

Faculté de Droit,  
d'Économie  
et de Finance

# **Delivering proportionality Administrative v criminal law enforcement**

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# Outline

## **Delimitation of the scope:**

- SSM
- Sanctions
- Enforcement

## **The SSM as a “quasi-criminal” enforcement system**

## **Proportionality and administrative “punitive” sanctions:**

- Antitrust as a blueprint
- Horizontal (or internal) proportionality
- Vertical proportionality
- Diagonal proportionality

## **Conclusions**

# SSM as a quasi-criminal enforcement system:

- ECHR case law developed the so-called Engel criteria (alternative):
  - Categorisation in the domestic law as criminal;
  - Punitive nature of the offence,
  - Nature and degree of severity of the possible penalty
- (ECHR, *Engel and o.*, 1971, ECHR, *Menarini*, 2011, CJEU *Akerberg Fransson*, 2013; ECHR, *A.B. v Norway*, 2016)
- Punitive nature of the administrative sanctions of Article 18 SSM Reg.
- Consequences: a different constitutional framework at the EU level:
  - *Nulla poena sine lege* (Article 7 ECHR, Article 49(1) CFR)
  - *Nulla poena sine culpa*
  - Defense rights (Article 6 ECHR, Article 48 CFR)
  - Right to an effective remedy with full jurisdiction (Article 47 CFR)
  - *Ne bis in idem* (Article 4 Prot. 7 ECHR, Article 50 CFR)

# Proportionality test

First, any measure of public policy impairing the citizen's rights and liberties must generally be suitable.

Second, the measure must be necessary.

Third, it must be appropriate and strictly proportionate (proportionality *stricto sensu*).

# A different concept of proportionality?

Criminal law	EU Administrative law
Ancient roots: 18 <sup>th</sup> century	Recent origins (German Const. court)
Utilitarianism (Bentham)/Retributivism (Kant)	Utilitarianism more than retributivism Posner
Mostly individuals: personal liberty	Mostly legal entities: pecuniary penalty
Balancing between general and special prevention with reeducation	General prevention as the main goal Deterrence and symbolic fines (Antitrust guidelines, 36) Naming and shaming
Shared concept (not shared consequences – EAW)	Fragmented and unstable concept National differences on the nature, the scope and the role of the principle
Cardinal and ordinal proportionality	Tailor-made Economic solvency is crucial
Full judicial scrutiny	Full jurisdiction? Role of the Court of justice?

# Proportionality in administrative penalties

- What if they are considered as criminal?
  - A different concept of proportionality: Article 20 of the CFR-EU) equality before the law
  - A shift in the Constitutional paradigm: Article 49 CFR-EU: retributive approach
  - *“49(3) CFR: 3. The severity of penalties must not be disproportionate to the criminal offence”.*
- A stronger right to an effective judicial remedy

# Proportionality in administrative penalties: Antitrust as a blueprint?

- Guidelines of the Commission on the method of setting fines imposed pursuant to Article 23(2)(a) of Reg 1/2003 (2006/C 210/02)
- Basic amount
  - Value of sales x Gravity x Duration
  - + "Entry fee"
  - Adjustment factors
  - Aggravating circumstances
  - Mitigating circumstances
  - Deterrence multiplier
  - Legal maximum
  - Fines reductions

# Proportionality in administrative penalties: Antitrust as a blueprint?

- Antitrust as a blueprint: full or unlimited jurisdiction of the CJEU
  - the measure is suitable for the pursued objective
  - it is necessary since no less restrictive measure would be equally adequate
  - It is proportionate *stricto jure* (ECJ, Käserei Champignon hofmeister C-210/00)
- But: Deferential approach of the CJEU toward the Commission discretion on the economic assessment
- After 2011 and ECtHR in *Menarini*: full jurisdiction entails full control and limited deference for the discretionary powers of the administrative authority (CJEU KME Germany AG, 2011; FI Smith and Co., 2014)



# Proportionality in the SSM: horizontal dimension

- No (public) guidelines for the sanctioning powers of the SSM
- On the *an*:
  - What for minor offences?
- On the *quomodo*:
  - Which are the criteria to choose between a measure (cease and desist) or a pecuniary penalty?
  - Leniency programs?
- On the *quantum*:
- Lack of ranking among the offences (cardinal proportionality)
- Lack of ranking among the sanctions (ordinal proportionality)
- No minimum
- Proportionality *strictu sensu*: “profits gained or loss avoided”
- “Limited judicial review”

# EU Legal framework for judicial control

Article 47 CFR

Everyone whose rights ...are violated has the right to an effective remedy before a tribunal

Recital 86 SSM reg.

the SSM reg. should respect the fundamental rights and observes the principles recognised in the Charter of FR, in particular ...the right to an effective remedy

article 51 CFR

same meaning of article 6 ECHR

# Models of jurisdiction for administrative penalties

## Limited jurisdiction

- Article 261 TFEU: regulations on penalties may confer unlimited jurisdiction
- Article 263 TFEU: action for annulment of ECB decisions limited to the legality
- Two months from the publication, notification or execution
- If the action is well founded the CJEU shall declare the act concerned to be void
- Article 267 TFEU: preliminary ruling on the validity of acts of the institutions

## Unlimited jurisdiction

- Article 31 reg. 1/2003: “the CJEU should have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or PPP. It may cancel, reduce or increase the fine or PPP imposed”.

Article 5 reg. 2532/98: “the CJEU shall have unlimited jurisdiction within the meaning of Article (261 TFEU) over the review of final decisions whereby a sanction is imposed”

# Limited or unlimited jurisdiction for the SSM administrative penalties?

## Art. 13 SSM

Only the CJEU can review the necessity or the lawfulness of the investigative measures

## Art. 18(4) SSM

The ECB shall apply this Article...including the **procedures** contained in Reg 2532/98 as **appropriate**

Provisional conclusion:  
limited jurisdiction

## Art. 24(11) SSM

Administrative Board of Review: no judicial nature

right to bring proceedings before the CJEU in accordance with the Treaties.

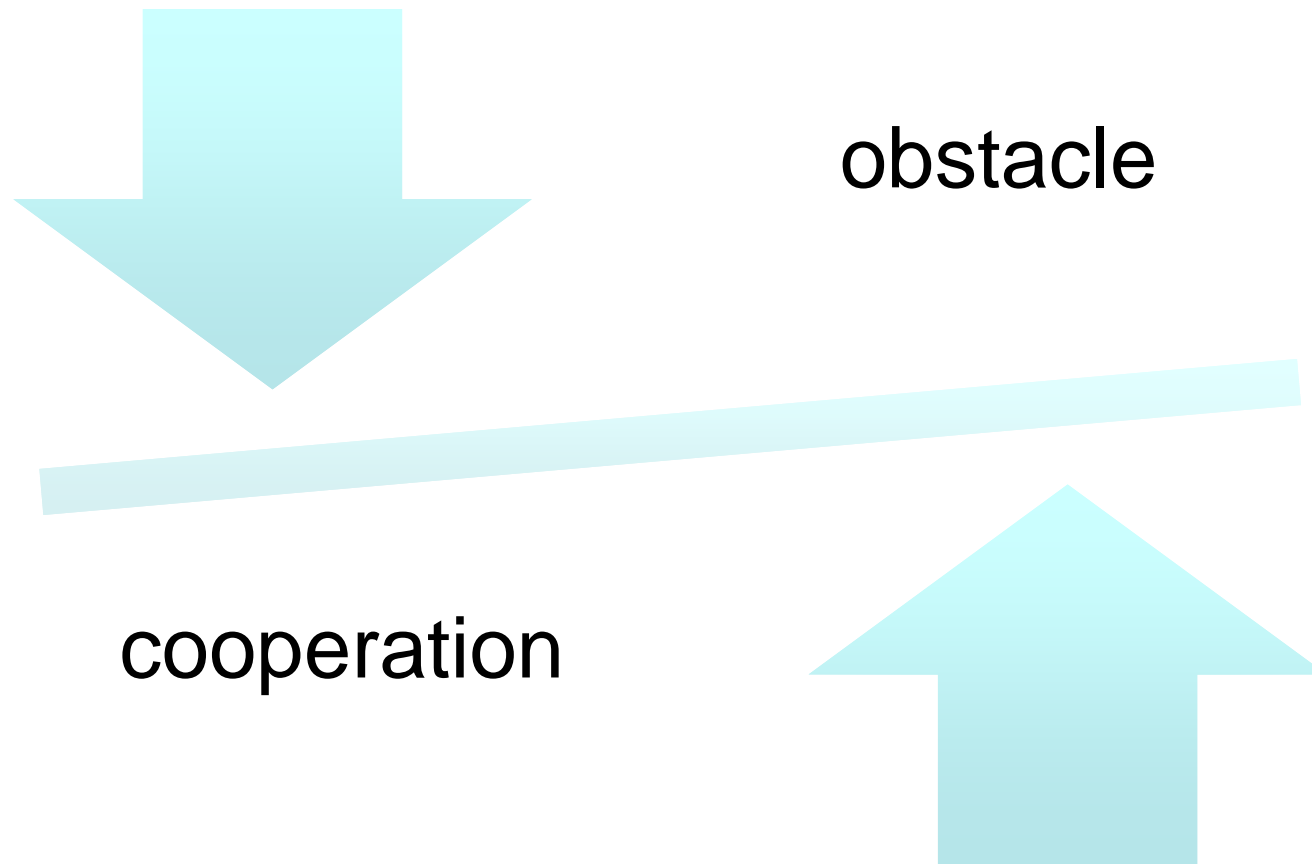
## Recital n. 60 SSM reg.

Pursuant to art. 263 TFEU, the CJEU is to review the legality of acts of the ECB...intended to produce legal effects vis-à-vis third parties

# Proportionality in administrative penalties: vertical dimension

- Request to sanctions the individuals
  - Who is assessing the proportionality of the sanction?
  - According to which criteria?
  - Fragmented pictures among the Euro-zone

# Diagonal proportionality: administrative v criminal (for legal entities)



# Ne bis in idem

- New dimensions of ne bis in idem because of the **vertical dimension of multilevel enforcement**:
  - European Administrative Punitive sanction v national administrative punitive sanction
  - European Administrative Punitive sanction v national criminal penalty (for the legal entity)
- Dual systems of sanctions
- First come, first served
- What if the criminal sanction comes first?

# Diagonal proportionality: administrative v criminal (for legal entities)

- A.B. v Norway, 16 November 2016: there is no violation of the *ne bis in idem* when there is **sufficient connection in substance and in time** between the two sets of proceedings, to consider them **as forming part of an integral scheme of sanctions**
- **Three elements:**
- Proportionality: Criminal authorities took into account the tax penalty (accounting principle or *Anrechnungsprinzip*).
- Foreseeability of the conduct of dual proceedings, with the possibility of different cumulated penalties.
- No duplication of collection and assessment of evidence



# A blueprint for an integrated enforcement model

Clear distinctive criteria  
between administrative  
breaches and criminal offences

Legal basis

Article 82(2) TFEU

Targeting the individuals?

Respect of fundamental rights  
in the administrative  
investigative measures in order  
to facilitate/allow the “file  
sharing”

**Integrated  
Enforcement**

**Mixed composition of the  
investigative units and  
flaw of information**

Avoid double penalties  
(prevention of  
ne bis in idem)

# Conclusions

- Public guidelines on the method of setting fines
- Introduction of leniency programs or transactions
- Common guidelines for NCAs
- Integrated model with criminal law enforcement
- A fully-fledged judicial review at the EU level

# Individuals, not banks!

- *We were led to believe the Obama's era fines **were the same as justice**, but that's not remotely true, especially since many of the facts about what happened were whitewashed as part of the settlements and no individual Wall Street bankers, traders or executives have been held responsible for their wrongdoing (Cohan, NYT, 17<sup>th</sup> Febraury 2017).*

- *DA Yates, 2015 “one of the most effective ways to combat corporate misconduct is by seeking accountability from the **individuals**”*

*Jonathan Ford, *Financial Times*: That's one reason why public confidence in Wall Street remains so low. Yet it is hard to see how this can change until prosecutors and regulators start **holding bosses directly accountable** — rather than settling at a corporate level without admission of guilt and imposing fines that management can pay with shareholders' money.*

*Thank you for your attention!*

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