Procedural Guarantees for Criminal and Administrative Criminal Sanctions under European Human Rights Convention (Some Selected Issues)

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Overview

I. Administrative sanctioning regimes
II. Institutional guarantees
III. Right against the self-incrimination
I. Administrative sanctioning regimes

A. Basic requirements (*Engel*-criteria)

- *National law*

Minor offences and irregularities in the area of economic and business activities: quite closed to the national criminal law and understood as criminal law in broad sense.

- *Nature of offence*

Protection of ‘values and interests normally falling within the sphere… of criminal law’.

Regulation of certain conducts by means of sanctioning

- *Nature and severity of the sanction*

Punitive and deterrent

Threshold of ‘a serious detriment’.
I. Administrative sanctioning regimes (criminal)

B. Examples

*Areas of criminal minor offences*

- Traffic offence
- Offences against demonstration law
- Offences against public order (minor hooliganism)
- Customs offences
- Offences against social security regulations
- Offences against restrictions of labor law with regard to foreigners

*Other criminal administrative sanctioning regimes*

- Italian Competition and Market Authority (AGCM)
- Italian Companies and Exchange Commission (CONSOB)
- French Financial Market Authority (AMF)
- French Banking Commission
I. Administrative sanctioning regimes (criminal)

B. Examples

*Besides imprisonment and convertible fines:*

- Suspension of driving licence
- Unconvertible fine
- Publishing of the judgment
- Warning
- Permanent prohibition from exercising certain economic activities
- Suspension of the trading licence for six months
- Confiscation
- Demolishing a house in case of that it is illegal built
II. Institutional guarantees

A. Basic requirements

The determination of the charge against the defendant by an ‘independent and impartial tribunal’ [Article 6 (1)]

Minor offences: ‘too trivial to be governed by the ordinary substantive and procedural criminal law’ [ECtHR]

‘The prosecution and punishment… to be primarily a matter for the administrative authorities’: a subsequent judicial review is sufficient [ECtHR]

Not convincing for severe sanctions imposed, for instance by the so-called independent or supervisory administrative authorities.

The administrative fact-finding and decision-making proceedings must be: inter alia, adversarial, under the guarantee of equality of arms and evidentiary standards of Article 6 (1).
II. Institutional guarantees

A. Basic requirements
Strict separation of investigating and prosecuting entities from the deciding body.
Charging and trying must not be conducted by the same person.
The guilt must not be established at the very beginning of the trial.

B. Examples
- Merge of investigating and deciding body (violation): Italian Companies and Exchange Commission (CONSOB) in ECtHR Grande Stevens and Others v. Italy, no. 18640/10, 4 March 2014
III. Right against the self-incrimination

A. In administrative proceedings
In principle no application: no charge and no pending or anticipated criminal proceedings.

Misusing of administrative proceedings for evidence collection: violating this right!

Administrative proceedings with double functions: only under the guarantee of exclusion of compulsory obtained evidence in following criminal proceedings.

In case of parallel pending proceedings: compulsion is not permitted.
III. Right against the self-incrimination

B. Its application for companies

*Former Commission*: Peterson Sarpsborg v. Norway

Left open: ‘whether or to what extent *these companies* can incriminate themselves through the statements of their employees’.

Directors and companies were the accused of the same criminal proceedings!

ECtHR: not yet decided.

Protection of the defendant form undue compulsion by the authorities: no general protection of his will as requirement of human dignity or the right of self-determination

Rather a procedural understanding: no doubt that this right is applicable for companies: some indications in Bern Lahrsen Holding and others v. Norway.
Thank you for your attention

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