR *Mayzit v. Russia*, no. 63378/00, 63378/00, §§ 78–79, 20 January 2005; ECtHR *Kornev and Karpenki v. Ukraine*, no. 17444/04, § 66, 21 October 2010; see also *Zrvandyan*, p. 85.

b) *Access to the files*

The Court derives the defendant's right to access to the files from the equality of arms principle. According to the Court's jurisprudence, this principle includes, *inter alia*, the defendant's fundamental right to adversarial criminal proceedings. It is inherent in the very notion of an adversarial trial that "both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party."²²⁹ If the so-called files contain such observations and evidence, the Court requires guaranteed access to these files. In describing this right, the Court speaks of "the right to inspect the court file"²³⁰ or the right to "access to the case file."²³¹ Particularly relevant are the individual pieces of evidence in the case files on which the charges against the accused are based. They include both documentary evidence, such as records of witness testimony, as well as physical evidence, such as *corpus delicti*. Affording access means that the defendant must be enabled to inspect and study the prosecution's evidence against him.²³² The right of access to the files in accordance with Art. 6 (1) principally guarantees full and unrestricted access to all parts of the case files, *inter alia*, the opportunity to obtain an unrestricted copy of all documents, to take full notes, and to rely fully on them.²³³

The right to access to the case file is not absolute.²³⁴ The question of whether the defendant has been denied the right to a fair trial by restricting his right of access to the file must be answered by considering three factors: whether he defends himself or through a lawyer, what the reasons are for the restriction, and how it impaired his defense in the specific case.²³⁵ The restriction that only the lawyer of the defendant has access to the case files is not in itself incompatible with Art. 6 ECHR.²³⁶ However, a personal inspection of the case file might be necessary in the specific case, for instance if, due to his privileged knowledge, the accused person is better able to assess the significance of the comprehensive evidence submitted by the prosecution, and if the lawyer is unable to bring the extensive content of the file to the attention of his client.²³⁷ Such a restriction is incompatible if the defendant does

²²⁹ ECtHR *Öcalan v. Turkey*, no. 46221/99, § 166, 12 March 2003; ECtHR *Foucher v. France*, (rep.), no. 22209/93, § 36, 18 March 1997.

²³⁰ ECtHR *Öcalan v. Turkey*, no. 46221/99, § 160, 12 March 2003.

²³¹ ECtHR *Moiseyev v. Russia*, no. 62936/00, § 217, 9 October 2008.

²³² ECtHR *Öcalan v. Turkey*, no. 46221/99, § 164, 12 March 2003.

²³³ ECtHR *Welke und Bialek v. Poland*, no. 15924/05, § 65, 1 March 2011.

²³⁴ ECtHR *Öcalan v. Turkey*, no. 46221/99, § 140, 12 May 2005.

²³⁵ ECtHR *Foucher v. France*, (rep.), no. 22209/93, § 35, 18 March 1997.

²³⁶ See also ECionHR *X v. Austria* (rep.), no. 7060/75, § Law, 5 July 1977; ECtHR *Kamasinski v. Austria*, no. 9783/82, § 88, 19 December 1989; ECtHR *Kremzow v. Austria*, no. 12350/86, § 52, 21 September 1993; ECionHR, *Kitov v. Denmark*, (dec.), 29759/96, 16 March 1999 § 2d Law; ECionHR (dec.), *Lanz v. Austria*, 24430/94, 21 May 1998, § 2d.

²³⁷ ECtHR *Öcalan v. Turkey*, no. 46221/99, § 142, 12 May 2005

not have a lawyer and seeks to defend himself in person in accordance with Art. 6 (3) lit. c ECHR.²³⁸ The restriction for one month at the stage of preliminary investigations due to the risk of suppression of evidence (minutes of the wiretapping contained in the investigation files) in the case of *Talirz* did not render the trial unfair as such a brief restriction did not impair the defendant's defense.²³⁹ Another issue that arises with regard to the right to access the case file is the time given to the defense to inspect the file.²⁴⁰ Especially in cases where the file comprises documents consisting of thousands of pages, the defense must be given sufficient time for studying the file prior to the beginning of the court trial.²⁴¹

*c) Restrictions on the right to prepare the defense
in criminal and administrative criminal proceedings*

aa) Non-defense related documents

In the case of *Messier v. France*, the defendant, Chairman and Chief Executive Officer of a stock company, claimed that his access to the files of the proceedings before the sanctioning committee of the French Financial Markets Authority (AMF) was restricted, as the files accessible to him did not contain some of the evidence that was at the disposal of the investigating branch of the AMF.

In this case, the AMF investigators had seized all the documents at the company's headquarters and copied them to CD-ROMs and DVDs. These comprised all the files on the computers and the email communication of all company executives including the defendant's as well as his agenda, address book, and notes.²⁴² The Court, however, was not convinced that the selection of evidentiary material by the investigation branch of the AMF impaired the adversarial nature of the proceedings before the sanctioning committee of AMF and the defense of the defendant. It accepted that the investigators in the instant case collected a huge amount of documents, which were partially unrelated to the ongoing investigations. Thus, the Court held that the defendant was not denied access to the files that were sent to the sanctioning committee. Moreover, the defendant already held the originals of the emails and other evidentiary material in question and failed to make any reservation during the seizure stating that the list of copied material is not complete. Final-

²³⁸ ECtHR *Foucher v. France*, (rep.), no. 22209/93, § 36, 18 March 1997; see also *Ambos*, ZStW (115) 2003, 601.

²³⁹ ECionHR *Talirz v. Austria*, (dec.), no. 21837/93, 02 March 1994 § 2 Law; see also ECionHR *Du Bois v. The Netherlands* (dec.), 21 November 1998 § Law.

²⁴⁰ ECtHR *Klimentyev v. Russia*, no. 46503/99, § 107, 16 November 2006.

²⁴¹ For shortcomings in this regard see ECtHR *Öcalan v. Turkey*, no. 46221/99, § 167, 12 May 2005; ECtHR *Öcalan v. Turkey*, no. 46221/99, §§ 145f., 12 May 2005; for compliance with the time requirement see ECtHR *Kremzow v. Austria*, no. 12350/86, § 48, 21 September 1993.

²⁴² ECtHR *Messier v. France*, no. 25041/07, §§ 56–57, 30 June 2011.

ly, although he submitted a list of missing documents before the sentencing committee, he was unable to substantiate in which way they would influence the outcome of the proceedings und benefit his defense.²⁴³

bb) Short time for inspection of the court files

In *Oao Neftyanay Kompaniya Yukos v. Russia*, the Court found that the defendant's right to Art. 6 (3) lit. b ECHR was violated because four days were not sufficient to inspect case files of at least 43,000 pages. For the Court, the fact that the defendant had a number of lawyers on his defense team did not change the result that a proper preparation of defense was not possible.²⁴⁴

cc) Expeditious proceedings

The right “to have adequate time and facilities for the preparation of his defence” under Art. 6 (3) lit. b ECHR may be restricted in so-called expeditious proceedings for minor offenses. According to the Court, this way of proceeding itself does not contradict the notion of a fair trial under Art. 6 (1) ECHR. However, after the defendant has been apprehended and before he appears at the hearing before the judge, the defendant must have sufficient time to prepare his defense: a period of “a couple of hours”²⁴⁵ or “a few hours”²⁴⁶ indicates that the defendant did not have adequate time to familiarize himself with the accusations and evidence against him and to prepare a defense prior to his appearance.²⁴⁷

3. Right to be heard and oral hearing

a) General concept

Art. 6 (1) ECHR guarantees the defendant “a fair and public *hearing*... by an independent and impartial tribunal.” The Court's notion of fairness of the hearing – broadly speaking – is first and foremost an oral hearing by the court of first instance. The requirement of an oral hearing intends to protect the defendant against a written trial where the defendant's opportunities to participate and influence the outcome of criminal proceedings against him are considerably restricted. Specifi-

²⁴³ ECtHR *Messier v. France*, no. 25041/07, §§ 58 et seqq., 30 June 2011.

²⁴⁴ ECtHR *Oao Neftyanay Kompaniya Yukos v. Russia*, no. 14902/04, § 541, 20 September 2011.

²⁴⁵ ECtHR *Borisova v. Bulgaria*, no. 56891/00, § 43, 21 December 2006.

²⁴⁶ ECtHR *Kornev and Karpenki v. Ukraine*, no. 17444/04, §§ 67–68, 21 October 2010.

²⁴⁷ See also ECtHR *Ashughyan v. Armenia*, no. 33268/03, § 66, 17 July 2008; ECtHR *Menesheva v. Russia*, no. 59261/00, 9 March 2006 (forceful resistance to a lawful order or demand by a police officer).

cally, this includes the opportunity to present his defense orally, to be present during the evidence taking, thereby to take notice of the evidence against him, and to contest the evidence.²⁴⁸ Art. 6 (1) ECHR demands these high guarantees in criminal proceedings because “the allocation of criminal responsibility” to the defendant as well as “the imposition of a punitive and deterrent sanction” on him are at stake.²⁴⁹

Despite the importance of the right to an oral hearing, this right is not absolute.²⁵⁰ The Court allows restrictions in view of the nature of offenses in question and the nature and severity of the sanction imposed. In doing so, the Court points to a differentiation that already underlies the applicability of the right to a fair trial itself under Art. 6 (1) ECHR. The Court highlights that, by applying the *Engel*-criteria, areas not formally covered by a customary notion of criminal law fall under this provision, notably administrative offenses, customs offenses, pecuniary sanctions for breach of competition law, and fines imposed by financial courts. However, the Court holds that the fact that Art. 6 (1) ECHR (criminal limb) applies does not necessarily mean that the procedural guarantees of Art. 6 (1) ECHR must be observed in all criminal proceedings.²⁵¹ In particular, with regard to the right to an oral hearing, the Court further argues that the weight of the charges in criminal proceedings differ. Not all charges carry the same weight in terms of stigma.²⁵² Furthermore, in criminal proceedings resulting in the imposition of a minor fine on the defendant, the stakes against him are not high.²⁵³

Besides these inherent restrictions on the right to an oral hearing, the Court accepts that by applying expedited or simplified forms of proceedings in case of minor offenses the contracting states are pursuing efficiency, particularly in economic terms or by reducing the judiciary’s workload.²⁵⁴ This indicates that the guarantee of an oral hearing may not only be restricted in rare cases but in proceedings of a

²⁴⁸ ECtHR *Hüseyin Turan v. Turkey*, no. 11529/02, § 31, 4 March 2008; ECtHR *Kammerer v. Austria*, no. 32435/06, 12 May 2010 (failure to have the car inspected).

²⁴⁹ ECtHR *Jussila v. Finland*, no. 73053/01, § 41, 23 November 2006.

²⁵⁰ ECtHR *Jussila v. Finland*, no. 73053/01, 23 November 2006 § 41; ECtHR *Kammerer v. Austria*, no. 32435/06, § 24, 12 May 2010 (failure to have the car inspected); ECtHR *Suhadolc v. Slovenia*, no. 57655/08, 17 May 2001 (driving in excess of the speed limit and driving under the influence of alcohol); see also *Zrvandyan*, p. 73.

²⁵¹ ECtHR *Kammerer v. Austria*, no. 32435/06, § 24, 12 May 2010 (failure to have the car inspected); see also *Meyer*, ZDAR 3/2014, 99; *Brodowski*, FS Vogel, p. 165; for a justification of reduced safeguards in proceedings of regulatory offenses see *Picinali*, Crim. L. & Phil. 11(2017), 681–703.

²⁵² ECtHR *Hüseyin Turan v. Turkey*, no. 11529/02, § 32, 4 March 2008; see also *Meyer*, ZDAR 3 (2014), 100; critical on reducing the procedural guarantees in administrative offenses proceedings by arguing that they lack the moral stigma, *Brodowski*, ZStW 128 (2016), 385.

²⁵³ ECtHR *Kammerer v. Austria*, no. 32435/06, § 24, 12 May 2010 (failure to have the car inspected); see also *Brodowski*, Policy Options, 934.

²⁵⁴ ECtHR *Suhadolc v. Slovenia*, no. 57655/08, 17 May 2001 (driving in excess of the speed limit and driving under the influence of alcohol).

certain area of the law. However, special care must be taken in criminal proceedings concluded by the court of first instance without the possibility of an appeal. In such cases, an oral hearing may only be dispensed with for substantial reasons.²⁵⁵

For the Court, an oral hearing can generally be dispensed with if there are no issues of credibility of evidence or facts in dispute between the prosecutor and the defendant. In such cases, the Court accepts that the trial court can render its judgment in a reasonable way based on observations submitted by the parties and the content of the files.²⁵⁶ However, if there are any questions of fact or law that can only be considered after an oral hearing, the domestic court must hold one. It is compatible with Art. 6 (1) ECHR that the national law assigns the trial court a certain margin of discretion in this regard.²⁵⁷ One problem associated with this are provisions of national law that exclude the possibility of an oral hearing or their automatic application to the same effect. In such cases, the domestic court's decision to dispense with an oral hearing must be reasoned.²⁵⁸ Also, the right to an oral hearing will not be guaranteed if the defendant is not notified about the date of the hearing or not summoned in proper time.²⁵⁹ Finally, the defendant can waive this right, both explicitly and implicitly.²⁶⁰

b) Restrictions on the right to an oral hearing in various contexts

aa) Hearing before regulatory and supervisory administrative bodies

In the above-mentioned case of *Lilly France S.A. v. France*, the French government recognized that the proceeding before the Competition Commission was criminal in nature within the meaning of Art. 6 (1) ECHR, and the complaint by the defendant company that its representative was not heard by the rapporteur of the decision-making body of the Commission, which was acting as the tribunal within the meaning of Art. 6 (1) ECHR, was not appropriate. As the applicant did not expressly request to be heard by the rapporteur and was represented by its lawyer in all subsequent proceedings before the Commission as the decision-making body,

²⁵⁵ ECtHR *Hüseyin Turan v. Turkey*, no. 11529/02, § 33, 4 March 2008.

²⁵⁶ ECtHR *Jussila v. Finland*, no. 73053/01, § 41, 23 November 2006.

²⁵⁷ ECtHR *Özmurat İnşaat Elektrik Nakliyat Temizlik San. ve Tic. Ltd. Şti. v. Turkey*, no. 48657/06, § 32, 28 November 2017; see also *Zrvandyan*, p. 76.

²⁵⁸ ECtHR *Özmurat İnşaat Elektrik Nakliyat Temizlik San. ve Tic. Ltd. Şti. v. Turkey*, no. 48657/06, § 35, 28 November 2017; ECtHR *Baischer v. Austria*, no. 32381/96, 20 December 2001 (failure to inform who had used his car on specific days).

²⁵⁹ ECtHR *Nadtochiy v. Ukraine*, no. 7460/03, § 27, 15 May 2008; ECtHR *Ziliberg v. Moldova*, no. 61821/00, § 41, 1 February 2005; ECtHR *Gutu v. Moldova*, no. 20289/02, 7 June 2007 (disobeying the lawful order of a police officer); see also *Zrvandyan*, p. 73.

²⁶⁰ ECtHR *Kammerer v. Austria*, no. 32435/06, § 24, 12 May 2010 (failure to have the car inspected); ECtHR *Stempfer v. Austria*, no. 18294/03, 26 July 2007 (failure to stop after the traffic accident and to inform the next police station).

the Commission had to assume that the defendant company waived its right to be heard and that its defense rights were not restricted. Moreover, throughout the entire proceedings the defendant company had been able to put forward its observations and its defense both orally and in writing. Furthermore, the defendant company had failed to show how its defense was impaired by the fact that the rapporteur did not hear its representative.²⁶¹

bb) Subsequent review for the imposition of an administrative criminal sanction by the regulatory authorities

In *Hüseyin Turan v. Turkey*, the Court based the violation of the right to an oral hearing on two facts: First, the Turkish criminal procedural code at that time did not provide the defendant with the possibility to request an oral hearing.²⁶² Second, the ECtHR found that a proper administration of justice under the circumstances of the case in question required an oral hearing, where the defendant could have freely made his case on the factual controversies in the charge against him. The completion of the report, which was decisive for his conviction, was particularly controversial as the defendant was not given the opportunity to have the social security inspector and the witnesses questioned, as the court released its judgment based only on the file.²⁶³

In *Özmurat İnşaat Elektrik Nakliyat Temizlik San. ve Tic. Ltd. Şti. v. Turkey*, the Court was convinced that the the trial court should have addressed the credibility of the evidence, in the instant case an inspection report, in an oral hearing. In its request to hold an oral hearing, take additional evidence, and adduce its witnesses, the applicant company had drawn the attention of the domestic court to the fact that a criminal trial for extortion was pending against the officials who had concluded said inspection report. The domestic court not only neglected to give reasons for its denial of the applicant's requests but, for all intents and purposes, also did nothing to clarify the circumstances of the report in question. All these shortcomings led to a violation of Art. 6 (1).²⁶⁴

²⁶¹ ECtHR *Lilly France S. v. France* (dec.), no. 53892/00, 3 December 2002.

²⁶² According to § 302 of the former Turkish criminal procedure code, in such cases the court releases its judgment after holding an oral hearing only if explicitly required by law.

²⁶³ ECtHR *Hüseyin Turan v. Turkey*, no. 11529/02, §§ 34 et seqq., 4 March 2008; see also ECtHR *Becker v. Austria*, no. 19844/08, § 41, 11 June 2015 (violation of the right to have an oral hearing with regard to a civil dispute within the meaning of Art. 6 (1) ECHR because the administrative court gave no specific reason for its decision to find a hearing unnecessary even though the defendant had asked the court to take evidence).

²⁶⁴ ECtHR *Özmurat İnşaat Elektrik Nakliyat Temizlik San. ve Tic. Ltd. Şti. v. Turkey*, no. 48657/06, §§ 34 ff., 28 November 2017.

- cc) Subsequent review for the imposition of the administrative criminal sanction by the police

In *Igor Pascari v. Republic of Moldova*, the Court found a violation of Art. 6 (1) because the national court's judgment on an accident had the effect of *res judicata* with respect to the applicant's guilt. As the latter did not participate in the relevant court hearing and the court nevertheless rendered a guilty verdict according to national law, his right to have an oral and public hearing on the criminal charge raised against him was violated.²⁶⁵

In *Suhadolc v. Slovenia*, the applicant contested his case based on a police procedure, specifically, that it was his car that exceeded the speed limit, measured by an electronic device the police had used. In particular, the applicant requested to provide him with the documents showing the reliability of the laser measuring device. Under these circumstances, the Court found no issue with the credibility of the measuring result since the defendant did not specify in his request how to contest the accuracy of the results. Against the background of the technical nature of the evidence in question, the Court was convinced that the domestic court could reasonably handle the defendant's request based on the file.²⁶⁶

Summary

The jurisprudence of the ECtHR shows that the classification by national legislatures of some offenses as administrative must not lead to a denial of procedural fair trial guarantees. Administrative sanctioning regimes must comply with procedural fair trial guarantees if they prosecute and adjudicate criminal offenses within a broad interpretation of Art. 6 (1) ECHR. This is especially the case if administrative regimes aim to protect values and interests typically covered by criminal law and impose punitive and deterrent sanctions with serious negative consequences. These values also include those of a free and competitive market economy. In this respect, the Court acknowledges the criminal nature of some Italian and French administrative sanctioning regimes in the areas of Banking, Competition, and Financial Markets. It is remarkable that the Court is willing to accept the punitive and deterrent nature of new types of administrative sanctions such as warning, publication of judgment, prohibition from exercising one's profession, or suspension of license due to the serious detrimental effects on the economic existence of corporations or their representatives.

²⁶⁵ ECtHR *Igor Pascari v. The Republic of Moldova*, no. 25555/10, § 27, 30 August 2016.

²⁶⁶ ECtHR *Suhadolc v. Slovenia*, no. 57655/08, 17 May 2001.

Although the Court accepts that the administration initiates and finalizes the investigation and prosecution of minor offenses (given a subsequent judicial review), its partial willingness to apply the same standards in cases involving administrative criminal offenses of huge economic import is subject to criticism. Its approach in cases related to the French independent administrative authorities is preferable, where the Court reviewed and partially approved that they afford the institutional safeguards of an independent and impartial tribunal within the meaning of Art. 6 (1) ECHR.

In this context, the Court requires, *inter alia*, a clear and strict separation of the investigating, prosecuting, and adjudicating units of the independent administrative authorities. In fact, these institutional guarantees, which provide the defendant with an adversarial decision-making process and other procedural fair trial guarantees at the earliest possible time of fact-finding, are more to the advantage of the defendant than a subsequent review by a court, where the imposition of administrative criminal sanctions involves a two-pronged procedure and thus several complications.

The Court correctly acknowledges that, under some circumstances, the right against self-incrimination applies as well. This is particularly the case where administrative proceedings pursue not only certain regulatory aims but also prepare subsequent criminal actions. The application of the right against self-incrimination to corporations raises no principal questions under Art. 6 (1) ECHR as the Court does not explain it by reference to some substantive personality-based considerations but on grounds of procedural fairness. The same is true for the presumption of innocence, which applies not only to press releases and investigation measures against corporations but also to the attitude of the decision-making bodies of defendant corporations.

Another important right of defense in administrative criminal sanctioning proceedings is to have adequate time and facilities to prepare for the case. Particularly the access to the files must be guaranteed. This, however, does not extend to documents unrelated to the defense. Problems may arise if the defense is given a short time for studying the files or if the trial was conducted as part of an expedited procedure.

Finally, regarding restrictions on the right to an oral hearing, the Court distinguishes charges by looking at whether they carry a certain level of stigma and entail severe sanctions. In cases where the level of stigma or the severity of an administrative criminal sanction is in the lower range, the Court is more willing to accept a written process of adjudication and, thus, considerable restrictions on the right to be present and the right to file evidence requests.

Appendix

Judgments on Art. 6 ECHR

Cases involving economic offenses

ECtHR *Özmurat İnşaat Elektrik Nakliyat Temizlik San. ve Tic. Ltd. Şti. v. Turkey*, no. 48657/06, 28 November 2017

ECtHR *Vinci Construction and GMT génie civil et services v. France*, nos. 63629/10 and 60567/10, 2 April 2015

ECtHR *Grande Stevens and Others v. Italy*, no. 18640/10, 4 March 2014

ECtHR *Oao Neftyanay Kompaniya Yukos v. Russia*, no. 14902/04, 20 September 2011

ECtHR *Steininger v. Austria*, no. 21539/07, 17 April 2012

ECtHR *Société Metallurgique Liotard Freres v. France*, no. 29598/08, 5 May 2011

ECtHR *Société Canal Plus et Autres v. France*, no. 29408/08, 21 December 2010

ECtHR *Messier v. France* (dec), no. 25041/07, 19 May 2009

ECtHR *Balyste-Lideikiene v. Lithuania*, no. 72596/01, 4 November 2008

ECtHR *Gutu v. Moldova*, no. 20289/02, 7 June 2007

ECtHR *Västberga Taxi Aktiebolag and Vulic v. Sweden*, no. 36985/97, 23 July 2002

ECtHR *Didier v. France* (dec.), no. 58188/00, 27 August 2002

ECtHR *Funke v. France*, no. 10828/83, 25 February 1993

ECionHR *Société Sténuit v. France* (rep.), no. 11598/85, 30 Mai 1991 (imposition of fine for price fixing between competitors)

ECionHR *Funke v. France* (dec.), no. 10828/83, 06 October 1988

ECtHR *Deweere v. Belgium*, no. 6903/75, 27 February 1980 (proposed friendly settlement of a regulatory offense, notably violating the price order, on threat of provisional closure of the business by the administration)

Cases involving other administrative offenses

Traffic offenses

ECtHR *Igor Pascari v. The Republic of Moldova*, no. 25555/10, 30 August 2016 (involvement in an accident)

ECtHR *Penias and Ortmair v. Austria*, nos. 35109/06 and 38112/06, 18 October 2011 (driving a motor vehicle under the influence of alcohol)

ECtHR *Kammerer v. Austria*, no. 32435/06, 12 May 2010 (failure to have the car inspected)

ECtHR *Schutte v. Austria*, no. 18015/03, 26 July 2007 (failure to comply with a request to stop for the purpose of a traffic control)

ECtHR *Stempffer v. Austria*, no. 18294/03, 26 July 2007 (failure to stop after the traffic accident and to inform the next police station)

ECtHR *Hauser-Sporn v. Austria*, no. 37301/03, 7 December 2006 (failure to inform the next police station about the accident)

ECtHR *Suhadolc v. Slovenia*, no. 57655/08, 17 May 2001 (driving in excess of the speed limit and driving under the influence of alcohol)

ECtHR *Baischer v. Austria*, no. 32381/96, 20 December 2001 (failure to inform who had used his car on specific days)

ECtHR *Schmautzer v. Austria*, no. 155523/89, 23 October 1995 (not wearing the safety belt)
ECtHR *Öztürk v. Germany*, no. 8544/79, 21 February 1984 (causing an accident)

Offenses against demonstration law

ECtHR *Mikhaylova v. Russia*, no. 46998/08, 19 November 2005
ECtHR *Ashughyan v. Armenia*, no. 33268/03, 17 July 2008
ECtHR *Ziliberberg v. Moldova*, no. 61821/00, 1 February 2005

Offenses against the public order (minor hooliganism)

ECtHR *Karelin v. Russia*, no. 926/08, 20 September 2016 (disorderly behavior in a public place)
ECtHR *Fomin v. Moldova*, no. 36755/06, 11 October 2011 (insult)
ECtHR *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, 10 February 2009 (verbal abuse)
ECtHR *Gutu v. Moldova*, no. 20289/02, 7 June 2007 (disobeying the lawful order of a police officer)
ECtHR *Borisova v. Bulgaria*, no. 56891/00, 21 December 2006 (verbal exchange)
ECtHR *Menesheva v. Russia*, no. 59261/00, 9 March 2006 (forceful resistance to a lawful order or demand by a police officer)
ECtHR *Kadubec v. Slovakia*, no. 5/1998/908/1120, 2 September 1998 (refusing to obey police officers)
ECtHR *Lauko v. Slovakia*, no. 4/1998/907/1119, 2 September 1998 (causing a nuisance)

Minor marketplace offenses

ECtHR *Kuzmickaja v. Lithuania* (dec), no. 27968/03, 10 June 2008 (defrauding a customer)

Minor offenses against court order

ECtHR *Kornev and Karpenki v. Ukraine*, no. 17444/04, 21 October 2010

Customs offenses

ECtHR *Zaja v. Croatia*, no. 37462/09, 4 October 2016 (importing a car without paying relevant taxes)
ECtHR *Khrstov v. Ukraine*, no. 24465/05, 19 February 2009
ECtHR *Nadtochiy v. Ukraine*, no. 7460/03, 15 May 2008
ECtHR *Tarasjuk v. Ukraine*, no. 39453/02, 24 June 2008

Labor law offenses

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ECtHR *Müller v. Austria*, no. 12555/03, 5 October 2006 (illegal employment of a foreigner)

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ECtHR *Van Vondel v. The Netherlands* (dec.), no. 38258/03, 23 March 2006

ECtHR *Shannon v. The United Kingdom*, no. 6563/03, 4 October 2005

ECtHR *Kansal v. The United Kingdom*, no. 21413/02, 27 April 2004

ECtHR *Allen v. The United Kingdom* (dec), no. 76574/01, 10 September 2002

ECtHR *Weh v. Austria*, no. 38544/97, 8 April 2004

ECtHR *I.J.L. v. The United Kingdom*, nos. 29522/95, 30056/96, and 30574/96, 19 September 2000

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List of Abbreviations

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| Art. | Article |
| Crim. L. & Phil. | Criminal Law and Philosophy |
| Dec. | Decision |
| ECHR | European Convention on Human Rights |
| ECionHR | European Commission of Human Rights |
| ECtHR | European Court of Human Rights |
| ed./eds. | editor/editors |
| et seq./et seqq. | et sequens/et sequentes |
| FS | Festschrift |
| GC | Grand Chamber |
| LR-StPO | Löwe-Rosenberg Strafprozessordnung |
| Rep. | Report |
| S. Afr. Mercantile L. J. | South African Mercantile Law Journal |
| v. | versus |
| wistra | Zeitschrift für Wirtschafts- und Steuerstrafrecht |
| ZDAR | Zeitschrift für Deutsches und Amerikanisches Recht |
| ZIS | Zeitschrift für internationale Strafrechtsdogmatik |
| ZÖR | Zeitschrift für öffentliches Recht |
| ZStW | Zeitschrift für die gesamte Strafrechtswissenschaft |

The growing trend toward using administrative sanctioning mechanisms in order effectively to control economic, minor, and mass offences raises the question of how the safeguards of a fair trial in the sense of Article 6 of the European Convention on Human Rights (ECHR) can be afforded while the administrative authorities continue to enjoy broad flexibility in the regulation, inspection, and supervision of certain areas of economic and public life. To answer this question, the present contribution, first, identifies the administrative sanctioning mechanisms that must be deemed criminal in nature within the meaning of the ECHR. Second, it examines the procedural guarantees of a fair trial and their effects on the institutions and actors in charge of administrative sanctioning proceedings, on the status of the defendant, and on the additional safeguards that arise in the course of the decision-making process. More specially, it focuses on the following rights of the defendant as they are interpreted in the jurisprudence of the European Court of Human Rights: access to an impartial and independent tribunal, the privilege against self-incrimination, the presumption of innocence, the right to prepare a defence, the right to be heard, and the right to oral hearings.

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